JOHN KISSICK, PETER KISSICK, WILLIAM KISSICK, STELLA (SALLY) SMALLWOOD ..... } APPELLANTS;

1951 *Dec. 3, 4.

1952 *Jan. 8.

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Criminal law—Evidence—Conspiracy to sell, etc. narcotic drugs—Certificates of analysts only evidence of narcotics—Whether certificates admissible—No objection by defence—Testimony of analysts heard before Court of Appeal—Whether Court has that power and whether it could then affirm conviction—Opium and Narcotic Drug Act, 1929, S. of C. 1929, c. 49, s. 18—Criminal Code, ss. 1014, 1021.

The appellants were found by a jury to be guilty on three charges laid under s. 573 of the *Criminal Code* of conspiracy to possess, to sell and to transmit narcotic drugs in violation of the *Opium and Narcotic Drug Act, 1929,* (S. of C. 1929, c. 49). The only proof tendered at the trial that the substance was a narcotic drug, consisted of certificates of two analysts. The analysts were not heard as witnesses, although one of them was offered for cross-examination. Counsel for the accused did not at any time object to the admission of the certificates nor to the trial judge's reference to them in his charge as being "conclusive evidence" of the substance of the narcotic drug. On appeal, the accused contended that this evidence, although admissible under s. 18 of the *Opium and Narcotic Drug Act, 1929,* on a charge under that *Act,* was not admissible where the charge was one of conspiracy under the *Code.* Thereupon, the Crown asked for, and obtained, leave under s. 1021 of the *Code* to call the analysts at the hearing of the appeal; their testimony was heard in the absence of the accused, who declined to attend but who were represented by counsel who cross-examined the witnesses on behalf of the accused. The Court of Appeal for Manitoba affirmed the convictions.

By leave granted by this Court, the accused appealed on two questions of law: (*a*) whether the Court of Appeal was empowered under ss. 1014 and 1021(1) (*b*) of the *Criminal Code* to allow the Crown to produce before that Court the oral evidence given by the analysts, and (*b*) whether the Court of Appeal was empowered on such evidence, taken in conjunction with that given at the trial, to affirm the convictions.

Held: The appeals should be dismissed and the convictions affirmed since the Court of Appeal was justified in allowing the taking of further evidence and in affirming the convictions (Kerwin J., dissenting in part, would have ordered a new trial).

Per Kerwin, Estey and Locke JJ.: The certificates were not admissible in evidence (*Desrochers* v. *The King,* 69 C.C.C. 322, overruled). (Taschereau J. expressing no opinion on that question, and Fauteux J. *contra*).

*PRESENT: Kerwin, Taschereau, Estey, Locke and Fauteux JJ.

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Per Taschereau, Estey and Locke JJ.: In the circumstances of this case, having considered that it was necessary or expedient in the interests of justice to admit further evidence on a non-controversial issue, the Court of Appeal did not infringe any principle of law governing the exercise of the power to hear further evidence given to it by s. 1021(1) (*b*) of the *Code,* whose provisions are available to a respondent as well as to an appellant.

Since there is no restriction as to the effect to be given by the Court of Appeal to the further evidence in disposing of the appeal under s. 1014 of the *Code,* and since the evidence heard before the Court of Appeal was in its nature conclusive and did not reveal new facts that might influence a jury to come to a different conclusion, the Court of appeal followed the proper course in confirming the convictions.

Per Fauteux J.: The additional evidence, introduced in appeal, was not essential to legally support the verdict since the certificates were admissible evidence of the facts therein stated, as on a true interpretation of s. 18 of the *Opium and Narcotic Drug Act* the prosecution in the present case was a prosecution under that *Act.* (*Simcovitch* v. *The King* [1935] S.C.R. 26 and *Robinson* v. *The King* [1951] S.C.R. 522 referred to). But in any event, although the failure to object to inadmissible evidence is not always fatal, since the defence manifested a positive intention to accept the certificates as sufficient evidence of the facts therein stated or else opted to attempt to preserve a possible ground of appeal, the accused cannot now raise this point; and, as there was no substantial wrong or miscarriage of justice, the appeal should be dismissed.

Per Kerwin J. (dissenting in part): The Court of Appeal was empowered by s. 1021(1) (*b*) of the *Code* to direct that further evidence be taken to support the convictions of the appellants, but it was not empowered on the evidence of the analysts taken before it and on the evidence at the trial to affirm the convictions because it would thereby be usurping the functions of the jury; it is impossible to say what view the jury might have taken if they had heard the analysts and hence it cannot be said that no substantial wrong or miscarriage of justice had occurred within s. 1014(2) of the *Code.*

APPEALS from the judgment of the Court of Appeal for Manitoba (1) affirming the appellants' convictions by a jury on charges of conspiracy to sell, etc. narcotic drugs in violation of the *Opium and Narcotic Drug Act, 1929.*

Harry Walsh and C. N. Kushner for the appellants. The certificates of analysis were wholly inadmissible in evidence, they were not proof of a drug or drugs within the meaning of the *Opium and Narcotic Drug Act, 1929,* and the jury should not have been directed that these certificates constituted such proof and that the jury was to take the contents of the said certificates as conclusive evidence of the facts stated therein, since s. 18 of the *Opium and Narcotic Drug Act, 1929,* is not applicable to a charge of conspiracy

(1) 59 M.R. 86; 100 Can. C.C. 130.

under s. 573 of the *Criminal Code*. It is clear from the wording of s. 18 of the *Act*, that the departure from the ordinary rules of evidence requiring oral testimony, is only authorized in a prosecution under that *Act*. It became therefore vitally necessary for the prosecution to prove the existence of narcotic drugs within the meaning of the *Act*. When the certificates are eliminated there is no proof anywhere of the existence of a drug. The jury therefore should have been directed that there was a complete lack of proof of the existence of any drug within the meaning of the *Act*.

The Court of Appeal having come to the conclusion that the jury's verdict was unsupported by proper evidence, and that the certificates had been improperly admitted in evidence, should have allowed the appeal under s. 1014(1) (*a*) of the *Code* (*Govin* v. *The King* (1) and *The King* v. *Drummond* (2)).

For an interpretation of what is meant by the words "having regard to the evidence" in s. 1014(1) (*a*) of the *Code*, the case of *R.* v. *Dashwood* (3) is referred to.

The Court of Appeal had no power to order the examination of the analysts before that Court. S. 1021(1) (*b*) of the *Code* must be interpreted as referring only to the hearing of "newly-discovered evidence" or "new evidence" and not to evidence that was known and that could have been produced at the trial as was the case here. Furthermore, s. 1021(1) (*b*) applies only to evidence that is brought forward on behalf of an appellant in order to set aside the verdict of a jury, but not to the evidence that is tendered by a respondent in order to supply gaps in a case or to support or bolster up a verdict. All the decisions both in England and Canada point up the fact that such evidence will not be received unless it was such that could not have been adduced at the trial and the power to hear fresh evidence is exercised with great caution. S. 1021 was first passed in Canada in 1923 and is practically the same as s. 9 of the *English Criminal Appeal Act, 1907*. A resume of the English decisions indicates that the instances in which evidence is admitted before the Court of Appeal are very limited and that, without exception, so far as can

(1) [1926] S.C.R. 539. (2) 10 Can. C.C. 340.
(3) 28 C.A.R. 167.

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be found, it is always at the instance of the appellant in the case that new evidence is admitted, if at all. (*McGrath* v. *R.* (1), *Thorne* v. *R.* (2), *Hyman Kurasch* v. *R.* (3), *Warren* v. *R.* (4), *Knox* v. *R.* (5), *Hullett* v. *R.* (6), *Allaway* v. *R.* (7), *William Ward* v. *R.* (8), *Mason* v. *R.* (9), *Weisz* v. *R.* (10), *Starkie* v. *R.* (11), *R.* v. *Mortimer* (12), *R.* v. *Hewitt* (13), *R.* v. *Dutt* (14), *R.* v. *McGerlymchie* (15), *R.* v. *Livock* (16) and *R.* v. *Robinson* (17)). It would be usurping the function of the jury altogether, if every time a certain essential bit of evidence was not proved properly and by evidence properly admissible, by the prosecution, it was permitted to the Crown respondent to adduce that evidence before the Court of Appeal in order to have the appeal dismissed.

A resume of the Canadian decisions also indicates that the application can only be made by an appellant who is seeking to upset the verdict of the jury or trial Court and cannot be invoked by a respondent in order to fill a gap in the evidence presented to the jury. Neither the case of *R.* v. *Feeney* (18) nor *R.* v. *Buckle* (19) support the course that was adopted by the Court of Appeal in hearing the analysts. The case of *Berret* v. *Sainsbury* (20) is useful to show what is done in civil matters where the Court has the same power as given by s. 1021.

Even if the Court of Appeal did have the power to hear the evidence of the analysts, such evidence could only be used for the purpose of determining whether there should be a new trial or an acquittal, and could not be used for the purpose of taking same in conjunction with the evidence given at the trial, and then used to dismiss the appeal. The Court of Appeal should have allowed the appeal since there was no proof adduced of any drugs within the meaning of the Act, and then either quash the convictions or direct a new trial (*R.* v. *Drummond* (21)).

(1) [1949] 2 All E.R. 495.
(2) 18 C.A.R. 186.
(3) 13 C.A.R. 13.
(4) 14 C.A.R. 4.
(5) 20 C.A.R. 96.
(6) 17 C.A.R. 8.
(7) 17 C.A.R. 15.
(8) 17 C.A.R. 65.
(9) 17 C.A.R. 160.
(10) 15 CA.R. 85.
(11) 16 C.A.R. 61.
(12) 1 C.A.R. 20.
(13) 7 C.A.R. 219.
(14) 8 C.A.R. 51.
(15) 2 C.A.R. 184.
(16) 10 C.A.R. 264.
(17) 12 C.A.R. 226.
(18) (1946) 2 C.R. 304.
(19) (1949) 7 C.R. 485.
(20) [1928] S.C.R. 72.
(21) 10 Can. C.C. 340.

S. 1014(2) of the *Code* cannot effect the result of a dismissal of the appeal, since the onus is on the respondent to show that the balance of the evidence, apart from the impugned certificates, would certainly or inevitably result in a conviction of the appellants. Without the certificates there cannot have been any possibility of conviction of any of the appellants since there was then no proof of the existence of any drugs within the meaning of the *Act*. (*Northey* v. *The King* (1)).

A. M. Shinbane, K.C., for the respondent. The certificates were admissible in evidence (*Jacobs* v. *R.* (2) and *Desrochers* v. *The King* (3).

The Court of Appeal was empowered to allow the respondent to produce before that Court the oral evidence given by the analysts. S. 1021(1) (*b*) of the *Code* gives it that power. This section corresponds substantially to s. 9 of the *English Criminal Appeal Act, 1907*. But the Court of Criminal Appeal has no jurisdiction to direct a new trial and this limitation of power in some measure at least accounts for the reluctance of that Court to allow evidence to be called which might have been heard at the trial. (*R.* v. *Mason* (4)). Almost all the reported cases deal with "fresh" or "new" evidence. Here the evidence was merely supplementary and confirmatory. Inasmuch as the form in which their evidence was tendered was to be considered faulty, the analysts were called merely to confirm the accuracy of their analyses, the introduction of which as evidence and the reference thereto were not at any time objected to by the defence at any stage of the trial. But under s. 1021, the evidence may be of a character other than "new" or "fresh".

Although the omission by the defence to object does not prevent the defence from raising the objection in the Court of Appeal, nevertheless that omission was a circumstance properly to be considered by the Court. It indicated that the defence either shared in the mistake of the prosecution and the Court, or believed that the accused was not substantially prejudiced by the erroneous form in which the proof of drugs was put before the jury. More so in this case when the notice of appeal arguing that the certificates were

(1) [1948] S.C.R. 135.
(2) [1944] 1 All E.R. 485.
(3) 69 Can. C.C. 322.
(4) 17 C.A.R. 160.

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not admissible was filed the day after the verdict was rendered and on the same day that sentence was passed. (*R.* v. *Stirland* (1) and *R.* v. *Cutter* (2)).

The power and the practice of the Court of Appeal in respect of fresh or new evidence not tendered at the trial may be summarized thus: (*a*) The Court has power to admit it; (*b*) It is a power which must always be exercised with great care; (*c*) The Court will not lay down any definition of what will constitute exceptional or special circumstances; (*d*) The Court will allow evidence to be given which might have been given at the trial, if it is satisfied that the omission was due to a misunderstanding, inadvertence or mistake. (*R.* v. *Robinson* (3), *R.* v. *Weisz* (4), *R.* v. *Hullett* (5), *R.* v. *Warren* (6), *R.* v. *Knox* (7) and *R.* v. *Collins* (8).

Furthermore, that section is a remedial provision and there is no ambiguity in its language. (*R.* v. *Robinson et al* (9) and *R.* v. *McTemple* (10).

The Court of Appeal was empowered on the evidence of the analysts taken in conjunction with that given at the trial, to confirm the convictions, as there was then such overwhelming evidence of guilt that no reasonable jury on a proper direction could or would have failed to convict the appellants, and there was therefore no miscarriage of justice. The converse of the principle in *R.* v. *Gach* (11) is applicable to the present case, and the Court of Appeal was authorized to dismiss the appeal by ss. 1014, 1021 of the *Code,* and by the provisions of the Court of Appeal Act of Manitoba. Because fresh evidence or further or additional evidence is admitted on appeal, it does not follow that the case must be sent back for a new trial (*R.* v. *Feeney* (12) and *R.* v. *Buckle* (13).

The accused had a trial by jury, because, apart from anything else, there was ample evidence to support the verdict as found out by the Court of Appeal, and therefore there was no substantial wrong or miscarriage of justice.

(1) 30 C.A.R. 40.
(2) 30 C.A.R. 107.
(3) 12 C.A.R. 226.
(4) 15 C.A.R. 85.
(5) 17 C.A.R. 8.
(6) 14 C.A.R. 4.
(7) 20 C.A.R. 96.
(8) 34 C.A.R. 146.
(9) 100 Can. C.C. 1.
(10) [1935] 3 D.L.R. 436.
(11) [1943] S.C.R. 250.
(12) 86 Can. C.C. 429.
(13) 94 Can. C.C. 84.

KERWIN J. (dissenting in part):—The four appellants were found by a jury to be guilty on three counts of an indictment charging conspiracies to commit indictable offences, i.e., to unlawfully sell drugs, to unlawfully possess drugs, and to unlawfully cause drugs to be taken or carried from one place to another in Canada—all within the meaning of the *Opium and Narcotic Drug Act, 1929*, as amended, without first having obtained a licence. Convictions were entered and sentences imposed. From these convictions they appealed to the Court of Appeal for Manitoba (1) and during the hearing of their appeals the Crown applied to be allowed to produce before the Court of Appeal, in support of the convictions, the evidence of two analysts who had certified that certain material sold, possessed, or taken or carried, was a narcotic drug within the meaning of the *Opium and Narcotic Drug Act*. The certificates had been put in evidence as if the prosecutions had been under that *Act* instead, as was the fact, for conspiracies under section 573 of the *Criminal Code*. The evidence of the sale, possession, taking or carrying was given as part of the evidence upon which the charges of conspiracy were based.

The Court of Appeal (1) granted the Crown's application and the evidence of the analysts was taken. Upon that evidence and the evidence at the trial, the Court of Appeal dismissed the appeals of the accused. By leave granted under subsection 1 of section 1025 of the *Code* as enacted by section 42 of chapter 39 of the 1948 Statutes, the accused appeal to this Court on the following questions of law:

(1) On the appellants' appeal from their conviction was the Court of Appeal for Manitoba empowered under sections 1014 and 1021(1) (*b*) of the *Criminal Code* or otherwise to allow the respondent to produce before that Court the oral evidence actually given?

(2) If so, was that Court empowered, on such evidence taken in conjunction with that given at the trial, to affirm the conviction, or was it authorized merely to order a new trial?

(1) 59 M.R. 86; 100 Can. C.C. 130.

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As to the first point, section 1021(1) (*b*) of the *Code* is in the following terms:

> 1021. For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interest of justice
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> . . .
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> (*b*) if it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court of appeal, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose, and allow the admission of any deposition so taken as evidence before the court of appeal; and
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> exercise in relation to the proceedings of the court of appeal any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court of appeal.

It is contended that by the words "For the purposes of an appeal under this Part", Parliament never intended to give the Crown, on an accused's appeal, the right to ask, or to give the Court the right to permit, that evidence be heard in support of the conviction of the appellant, particularly when the trial had been with a jury. Emphasis is placed upon section 1014 of the *Code* which provides that on the hearing of an appeal against conviction the Court of Appeal shall allow the appeal if it is of opinion

> (*a*) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
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> (*b*) that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law;

It is said that the convictions cannot be supported on the evidence because without the certificates there was no evidence that the material in question was a drug within the meaning of the *Opium and Narcotic Drug Act*. Testimony was given at the trial by which, the Crown contends, the jury would have been entitled to find that it was such a drug. The Court of Appeal evidently felt that proposition to be doubtful because, if it were sound, there would have been no occasion to order the taking of the evidence of the analysts. Presuming in the meantime that this is so, the question is squarely raised as to the power of the Court of Appeal to make the order.

We are told that no Canadian case can be found where evidence was taken before the Court of Appeal to support a conviction. Reliance is placed upon the decision of the Ontario Court of Appeal in *Rex* v. *Drummond* (1), where it was held that on a charge of perjury committed at the trial of an indictment, such trial and the indictment, verdict and judgment therein must be proved as matters of record and this not having been done, the conviction was set aside. It is to be noted that that part of section 1021 quoted above was first enacted by section 9 of chapter 41 of the Statutes of 1923, so that at the time of the *Drummond* decision there was no power in the Court of Appeal to receive further evidence. In another case, which was not referred to, *Rex* v. *Ivall* (2), the Ontario Court of Appeal ordered a new trial on a charge that the accused removed a child under the age of fourteen years from the custody of the Children's Aid Society where, on the first trial, the child's age had not been proved. No application was made for leave to produce the evidence before the Court of Appeal.

The 1923 Act was taken from the *Criminal Appeal Act of England, 1907*, and no decisions have been found in England in which the Crown was given leave to do as was done here. In *Rex* v. *Robinson* (3), an application was made by the Crown to introduce evidence that arose after the conviction and therefore could not have been called at the trial, but this was on the basis that such evidence would have a material bearing on the accused's application for leave to appeal from a conviction in view of the fact that one of the grounds stated in the application for leave was that the verdict was against the weight of the evidence and in those circumstances one question that would have to be considered was whether there had been any substantial miscarriage of justice. The evidence admitted was a letter written by the accused in which he admitted the act which it was alleged constituted murder.

The case does show that further evidence will be admitted although there it was of something that occurred after the trial. However, the ground of the decision was the provision in the *Criminal Appeal Act* that the Court of Criminal Appeal may exercise in relation to the proceedings in

(1) (1909) 10 O.L.R. 946. (2) 94 Can. C.C. 388.
(3) 12 C.A.R. 226.

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the Court any other powers which might for the time being be exercised by the Court of Appeal in appeals on civil matters. Considering the similar provisions of section 1021, it appears to me that they are sufficient to empower the Court of Appeal to direct that further evidence be taken.

On the argument, the attention of counsel was directed to the decision of the Court of King's Bench (Appeal Side) of the Province of Quebec in *Desrochers* v. *The King* (1). That decision was not referred to before the Manitoba Court of Appeal (2) or on the application for leave to appeal to this Court. There, the accused were charged under section 573 of the *Criminal Code* with having conspired to commit an indictable offence under *The Excise Act, 1934*. By section 113 of that Act: "In every prosecution under this Act, the certificate of analysis . . . shall be accepted as *prima facie* evidence"; and in the French version: Dans toute poursuite en vertu de la présente loi, le certificat d'analyse . . . est accepté comme *prima facie*. It was held that a certificate was admissible by virtue of that section in the prosecution of the charge of conspiracy under the Code.

Section 18 of the *Opium and Narcotic Drug Act, 1929*, enacts: "In any prosecution under this Act a certificate as to the analysis of any drug or drugs . . . shall be *prima facie* evidence." The French version reads: "Dans toute poursuite instituée sous le régime de la présente loi, un certificat relatif à l'analyse d'une drogue ou de drogues, . . . constitue une preuve *prima facie*". For present purposes, this section, in either version, may be taken to bear the same meaning as section 113 of *The Excise Act, 1934*, in either version. The present proceeding not being a prosecution under the *Opium and Narcotic Drug Act*, section 18 thereof is inapplicable and the decision in *Desrochers* on that point should be overruled.

Section 28 of the *Interpretation Act*, R.S.C. 1927, chapter 1, reads as follows:

> 28. Every Act shall be read and construed as if any offence for which the offender may be
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> (*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence;

(1) 69 Can. C.C. 322. (2) 59 M.R. 86; 100 Can. C.C. 130.

(*b*) punishable on summary conviction, were described or referred to as an offence; and all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence.

That section was considered by this Court in *Simcovitch* v. *The King* (1) in conjunction with section 69 of the *Criminal Code* by which anyone is a party to and guilty of an offence who "(*d*) counsels or procures any person to commit the offence." It was held that one who counselled a bankrupt to commit an offence specified in section 191 of the *Bankruptcy Act* was by the combined operation of section 28 of the *Interpretation Act* and section 69 of the *Code* guilty of an offence under section 191 of the *Bankruptcy Act* although that section, by its terms, referred only to a person having been a bankrupt or in respect of whose estate a receiving order has been made, or who had made an authorized assignment under the *Bankruptcy Act.* That decision can have no application here because, within the terms of section 28 of the *Interpretation Act,* there is no provision of the *Criminal Code* which it is suggested might be made applicable. On the contrary, the suggestion is that on a prosecution under the Code a certificate of analysis is to be taken as *prima facie* evidence merely because section 18 of the *Opium and Narcotic Drug Act* states that in any prosecution under that *Act* a certificate is to be so treated. With respect I can find no justification for reading the enactment in that manner.

It was argued that there was sufficient evidence without the certificates but it must be borne in mind that having admitted them, the trial judge instructed the jury that they were conclusive. I am not now dealing with a situation where, on a charge of conspiring to commit an indictable offence under the *Opium and Narcotic Drug Act,* the evidence of such conspiracy is based upon something other than the actual commission of an offence itself. What is relied upon in the present case to prove the conspiracy are specific acts, and the circumstances that witnesses testified at the trial that the article dealt with was heroin and that the accused, or some of them, so designated it to those witnesses, are not sufficient. If articles be sold which were mere substitutes for a narcotic and not within the class of specified drugs, there would be no offence. On the other

(1) [1935] S.C.R. 26.

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hand, the gist of an offence under section 573 of the *Code* is the conspiracy itself, and in a proper case a jury might find that a conspiracy existed to sell a specified narcotic without first having obtained a licence.

In my opinion the second question raises a question of law and the Court of Appeal was not empowered on the evidence of the analysts taken before it and on the evidence at the trial to affirm the conviction because it would thereby usurp the functions of the jury. It is not a matter of interfering with a discretion exercised by the Court of Appeal since it is impossible to say what view a jury might take if they had the analysts before them and hence it cannot be said that no substantial wrong or miscarriage had occurred within section 1014(2) of the *Code*.

The appeal should be allowed and a new trial directed.

TASCHEREAU J.:—The appellants were jointly charged on four counts of conspiracy to violate the *Opium and Narcotic Drug Act*, and were found guilty on three.

At trial, the respondent filed certificates of analysis to establish that the drugs which were possessed and sold by the appellants, were heroine, a drug within the meaning of the *Act*, but the analysts themselves were not heard. Section 18 of the *Act* is to the effect that "in any prosecution under the Act", such certificates signed by a Dominion analyst, constitute *prima facie* evidence of the facts therein stated.

Before the Court of Appeal (1), the appellants submitted that, not having been prosecuted under the *Act*, but for conspiracy under the *Criminal Code*, the certificates were illegal evidence, and that the analysts should have been called. The Court of Appeal (1) obviously agreed with this contention, for at the request of the respondent, it received the evidence of the analysts and unanimously confirmed the conviction. Leave to appeal to this Court was granted by Mr. Justice Kerwin on the two following questions of law:

(1) Was the Court of Appeal empowered under section 1014 and 1021 (1) and (*b*) of the Code or otherwise, to allow the respondent to produce before that Court the oral evidence actually given?

(1) 59 M.R. 86; 100 Can. C.C. 130.

(2) If so, was the Court empowered on such evidence taken in conjunction with that given at the trial, to affirm the conviction or was it authorized merely to order a new trial?

If a prosecution for *conspiracy* to possess and sell heroine, *is a prosecution under the Opium and Narcotic Drug Act,* the conviction was valid, and the Court of Appeal did not need to hear new evidence; but in view of the conclusion which I have reached, I do not think it necessary to determine this question.

Section 1021 (*b*) of the Criminal Code is as follows:

> 1021. For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interest of justice.
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> (*b*) if it thinks fit, *order any witnesses* who would have been compellable witnesses at the trial *to attend and be examined before the court of appeal,* whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose, and allow the admission of any deposition so taken as evidence before the court of appeal;

As to the power of the Court of Appeal to hear fresh evidence, I have no doubt, if any meaning is to be given to section 1021(*b*), which states that "for the purposes of the appeal", witnesses may be examined before the court. It is obviously in order to enable the court to properly determine the case, that such a power is conferred, and these plain words used by the legislator must be given effect to. Otherwise, the section would be nugatory, and Parliament's expressed intentions would be defeated.

This section corresponds substantially to section 9(*b*) of the English Criminal Appeal Act 1907. It has been held in England that this authority to hear new evidence must be used with "great care" and in "exceptional circumstances" only, and I think that the rule here is the same. (*Rex* v. *Mason*) (1); (*Rex* v. *Rowland*) (2). A too liberal exercise of this power would undoubtedly conflict with the economy of our criminal law, would in certain instances give the Crown a second chance to make a case which it has failed to make at trial, and could possibly also invest a court of appeal with powers exclusively within the province of the jury.

(1) 17 C.A.R. 160. (2) 32 C.A.R. 29.

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But in the case at bar, in view of the special circumstances, I think that the Court of Appeal was right in granting the application made by the Crown to hear the analysts. The accuracy of the facts contained in the certificates were not an issue before the jury, and all parties seemed to agree that the drug had been properly proved. Although the failure of counsel for the defence to object to illegal evidence, cannot as a rule be considered as fatal, it is important to note in the present case, that he declined to cross-examine one of the analysts who was present at the trial, and offered by the Crown. The Court of Appeal merely corrected an error upon which the jury acted, and as Dysart J. said, it has put the case in exactly the position in which the jury believed it to be, when they convicted the accused.

Under section 1014, Cr. Code, the Court of Appeal could confirm or order a new trial, and I think that it followed the proper course in adopting the former. The fresh evidence was in its nature conclusive and did not reveal new facts that might influence a jury in coming to a conclusion.

I would dismiss the appeals.

ESTEY J.:—The appellants, whose conviction for conspiracy contrary to s. 573 of the *Criminal Code* was affirmed by the Court of Appeal for Manitoba (1), have, by way of a further appeal, been granted leave, under s. 1025 of the *Criminal Code* as amended in 1948 (S. of C. 1948, c. 39, s. 42), to submit two questions of law to this Court:

"(1) On the Appellants' appeal from their conviction was the Court of Appeal for Manitoba empowered under sections 1014 and 1021 (1) (*b*) of the Criminal Code or otherwise to allow the Respondent to produce before that Court the oral evidence actually given?

(2) If so, was that Court empowered, on such evidence taken in conjunction with that given at the trial, to affirm the conviction, or was it authorized merely to order a new trial?"

These appellants were charged upon four counts of conspiracy to unlawfully (*a*) sell, (*b*) possess, (*c*) cause to be taken and (*d*) distribute, drugs within the meaning of

(1) 59 M.R. 86; 100 Can. C.C. 130.

The Opium and Narcotic Drug Act, 1929, and thereby to have committed an offence contrary to the provisions of s. 573 of the *Criminal Code.* At their trial before a judge and jury they were found guilty of (*a*), (*b*) and (*c*).

The Crown established the conspiracy by adducing evidence of specific instances of selling, possessing and causing to be taken, drugs contrary to *The Opium and Narcotic Drug Act.* As proof of the fact that the commodity dealt with in each instance was a narcotic drug, ten certificates of analysis were placed in evidence without objection. Counsel for the Crown, in tendering these certificates, was under the impression that they were admissible by virtue of the provisions of s. 18 of *The Opium and Narcotic Drug Act.* This impression was concurred in by the learned trial judge. S. 18 reads as follows:

> 18. In any prosecution under this Act a certificate as to the analysis of any drug or drugs signed or purporting to be signed by a Dominion or provincial analyst shall be *prima facie* evidence of the facts stated in such certificate and conclusive evidence of the authority of the person giving or making the same without any proof of appointment or signature.

The learned judges in the Court of Appeal held that the provisions of s. 18 had no application to a trial for conspiracy under s. 573 of the *Criminal Code* and that the ten certificates prepared by the analysts were improperly received. The learned judges, however, were of the opinion that this was an appropriate case in which to hear *viva voce* evidence of the analysts under the authority of s. 1021(1) (*b*) of the *Criminal Code*:

> 1021. For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interest of justice.
>
> . . .
>
> (*b*) if it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court of appeal, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose, and allow the admission of any deposition so taken as evidence before the court of appeal; . . .
>
> and exercise in relation to the proceedings of the court of appeal any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court of appeal.

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Messrs. Jones and Blanchard, who had prepared these certificates, were accordingly called as witnesses before the Court of Appeal and there gave evidence to the same effect as set out in their respective certificates.

S. 1021(1) (*b*) was enacted by Parliament in 1923 and is to the same effect as s. 9(*b*) of the Court of Criminal Appeal Act in Great Britain (1907, 7 Edw. VII, c. 23). In the Court of Criminal Appeal the corresponding English s. 9(*b*) was commented upon as follows:

> Undoubtedly the Legislature has armed this Court with the widest possible powers for the purposes of investigation, and in a proper case this Court would not refuse to make use of the powers which are contained in these paragraphs of s. 9.

Rex v. *Thorne* (1).

Parliament has indicated what is "a proper case" by expressly providing that the wide powers under s. 1021(1) (*b*) shall be exercised only where the court of appeal "thinks it necessary or expedient in the interest of justice." Under this provision it has been repeatedly held, as stated by the learned author of Archibald's Cr. Pl., Ev. & P., 32nd Ed., p. 309, that

> The Court will only act upon this power in very special circumstances.

which, as pointed out by the Lord Chief Justice in *Rex* v. *Weisz* (2), "they had been careful not to define." A similar view is expressed in *Rex* v. *MacTemple* (3). It, therefore, appears that if a court of appeal has concluded that the circumstances are exceptional and directed the reception of the evidence its decision should not be disturbed, unless, in arriving at its conclusion, it has acted contrary to principle.

The learned judges of the Court of Appeal deemed the circumstances here sufficiently special that, in the interest of justice, the evidence of the analysts should be heard. It is an unusual case. Apart from a statutory provision, such evidence as we are here concerned with can only be received *viva voce*. S. 18 is enacted as part of, and is applicable only "in any prosecution under," *The Opium and Narcotic Drug Act*. Such a provision has no application to a prosecution for an offence under s. 573 of the *Criminal Code*. In so far as *Desrochers* v. *The King* (4),

(1) (1925) 18 C.A.R. 186 at 187.
(2) (1920) 15 C.A.R. 85 at 87.
(3) [1935] 3 D.L.R. 436.
(4) 69 Can. C.C. 322.

may be contrary to this view, it must be overruled. S. 28 of the *Interpretation Act* (R.S.C. 1927, c. 1), which makes certain provisions of the *Criminal Code* applicable to other statutes, does not make the provisions of those other statutes applicable to prosecutions under the *Criminal Code* and, therefore, does not assist the prosecution upon this appeal.

We were informed that these certificates were placed in evidence at the preliminary without objection. Then, when counsel for the Crown, prior to the trial, decided that it was unnecessary for him to call all the witnesses who could depose to the relevant facts, he prepared a list of these, together with a summary of their evidence, and submitted it to counsel for the appellant, with a request that if he desired any of these witnesses to be called for the purpose of cross-examination that he so advise him. This list included Jones, one of the analysts, who had prepared some of these certificates. Counsel for the appellant replied that he desired that only one Porter, whose evidence was not upon any question relative to the analysis of the commodities, be alone produced for cross-examination. All of this was explained before the presiding judge and appears in the record of the trial, in part, as follows:

THE COURT: Your answer is, you don't wish him to call any except Porter?

Mr. KUSHNER: I don't wish any witness called for the purpose of cross-examination, other than Inspector Porter.

The failure of counsel for the defence to object to the reception of inadmissible evidence does not, in general, constitute a bar to the objection thereto in an appellate court, nor would it alone justify a court of appeal in exercising its powers under s. 1021(1) (*b*). It is, however, an important circumstance in this case because it corroborates what was evidenced throughout the trial that the main contentions of the defence were not directed to whether the substances were narcotic drugs within the meaning of *The Opium and Narcotic Drug Act*. In *Stirland* v. *Director of Public Prosecutions* (1), Viscount Simon stated:

. . . the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced.

(1) [1944] A.C. 315 at 328.

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Even if the certificates had been admissible under s. 18, they were only *prima facie* evidence of their contents and if counsel for the appellant had intended to raise any question as to their correctness or the weight of the statements contained therein he would have, upon receipt of the request from counsel for the Crown, asked that at least Jones be called for cross-examination.

The certificates, though inadmissible, were received at and accepted throughout the trial as evidence of the facts therein set out. The Court of Appeal, under s. 1021(1) (*b*), permitted these facts to be placed in evidence by the calling of the witnesses Jones and Blanchard, who had made the analyses and prepared the certificates and who deposed to the same facts as set out in the certificates. In effect, the same facts are now repeated in the record, but in a form admissible in law. Under these circumstances the Court of Appeal, in concluding, in the interests of justice, that the additional evidence should be received, has violated no principle and has acted within its power under s. 1021(1) (*b*).

The contention of counsel for the appellant that the Court of Appeal had no power to receive the evidence of Jones and Blanchard, because in neither case was the evidence "newly discovered" or "new evidence" unknown to the Crown at the time of the trial, is not tenable. In support of his contention he cited a statement of Lord Chief Justice Goddard in *Rex* v. *McGrath* (1), which had reference to the disposition of the case when previously before the court and was not essential to the decision of the case which was now before the court upon a reference by the Secretary of State under s. 19(*a*), where, as pointed out in *Rex* v. *Collins* (2), different considerations obtain. Moreover, counsel, in his submission, would construe s. 1021(1) (*b*) as equivalent to the rule in civil cases for the granting of a new trial and the reception of further evidence. The language of s. 1021(1) (*b*) does not support this submission. The incorporation of the reference to "appeals in civil matters" follows and is in addition, or supplementary, to the powers set out in subpara. (*b*) of

(1) [1949] 2 All E.R. 495 at 497. (2) 34 C.A.R. 146.

1021(1). Moreover, neither in England nor in Canada has this provision been so construed. *Rex* v. *Dutt* (1); *Rex* v. *Warren* (2); *Rex* v. *Hullett* (3); *Rex* v. *Allaway* (4); *Rex* v. *Ward* (5); *Rex* v. *Mason* (6); *Rex* v. *Knox* (7); *Rex* v. *MacTemple* (8); *Rex* v. *Buckle* (9).

The further submission of counsel for the appellant, that the provisions of s. 1021(1) (*b*) are applicable only in support of an appellant who seeks to set aside a verdict of guilty, is not tenable. The comprehensive language of the section is such as to make it applicable to both the defence and the Crown and had Parliament intended any such limitation as here suggested it would have adopted apt language to give expression thereto. Moreover, in *Rex* v. *Robinson* (10), where the accused appealed, the Crown was granted leave to call further evidence. The facts of the case are quite different, but it does support the view that the provisions of the section are available to the Crown as well as the defence. The section, as already stated, gives wide powers to a court of appeal, to be exercised only where that court properly concludes that the evidence should be received in the interest of justice.

The second question assumes the power of the court of appeal to hear the evidence, but suggests that, having done so, it is authorized merely to order a new trial. There does not appear to be, nor was our attention directed to, any provision in s. 1021(1) (*b*), or elsewhere, to the effect that the reception of evidence under that section by a court of appeal limits or restricts that court in its disposition of the appeal under s. 1014. On the contrary, the relevant provisions of the Criminal Code rather contemplate that the evidence so received shall form a part of the record and be considered along with the evidence taken at the trial. If the court of appeal finds that there are reasons within s. 1014(1) (*a*), (*b*) and (*c*) to allow the appeal, it will do so, but, if not, then under s. 1014(1) (*d*) it will dismiss the appeal. The Court of Appeal was of the opinion that this case did not come under s. 1014(1) (*a*),

(1) 8 C.A.R. 51.
(2) 14 C.A.R. 4.
(3) 17 C.A.R. 8.
(4) 17 C.A.R. 15.
(5) 17 C.A.R. 65.
(6) 17 C.A.R. 160.
(7) 20 C.A.R. 96.
(8) [1935] 3 D.L.R. 436.
(9) [1949] 7 C.R. 485.
(10) 12 C.A.R. 226.

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(*b*) or (*c*), but under s. 1014(1) (*d*), and, therefore, dismissed the appeal. Dysart J.A., speaking on behalf of the Court, stated:

> In the present case the fresh evidence is as nearly conclusive as oral testimony can be. It is directed to only one point—the scientific analysis of the material which the prosecution charges was a narcotic drug; and it proves beyond any doubt that the material was a narcotic within the meaning of the Opium and Narcotic Drug Act. The evidence is of highly competent analysts; it has no internal weakness or defect, and is not contradicted nor challenged by any other evidence in the case.

This evidence was to precisely the same effect as the facts set forth in the certificates. In cross-examination the witnesses were asked as to the possibility of mistake or error, but their answers were such that this contention was not pressed. What was attained by the calling of these witnesses was the placing in the record, in a form admissible as evidence, facts which erroneously had been treated as properly before the court at the trial. As such, they were passed upon by the jury. In effect, it was, therefore, a change in form rather than substance upon an issue in respect of which contentions were not raised at the trial. No reason is suggested why a jury, acting judicially, would not have come to the same conclusion.

In my opinion the judgment of the Court of Appeal should be affirmed and the appeal dismissed.

LOCKE J.:—The charge against the appellants in respect to the offence of conspiring to sell narcotic drugs was:

> That they, the said John Kissick, Peter Kissick, William Kissick and Stella (Sally) Smallwood . . . conspired with each other and with other persons unknown to commit an indictable offence, to wit: to unlawfully sell drugs, within the meaning of the Opium and Narcotic Drug Act, 1929, and amendments thereto, without first having obtained a licence from the Minister of National Health and Welfare or other lawful authority.

The charges as to the offences of possessing, carrying and distributing narcotic drugs were expressed in similar terms.

The offences created by section 4 of the *Opium and Narcotic Drug Act 1929* are indictable. Section 573 of the *Criminal Code* provides that:

> Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

and it was under this section of the *Code* that these proceedings were taken.

Section 18 of the *Opium and Narcotic Drug Act* provides that:

> In any prosecution under this Act a certificate as to the analysis of any drug or drugs signed or purporting to be signed by a Dominion or provincial analyst shall be *prima facie* evidence of the facts stated in such certificate and conclusive evidence of the authority of the person giving or making the same without any proof of appointment or signature.

On the assumption that this section might be invoked in a prosecution for conspiracy, ten certificates, certain of which were signed by J. B. Jones and others by J. F. Blanchard, both Dominion analysts, were tendered and received in evidence at the trial as proof of the fact that the drugs said to have been sold by certain of the appellants were substances mentioned in the schedule to the *Act*. Neither of the analysts gave oral evidence. In advance of the hearing, however, counsel for the Crown had advised counsel for the accused that there were eleven witnesses whose evidence would be merely corroborative, these including the name of the analyst Jones, whom the Crown did not propose to call, unless the defence wished any of them to be called for the purpose of cross-examination, and was advised that they did not wish Jones and others to be called for this purpose. The name of Blanchard was not included in the list. In charging the jury Mr. Justice Montague instructed them that they were to give full credence to the certificates and that the facts stated in them were to be taken as "proven conclusively" and no objection was made by counsel for any of the prisoners to this or any other portion of the charge. The learned trial judge directed the jury to acquit the appellants of the fourth of the charges, namely, that of conspiring to distribute narcotic drugs, and of the three other charges they were all found guilty and sentenced to various terms of imprisonment.

The present appellants appealed to the Court of Appeal for Manitoba (1), serving their notice on the day they were sentenced and raising amongst other grounds the contention that the certificates were inadmissible, since the prosecution was not under the *Opium and Narcotic Drug Act*. During the hearing of the appeal counsel for the

(1) 59 M.R. 86; 100 Can. C.C. 130.

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Crown applied for leave to adduce oral evidence in support of the conviction and orders were made that the evidence of the analyst Jones be taken before the Court of Appeal, and that of the analyst Blanchard, who was ill at the time, before Mr. Justice Adamson. The accused disclaimed any wish to be present during these proceedings but they were represented by counsel who cross-examined the witnesses on their behalf. In the result the convictions were affirmed and the appeals dismissed.

The present appeal has been taken pursuant to special leave granted by Kerwin J. and by whose order the questions of law to be determined are thus stated:

"1. On the appellants' appeal from their conviction was the Court of Appeal for Manitoba empowered under sections 1014 and 1021(1) (*b*) of the Criminal Code, or otherwise, to allow the respondent to produce before that Court the oral evidence actually given?

2. If so, was that Court empowered on such evidence, taken in conjunction with that given at the trial, to affirm the conviction, or was it authorized merely to order a new trial?"

Section 1013 of the *Criminal Code* grants a right of appeal to the Court of Appeal to a person convicted on indictment in certain defined circumstances, and subsection 4 of that section, introduced into the *Act* in 1930, allows an appeal by the Crown from a verdict of acqittal on any ground of appeal which involves a question of law alone. The powers of the Court for disposing of such appeals are defined by section 1014. Section 1021 provides in part as follows:

> For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interests of justice,
>
> . . .
>
> (*b*) if it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court of appeal, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose, and allow the admission of any deposition so taken as evidence before the court of appeal;
>
> and exercise in relation to the proceedings of the court of appeal any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, . . .

By the *Court of Appeal Act,* c. 40, R.S.M. 1940, section 27, it is provided that the court upon any appeal, may give any judgment which ought to have been pronounced and make such further or other order as is deemed just, and by subsection 3 that:

> the Court shall have full discretionary power to receive further evidence upon questions of fact by oral examination in court, by affidavit, or by declaration taken before an examiner or a commissioner.

The judgment of the Court of Appeal proceeded on the basis that the certificates of the analysts were not admissible in evidence and the application made on behalf of the Crown would indicate that this position was accepted by counsel on its behalf. On the argument before us, however, counsel for the Crown contended that section 18 of the *Opium and Narcotic Drug Act, 1929,* applied to a prosecution such as this and that accordingly the facts disclosed in the certificates of analysis were proven. If this contention could be sustained, it would, of course, be unnecessary to deal with either of the questions submitted. In my opinion, the certificates were not admissible and the fact that the substances dealt in by the appellants were narcotic drugs, within the meaning of the *Act,* was not proven. The offence for which the accused were indicted was not that of committing any of the offences enumerated in the *Act* of which section 18 forms a part, but rather the offence of conspiring with others to commit such an offence, a conspiracy declared to be indictable by section 573 of the *Criminal Code.* The opening words of section 18 are "in any prosecution under this Act" and there could be no prosecution under that *Act* for acts declared to be an offence by a section of the *Criminal Code* and not elsewhere in any statute relating to the criminal law. To invoke section 18 of the *Opium and Narcotic Drug Act* in a prosecution such as this would be to import a section of that *Act* into the *Criminal Code,* and for this I find no warrant anywhere.

In ordering the taking of further evidence the Court of Appeal has acted in the exercise of the discretion vested in it by section 1021 and the determination of the first question requires us to decide whether, in so doing, it has acted upon the proper principle (*Brown* v. *Dean*) (1). The relevant portions of section 1021, while not verbatim, are

(1) [1910] A.C. 373 at 375.

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indistinguishable from the corresponding portions of section 9 of the *Criminal Appeal Act 1907* of England. There it may be noted the court is not empowered to order a new trial. In *Rex* v. *Mason* (1) 17 C.A.R. 161, Darling J., in delivering the judgment of the court on an application to adduce further evidence, said in part:

> It is now really asked that there should be a new trial, which this Court is not empowered to order, and that we should hear certain witnesses whose names have been mentioned, and then consider the whole of the trial in the light of that new evidence. This Court exercises with very great caution the power given it to hear fresh evidence because to do so is opposed to the old established, trusted and cherished institution of trial by jury. This Court has to be convinced of very exceptional circumstances before it will reconsider the verdict of a jury in the light of fresh evidence which has not been laid before the jury, and which, in some cases, might have been put before the jury at the trial.

As to the evidence of proposed witnesses who were available but not called at the trial, to the same effect is the judgment of that court in *Rex* v. *Hatch* (2). In some cases such as *Rex* v. *Warren* (3), where the witness was not called at the trial, due to a misunderstanding, evidence has been received in the Court of Appeal but where, as in *Rex* v. *Weisz* (4), on the appeal of the prisoner an application was made to give the evidence of a woman who had been absent from England at the time of the trial, Reading C.J., in refusing the application, said that the appellant's legal advisers knew the case they would have to meet and no application was made to adjourn the trial, that there was no surprise and that the policy was deliberate of resting the defence upon the available evidence. These were all cases where the appellant was the prisoner but in *Rex* v. *Robinson* (5), where a prisoner applied for leave to appeal, the Crown asked leave to put in further evidence, being a letter written by the prisoner since his conviction in which he admitted committing the offence, and this was permitted under the provisions of section 9 of the Act.

In *Rex* v. *Collins* (6), further evidence was received on the appeal because the reference had been made to the court by the Home Secretary who wanted the court to deal with it, but Goddard L.C.J. pointed out the risk of allowing

(1) 17 C.A.R. 161.
(2) 20 C.A.R. 161.
(3) 14 C.A.R. 4.
(4) 15 C.A.R. 85.
(5) 12 C.A.R. 226.
(6) 34 C.A.R. 146.

such evidence after conviction and the reason why it is not done, save in exceptional circumstances, in these terms:

> The danger of allowing further evidence to be called after conviction, and the reason why the Court does not allow it save in exceptional circumstances, is clear enough. It is very easy after a person has been convicted to find witnesses who are willing to come forward and say this, that, or the other thing. If further evidence were allowed in such circumstances, it could always be said: "If this evidence had been given at the trial, it does not follow that the jury would have convicted, or they might not have convicted." That is especially true in cases where the defence is an alibi. Two or three witnesses perhaps are called to establish an alibi, which the jury reject. It is very often not difficult after conviction to find another witness or perhaps two more witnesses who would be willing to come and support the alibi, and it can always be said: "If only the prisoner had had the evidence of A or B which is now tendered, the jury might have come to a different decision, and the prisoner should have the benefit of that possibility." That is one of the reasons why this Court is necessarily reluctant to allow further evidence to be called after conviction.

Some further light on the construction which has been placed upon the English Statute by the court is afforded by the judgment in *Rex* v. *Rowland* (1), where, on an appeal against a conviction on a charge of murder, an application was made on behalf of the appellant for leave to call as a witness a man who, since the trial of the appellant, confessed that he himself had committed the murder of which the appellant had been convicted. Humphreys J., delivering the judgment of the court, after pointing out that to permit this would involve an inquiry of a totally different character from the simple issue involved in the calling of a fresh witness to speak to some fact connected with the defence put forward at the trial and in effect engage the court in trying not only the accused but also the man who wished to confess to committing the crime, said in part (p. 462):

> Now the court has in truth no power to try anyone upon any charge. It is not a tribunal of fact but a court of appeal constituted by statute to examine into the proceedings of inferior courts in certain cases of conviction or indictment. We have no power even to direct a new trial by a jury; much less have we the right to conduct one ourselves.

These general statements of the principles to be followed in hearing such appeals in England, while indicating generally the reluctance of the court to hear further evidence except under exceptional circumstances, do not touch the exact point to be determined here where there was, in my opinion, no sufficient evidence of a matter essential to the

(1) [1947] 1 K.B. 460.

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validity of the convictions, and counsel for the Crown seeks to remedy the defect on the prisoners' appeal to the Court of Appeal. If the application had been to give further evidence on the ground that its existence had been discovered since the trial and the issue upon which the evidence was tendered was controversial, the principles stated in the judgment of the Judicial Committee in *Hosking* v. *Terry* (1) and in the judgment of this Court in *Varette* v. *Sainsbury* (2), would apply. In the view I take of the matter, however, these principles are inapplicable in the circumstances of the present case.

Section 1021 does not restrict the power of the Court of Appeal to permit further evidence to be given before it to cases where the applicant is the appellant, but permits its admission also at the instance of the respondent if, in the circumstances of the case, it is considered that to do so is necessary or expedient in the interests of justice. If the evidence sought to be introduced on the hearing of the appeal touch upon an issue which is controversial, involving a consideration of the weight to be given to the evidence, the court of appeal would be involved, as pointed out by Humphreys J. in *Rowland's* case, in conducting a trial, and to do this, in my opinion, is outside of anything contemplated by section 1021.

The reasons for judgment delivered on the application to take the further evidence direct attention to the fact that, while all of the accused were represented by counsel, no objection was made to the admission of the certificates at the time they were offered in evidence, nor was the objection raised on the argument of the motion made on behalf of the accused at the conclusion of the Crown's case for a directed verdict of not guilty, nor after the judge's charge in which he had instructed the jury that the certificates were to be accepted as proof of the facts stated in them. From the fact that the appellants were found guilty on October 25, 1950, and were sentenced on the following morning, and that the notices of appeal were given on the same day raising the objection to the admissibility of the certificates, an inference might be drawn that the failure

(1) (1862) 15 Moo. P.C. 493 at 504. (2) [1928] S.C.R. 72 at 76.

to object at the trial was deliberate. In *Rex* v. *Sanders* (1), where copies of letters were introduced into the evidence by the Crown without objection and where the prisoners were represented by counsel, Bray J. said that the objection ought to have been taken at the time and, as it was not then taken, it could not be entertained by the court. That this statement cannot be taken without qualification appears from the judgment in *Stirland* v. *Director of Public Prosecutions* (2), where Viscount Simon, L.C. said in part:

> No doubt, as was said in the same case (*Rex* v. *Ellis* (1910) 2 K.B. 746,764), the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal, but where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice.

It is not the law, in my opinion, that the failure of counsel for a prisoner to object to the admission of evidence is in all circumstances fatal to an appeal taken on the ground that the evidence has been improperly admitted. If it be assumed that in these circumstances the objection may still properly be raised, the course adopted by counsel on behalf of the appellants has made manifest that they did not consider the fact that the drugs were of the nature referred to in the schedule to the *Opium and Narcotic Drug Act* was open to dispute and did not intend to tender evidence to dispute it. The accuracy of the evidence given in the Court of Appeal was not open to question and where it is clear that there had been no intention on the part of the accused persons to dispute the facts shown, I am unable to perceive any principle of law governing the exercise of the discretion vested in the court which has been infringed by receiving it. In my opinion, the answer to the first question should be in the affirmative.

Section 1021 permits the taking of further evidence "for the purposes of an appeal under this part." I see no ambiguity in this language nor anything in the section or elsewhere in the sections relating to criminal appeals restricting, or indicating any intention of restricting the

(1) 14 C.A.R. 9.

(2) [1944] A.C. 315, 328.

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effect to be given by the court to the further evidence in exercising its powers under section 1014. I respectfully agree with Mr. Justice Dysart that the evidence given before the Court of Appeal in this matter is as nearly conclusive as oral testimony can be and that it was within the powers of the Court to affirm the conviction and dismiss the appeals.

I would dismiss these appeals.

FAUTEUX J.:—At the Summer Assizes of the Court of King's Bench, held in the Eastern Judicial District, Province of Manitoba, the appellants were jointly tried, and on the 25th of October 1950, found guilty on three counts of conspiracy, i.e., conspiracy (*a*) to possess, (*b*) to sell, and (*c*) to cause to be carried in Canada, without first having obtained a licence from the Minister of National Health and Welfare, or other lawful authority, drugs within the meaning of the *Opium and Narcotic Drug Act*.

Each of the appellants entered an appeal (1) against these convictions, raising *inter alia*, the following points: beyond the *prima facie* proof, resulting from the production of several certificates of analysis, it was argued that there was no evidence establishing that the drugs referred to therein were drugs within the meaning of the *Act*, and that such certificates, admissible as such proof on a charge of actual possession, sale or transport, were inadmissible on a charge of conspiracy to possess, sell or transport. These contentions eventually turned out to be those on which the appeal fell to be determined. During the hearing, without acceding to the appellants' views, the respondent, nonetheless, applied for and obtained permission of the Court of Appeal—under section 1021 of the *Criminal Code*—to take and introduce in the record, the oral evidence of the two Dominion analysts who had issued these certificates filed at trial. The new evidence having been taken and considered, the appeals were dismissed.

Thereupon and pursuant to an application made under section 1025(1) of the *Code*, the appellants applied for and

(1) 59 M.R. 86; 100 Can. C.C. 130.

obtained leave to appeal to this Court on the following questions of law:

(1) Was the Court of Appeal empowered under section 1014 and 1021(1) and (*b*) of the *Code* or otherwise, to allow the respondent to produce before that Court the oral evidence actually given?

(2) If so, was the Court empowered on such evidence taken in conjunction with that given at the trial, to affirm the conviction or was it authorized merely to order a new trial?

In my view, it does not appear necessary, for the proper determination of this appeal, to deal with these two questions. For, while the additional evidence, introduced in appeal, might serve to confirm the conviction that there was no substantial wrong or miscarriage of justice in the premises, I have reached the conclusion that such evidence was not essential to legally support the verdict rendered. In my view, as I propose to show, the certificates of analysis were, in this prosecution, admissible evidence of the facts therein stated and, in any event, the record discloses that the defence, at trial, either chose—as it was, by law, entitled —not to hold the Crown to strict proof with respect to this particular issue, or else, opted to attempt to preserve a ground of objection for a possible appeal.

As to the admissibility of the certificates of analysis, Section 18 of the *Opium and Narcotic Drug Act*—hereinafter referred to as the Act—is the relevant section. The opening words of the English and French versions governing its operation must be quoted:

> In any prosecution under this Act . . . Dans toute poursuite sous le régime de la présente loi . . .

The adequate interpretation of these opening words cannot legally be gained by merely considering them only within the narrow compass of the section, or even of the *Act* in which they are found. It must rather be gathered in the full light of the relevant provisions of the *Interpretation Act,* particularly sections 15 and 28. The true import of section 15 was recently considered in *Robinson or Robertson* v. *The King* (1), particularly at pages 529, 530. Section 28 was equally considered by this Court in *Simcovitch* v. *The King* (2). In that case, Sir Lyman Duff, applying

(1) [1951] S.C.R. 522. (2) [1935] S.C.R. 26.

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the provisions of the latter section to section 191 of the *Bankruptcy Act*, under which the appellants were prosecuted, said that section 191 must be read and construed on the footing that the provisions of the *Criminal Code* apply to the offences created by it. The same principle must prevail as to the *Opium and Narcotic Drug Act* and so must its provisions, creating offences, be read and construed.

In this broader view, the following may be said. The opening words of section 18 are, on one hand, quite adequate to prevent the application of the section in the case of a prosecution entirely foreign to the *Act*, e.g. one exclusively under the *Code*. Thus, if a person sells a quantity of drugs, falsely representing them to be heroin, and obtains thereby a sum of money, the Crown could not, on a prosecution under section 405 of the *Criminal Code*, prove by means of a certificate of a Dominion analyst, the nature of the drugs sold, for this would not be a prosecution authorized under the *Act*. I cannot, however, convince myself that the all-embracing meaning of the language "In any prosecution under this Act", would be apt to include within the operation of section 18, prosecutions of offences nominally mentioned in the Act—such as the sale of drugs—and at the same time, be apt to exclude from its operation prosecutions of the other offences—such as counselling or conspiring to sell drugs—which Parliament by, and only by, the very same provision in the *Act*, virtually created and, therefore, rendered subject to prosecution. By force of section 28, in making the sale of drugs an offence, Parliament effectively thereby made the counselling of a sale, or the conspiracy to sell drugs, offences, and authorized by the *Act* itself, in each case, a prosecution. The prosecution of any of these offences is, in my view, a prosecution under the *Act*. The opening words of section 18 are not "In any prosecution for an offence under the Act", but "In any prosecution under the Act".

In *Desrochers* v. *The King* (1), a case which was not quoted before the Manitoba Court of Appeal nor on the application for leave to appeal to this Court, the Court of Appeal of the Province of Quebec has, on a charge of conspiracy to commit an offence under the *Excise Act*, admitted as evidence the certificate of analysis authorized under the

(1) 69 Can. C.C. 322.

latter *Act* in terms similar to those of section 18. This decision, rendered in 1937, was always followed in the Province of Quebec.

I do not find it necessary, however, to discuss this point any further, for the following reason, which led me to the conclusion that the additional evidence, introduced in appeal, was unessential to legally support the verdict rendered by the jury, is by itself sufficient.

As indicated above, the record in this case discloses the following facts: Defence counsel at trial entirely and consistently refrained from making any objection when these certificates—twelve in number—were filed by the Crown; properly notified, pursuant to a local practice, of the actual presence in Court of one of the Dominion analysts, who had issued some of them, and that, if heard, his testimony would bear on the facts therein appearing, counsel for the defence not only refrained from taking advantage of the opportunity to cross-examine him but positively indicated the intention not to do so; at the close of the evidence for the prosecution, a motion for non suit was made on behalf of the appellants, but the point as to the admissibility of the certificates was not even mentioned; the appellants were not heard at trial, nor was there any evidence adduced by the defence, nor was there any attempt to assail the facts mentioned in the certificates.

At the close of the judge's address, several objections were made by counsel for the defence; but, again, and though the judge had, in plain terms, instructed the jury that the certificates were positive evidence of the facts they mentioned, nothing was said, in this respect, by the defence. The verdict was rendered late on the afternoon of the 25th and the sentence imposed in the forenoon of the 26th and, on the same day, the notice of appeal which was served revealed, for the first time, this ground for complaint.

A large discretion is given to counsel in the conduct of the defence. Particularly, and under section 978 of the *Criminal Code*, it was open to counsel to make any admission as to any of the issues which the Crown had to prove as part of its case. Likewise, and in respect to the relevant issue, the defence had the discretion not to hold the Crown to strict legal proof. In my view, the whole conduct of

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the defence, in this case, manifested at trial a positive intention to accept the certificates as sufficient evidence of the facts therein stated, and to disregard them as one of the issues on which the case was fought, by the accused, represented by counsel.

In *Davis and Ridley* (1), Darling J., as he then was, said at page 139:

> It is stated that in opening the case, counsel for the prosecution stated matters which were not evidence against the appellant Davis on his trial, but we have been unable to find the admission of any evidence that could be objected to; but if it were so, if counsel on the other side do not object, it is not obligatory on the judge to do so. When a prisoner is defended by counsel and he chooses, *for reasons of his own,* to allow such evidence to be let in without objection, he cannot come here and ask to have the verdict revised on that ground.

In *The King* v. *Sanders* (2), the accused was charged with obtaining money by false pretences. During his opening speech, counsel for the prosecution proposed to read copies of letters alleged to have been written to the appellant by the prosecutor's wife and solicitor. As no notice to produce the original letters had been given to the defence, objection was taken and maintained as to the reading of such copies. However and in the course of the examination of the complainant by the Crown, these copies were admitted in evidence without any objection from counsel for the defence. The accused having been convicted, appealed on the ground that the copies of the letters were wrongly admitted. The judgment of the Court (Bray, Avory and Sankey, JJ.) was delivered by Bray J. At page 553, Bray J. said:

> In our opinion, if it was intended to rely on this point, the objection should have been repeated at the time the evidence was tendered, and not having been taken then, it cannot now be taken in this Court, at all events, when the prisoner was represented by counsel.

Said Viscount Simon in *Stirland* v. *The Director of Public Prosecutions* (3).

> There is no universal rule that a conviction cannot be quashed on the ground of the improper admission of evidence prejudicial to the prisoner unless an application is made at the time by counsel for the prisoner for the trial to begin again before another jury. It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence but should stop such questions himself. If that be the judge's duty it can hardly be fatal

(1) 2 C.A.R. 133.
(2) [1919] 1 K.B. 550.
(3) 30 C.A.R. 40.

to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt the Court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really "prejudiced." It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal.

These authorities are sufficient to support the proposition that, as to the consequences of the failure to object, there is no steadfast rule, and that, while the failure to object to inadmissible evidence is not always fatal, it cannot be said that it is never so.

Indeed, as stated by Lord Sankey in *Maxwell* v. *Director of Public Prosecutions* (1):

> . . . the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction *may* be quashed.

In the present case, however, the record, as indicated above, discloses more than a mere omission to object, as it shows a consistent conduct in this respect and a clear and positive intention not to deal with this particular point as being one in controversy in the case.

It might be, as it was intimated, that the defence acted in this way to preserve a possible ground of appeal; if so, the open conduct of the defence sufficiently defeats such a purpose, to which I would not find it consonant with the due administration of justice, to give effect.

With all these circumstances, there was, in the premises, no principle involved, no substantial wrong or miscarriage of justice.

The appeal, in each case, should be dismissed.

Appeals dismissed.

Solicitors for the appellants: *C. N. Kushner and Harry Walsh.*

Solicitor for the respondent: *Hon. C. Rhodes Smith.*

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(1) 24 C.A.R. 152 at 176.