1959

*Nov. 4
Dec. 21

ROBERT KOLSTAD .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Bribery—Reward given to government employee in connection with dealings with Government—Disposition of bribe money—Criminal Code, 1953-54 (Can.), c. 51, ss. 102(1)(b), 581(d), 584(1)(b), 595, 630(1), (2).

The accused was acquitted at a non-jury trial of the indictable offence of bribery under s. 102(1)(*b*) of the *Criminal Code*. Subsequently, the trial judge issued an order directing the return to the accused of the $400 bribe money, filed as exhibit in support of the charge. On appeal by the Crown, the Court of Appeal reversed the judgment of acquittal, directed that a verdict of guilty be entered and that the bribe money remain in Court until further order. The accused appealed to this Court against the conviction and the order.

Held: The appeal should be dismissed.

Per Curiam: The appeal against the conviction failed. The accused had dealings of some kind with the Government and the fact that a trap was set had no bearing on the commission of the offence.

Per Kerwin C.J. and Abbott and Martland JJ.: Section 630(2) of the Code, under which the order of the trial judge for the return of the money was made, had no application. The trial judge had acquitted the accused and had not found that an indictable offence had been committed by someone else. Nor was his jurisdiction assisted by

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

Rule 909(2) of the Rules of the Supreme Court of Alberta respecting criminal appeals, since he did not make a special order as to the custody or conditional release of any exhibit.

The submission that the Court of Appeal had no jurisdiction because no question of law was involved as required by s. 584 of the Code, must fail. The trial judge purported to act under s. 630(2), and in view of ss. 581(1)(*d*) and 595, the Crown could, by virtue of the extended meaning of "sentence", appeal under s. 584(1)(*b*) with leave. It should be taken that such leave was granted, as the Court of Appeal proceeded to deal with the matter.

Even if there were jurisdiction in this Court to hear an appeal from an order carrying those reasons—that the money should remain in Court until further order—into effect, and whether it be a separate order or part of one setting aside the acquittal and finding the accused guilty, there was no substance in the appeal.

Per Taschereau and Fauteux JJ.: This Court was without jurisdiction to deal with the order in relation to the bribe money. The question involved was not one coming within the ambit of any of the *Criminal Code* appellate provisions related to appeals to this Court in indictable offences. *Goldhar v. The Queen,* [1960] S.C.R. 60.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Primrose J. acquitting the accused. Appeal dismissed.

N. D. Maclean, Q.C., for the appellant.

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

The judgment of Kerwin C.J. and of Abbott and Martland JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal against a judgment of the Appellate Division of the Province of Alberta[1] setting aside the acquittal of the present appellant on a charge that on or about April 16th, A.D. 1958 at Edmonton he gave to an employee of the Government of Alberta a reward as consideration for an act in connection with dealings with the said Government of Alberta, contrary to the provisions of the *Criminal Code* of Canada. The applicable provision of the Code is s. 102(1)(*b*) reading as follows:

102. (1) Every one commits an offence who

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(*b*) having dealings of any kind with the government, pays a commission or reward to or confers an advantage or benefit of any kind upon an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit

[1] 123 C.C.C. 170, 30 C.R. 176.

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of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies upon him;

I agree with the reasons of Hugh J. MacDonald J.A., speaking on behalf of the Appellate Division, that the appellant did have dealings of some kind with the Government and that the fact that a trap was set has no bearing on the commission of the offence and I have nothing to add. So far, therefore, as the Appellate Division allowed the appeal from the trial judge and directed a verdict of guilty to be entered, the appeal fails. We have not been furnished with a copy of any formal order made by the Appellate Division but we were advised that on or about May 6, 1959, in pursuance of its direction the accused appeared before it and was fined $500 and that this amount has been paid.

The Crown had also appealed to the Appellate Division from an order of the judge of first instance made subsequent to the acquittal directing that there be paid out to the appellant the sum of $400 which the latter had given to two employees of the Government of the Province of Alberta. The four bills comprising that sum had been made exhibits at the trial. The argument of the present appellant that subs. (2) of s. 630 of the Code applied found favour with the trial judge. That subsection reads as follows:

630. (2) Where an accused is tried for an indictable offence but is not convicted, and the court finds that an indictable offence has been committed, the court may order that any property obtained by the commission of the offence shall be restored to the person entitled to it, if at the time of the trial the property is before the court or has been detained, so that it can be immediately restored to that person under the order.

The Appellate Division considered that this subsection had no application and with that I agree. The trial judge had acquitted the accused and had not found that an indictable offence had been committed by someone else. Counsel for the accused at the trial had suggested to the judge that the two witnesses who had been paid had committed a fraud, but when counsel for the Crown was arguing the trial judge asked him:

Do you mean to say that if the police improperly take money from a person as I in fact found in this case, following the acquittal of that person charged he is not entitled to get his money back?

And later, this occurred:

THE COURT: It is an exhibit in court. This money was taken by the police and put in court as an exhibit. Now, do I lose my power to deal with it?

MR. SHORTREED: You don't lose your power to deal with it, you never had any when you found that no crime had been committed.

THE COURT: Oh, I think I have. I will order return of the money following the expiry of the time for appeal.

In view of this it cannot be maintained that the Court had found an indictable offence had been committed and the trial judge therefore had no jurisdiction under s. 630(2) of the Code to make the order he did. Nor is his jurisdiction assisted by one of the Rules of the Supreme Court of Alberta respecting criminal appeals to which counsel for the appellant referred. In his factum he sets out subs. (2) of Rule 910, Order LVI, but by an amendment made some time ago the Rule is really subs. (2) of 909 although in the same terms. It is as follows:

909. (2) The judge or magistrate who presided at the trial of any person, or any judge of the Court in which he was tried, may at any time after the trial make a special order as to the custody or conditional release of any such documents, exhibits, or other things as the special circumstances or special nature thereof may make desirable and proper, and upon such terms as he may impose.

The trial judge did not make a special order as to the custody or conditional release of any exhibit.

The appellant takes the position that s. 584 of the Code giving the Attorney General the right to appeal against a judgment, or verdict of acquittal on any ground of appeal that involves a question of law alone, applies both to the judgment of acquittal and the order of payment out, whether the order be considered part of the judgment, or supplementary to it; that in neither case was a question of law involved, and that, therefore, the Appellate Division had no jurisdiction. However s. 581(*d*) and s. 595 of the Code provide:

581. In this Part,

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(*d*) "sentence" includes an order made under section 628, 629 or 630 and a direction made under section 638; and;

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595. (1) Where an order for compensation or for the restitution of property is made by the trial court under section 628, 629 or 630, the operation of the order is suspended

(*a*) until the expiration of the period prescribed by rules of court for the giving of notice of appeal or of notice of application for leave to appeal, unless the accused waives an appeal, and

(*b*) until the appeal or application for leave to appeal has been determined, where an appeal is taken or application for leave to appeal is made.

(2) The court of appeal may order annul or vary an order made by the trial court with respect to compensation or the restitution of property within the limits prescribed by the provision under which the order was made by the trial court, whether or not the conviction is quashed.

While I have already stated that I agree with the Appellate Division that s. 630(2) is not applicable, the trial judge purported to act under it. Therefore, by virtue of the extended meaning of "sentence", the Attorney General could appeal to the Court of Appeal under s. 584(1)(*b*), with leave of the Appellate Division or a judge thereof. It should be taken that such permission was granted, as the Appellate Division proceeded to deal with the matter. Their reasons stated that the money should remain in Court until further order.

Even if there were jurisdiction in this Court to hear an appeal from an order carrying those reasons into effect, and whether it be a separate order or part of one setting aside the acquittal and finding the appellant guilty, there is no substance in the appeal and it should be dismissed.

TASCHEREAU J.:—I agree with the Chief Justice that the Appellate Division of the Province of Alberta was right in allowing the appeal from the trial judge and directing a verdict of guilty to be entered.

On the second branch of the case concerning the order of the trial judge directing that there be paid out to the appellant the sum of $400, which order was reversed by the Appellate Division, I agree with Mr. Justice Fauteux that this Court has no jurisdiction on this matter.

The appeal should be dismissed.

FAUTEUX J.:—Charged with an indictable offence under s. 102(1)(*b*), the appellant was, on September 24, 1958, acquitted by Primrose J., sitting without a jury, in the Trial Division of the Supreme Court of Alberta. The charge being:

> That he, on or about the 16th day of April A.D. 1958, at Edmonton, in said judicial district, did give to an employee of the Government of Alberta, a reward as consideration for an act in connection with dealings with the said Government of Alberta, contrary to the provisions of the Criminal Code of Canada.

On October 3, 1958, he applied before the trial Judge for an order directing the return to him of a sum of $400, filed as exhibit in support of the charge, as being the reward given by him to an employee of the Government. This application was granted and the order was issued.

Both the acquittal and the order were appealed by the Crown to the Appellate Division of the Supreme Court of Alberta. This appeal was allowed and the Court directed that a verdict of guilty of the offence charged be entered, and directed the bribe money to remain in Court until further order.

The appellant now appeals to this Court against this judgment which set aside his acquittal, as well as the order of the trial Judge.

For the reasons given by the Chief Justice, I agree that the appeal against the conviction fails.

With respect to the order made by the Court of Appeal in relation to the bribe money, I am of opinion that this Court is without jurisdiction; for the question involved is not one coming within the ambit of any of the *Criminal Code* appellate provisions related to appeals to this Court in indictable offences. *Goldhar v. Her Majesty the Queen*[1].

I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: N. D. Maclean, Edmonton.

Solicitor for the respondent: The Attorney-General for the Province of Alberta.

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[1] [1960] S.C.R. 60.