HIS MAJESTY THE KING.....APPELLANT;

AND

E. W. BOAK .....RESPONDENT.

1925

*May 26.
*June 18.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Appeal—Deafness of juror as ground for—Question of law or fact or "sufficient ground" within discretion of court—"Substantial wrong or miscarriage of justice"—Grand jury—Error in written order summoning persons—Oral order by judge valid—Presiding judge—Sections 1013 and 1014 Criminal Code—Jury Act, B.C. 1913, c. 34, s. 31.

An appeal on the ground that a juror was deaf and the jury, therefore, illegally constituted is not an appeal on a question of law within clause (*a*) of section 1013 Cr. C., neither is the question one of fact alone or of mixed law and fact within clause (*b*), but it falls within clause (*c*) of that section; and therefore leave of the Court of Appeal was a condition precedent to the respondent's right of appeal to that court.

Although on the case being referred back to the Court of Appeal the respondent may obtain leave, his appeal on the ground of the disqualification of the petit juror would ultimately fail, because in the circumstances of this case, even though that disqualification should be established, it did not cause a miscarriage of justice (s. 1014 (1) (*e*) Cr. C.) or should be dismissed because "no substantial wrong or miscarriage of justice has actually occurred" (s. 1014 (2).

An order made by the judge designated to preside at the assizes directing the sheriff to summon other persons to serve on the grand and petit juries in the places of those whom the sheriff had been unable to serve was drawn up, by inadvertence, to cover only the summoning of petit jurymen.

Held that the order as pronounced by the judge may be regarded as the order made by him rather than the order in the mistaken form in which it was drawn up, and there had been no illegality in the constitution of the grand jury.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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The judge designated to hold the assizes may in advance of the actual opening of the court, for the purposes of section 31 of the *Jury Act* (B.C. 1913, c. 34) be regarded as the "presiding judge."

Judgment of the Court of Appeal ([1925] 2 W.W.R. 40) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), setting aside the conviction of the respondent for manslaughter and directing a new trial.

The material facts of the case and the questions at issue are fully stated in the judgment now reported.

J. A. Ritchie K.C. and *M. B. Jackson K.C.* for the appellant.

No counsel appeared for the respondent at the argument.

The judgment of the court was delivered by

ANGLIN C.J.C.—The Attorney-General appeals by leave of a judge of this court, under s. 1024 (*a*) of the Criminal Code, against an order of the Court of Appeal for British Columbia setting aside the conviction of the defendant and directing a new trial. Although he appeared by counsel on the application for leave to appeal and was duly served with notice of the appeal, the defendant was not represented on the argument and the appeal was heard *ex parte*.

Convicted of manslaughter on his trial before Mr. Justice Murphy and a jury, the defendant appealed to the Court of Appeal for British Columbia. Three grounds of appeal were urged:—

(*a*) misdirection

(*b*) illegality in the constitution of the grand jury; and

(*c*) disqualification of a petit juror through deafness.

The judgment of the Court of Appeal, pronounced by the Chief Justice, was that the conviction be set aside and a new trial ordered on the ground that one of the petit jurors was disqualified by deafness; that the question involved in this ground of appeal was a question of law alone in respect of which leave to appeal was unnecessary; that such leave was accordingly refused; and that the members of the court might pronounce separate judgments. (S. 1013 of the Criminal Code, as enacted by 13-14 Geo. V, c. 41, s. 9.)

(1) [1925] 2 W.W.R. 40.

Judgments were accordingly delivered by each of the judges who composed the court.

(*a*) There was no expression of opinion by any of them on the alleged misdirection.

On ground (*b*) two of the learned judges (Martin and M. A. Macdonald, JJ.A.) were of the opinion that the appeal should be allowed and the indictment quashed. McPhillips J.A. expressed no opinion on this point. Galliher J.A. was of the view that this ground of appeal was met by s. 1011 of the Criminal Code; and the learned Chief Justice thought that it should, if known, have been raised at the trial by motion to quash the indictment and that in any case it involved a question of fact and law as to which an appeal would not lie without leave, which, presumably, he would have refused.

(*c*) Martin, Galliher and McPhillips, JJ.A., were of opinion that the objection to the disqualification of the petit juror raised a question of law alone within clause (*a*) of s. 1013 in respect of which there was a right of appeal without leave; that evidence taken by direction of the Court of Appeal under s. 1021 established deafness amounting to disqualification of the juror Keown; that, as a result, there had been a miscarriage of justice; and that the conviction should be set aside. The Chief Justice, dissenting, held that the question raised by this ground of appeal was one of mixed law and fact falling within clause (*b*) of s. 1013; that, in the absence of a certificate of the trial court that it was a fit case for appeal, no appeal lay without leave of the Court of Appeal; and that, under the circumstances, which he detailed, leave should be refused. Mr. Justice M. A. Macdonald expressed no opinion on this ground of appeal.

The Court of Appeal is a statutory court (Criminal Code, s. 2, s.s. 7; s. 1012 (*b*). The right of appeal to it is conferred and defined by s. 1013 of the Criminal Code (13-14 Geo. V, c. 41, s. 9). Subsections 1 and 3 of that section read as follows:—

1013. (1) A person convicted on indictment may appeal to the court of appeal against his conviction;

(*a*) on any ground of appeal which involves a question of law alone; and

(*b*) with leave of the court of appeal, or upon the certificate of the trial court that it is a fit case for appeal, on any ground of appeal

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which involves a question of fact alone or a question of mixed law and fact; and

(c) with leave of the court of appeal, on any other ground which appears to the court of appeal to be a sufficient ground of appeal.

(3) No proceeding in error shall be taken in any criminal case, and the powers and practice now existing in the court of criminal appeal for any province, in respect of motions for or the granting of new trials of persons convicted on indictment, are hereby abolished.

The Criminal Code does not contain a provision corresponding to s.s. 4 of s. 20 of the English Criminal Appeal Act. (7 Edw. VII, c. 23.)

The defendant asserted a right of appeal under clause (*a*) of s.s. 1 of s. 1013 and, alternatively, asked leave to appeal if his case should be deemed to fall not within that clause but within clause (*b*) or clause (*c*) of that subsection. There was no suggestion that any other remedy was open to him.

By s. 921 (1) of the Criminal Code

Every person qualified and summoned as a grand or petit juror, according to the laws in force for the time being in any province of Canada, shall be duly qualified to serve as such juror in criminal cases in that province.

By s. 5 (1) of the Jury Act (B.C. 1913, c. 34) a person afflicted with deafness incompatible with the discharge of the duties of a juror is absolutely disqualified for service as a juror. Such disqualification is not a ground of challenge for cause. (S. 935 of the Criminal Code.)

We are of the opinion that the ground of appeal resting on the alleged disqualification of the petit juror does not fall within clause (*a*) of s. 1013. That clause was meant to cover questions of law arising out of the proceedings at the trial based upon facts admitted or conclusively found and not involving the appreciation or weighing of evidence by the appellate court. This is implied in the terms "law alone." The facts on which such questions were submitted under the former practice were found and stated by the trial judge: no matter of fact was open for decision by the appellate court. Here the deafness of a juror incompatible with the discharge of his duties was in issue; its existence was contested by the Crown; such determination of it as there was at the trial, if any, was adverse to the defendant; and in any case this ground of appeal involved the determination of a question of fact by the Court of Appeal upon evidence not before the trial court but taken by direction of the Court of Appeal under

the powers conferred upon it by s. 1021. This ground of appeal clearly did not "involve a question of law alone."

Neither, in our opinion, is the question one of fact alone, or of mixed law and fact within clause (*b*) of s. 1013. We incline to the view that the questions contemplated by that clause relate to matters which are in issue on the trial and the determination of which by the trial court is challenged.

In our view the ground of appeal now under consideration falls rather within clause (*c*) of s. 1013—

any other ground of appeal which appears to the Court of Appeal to be a sufficient ground of appeal.

(Archbold, Cr. Pl., Ev., Pr., 26th Ed., 338). The question is as to the constitution of the petit jury. Where such a defect in the constitution of the petit jury is charged as might involve a miscarriage of justice (s. 1014 (1) (*c*)) the Court of Appeal may regard it as something which, if established, would be a sufficient ground of appeal. But an appeal lies under clause (*c*) of s. 1013 only "with leave of the Court of Appeal."

We are, therefore, of the view that leave of the Court of Appeal was a condition precedent to the defendant's right of appeal. Inasmuch as the Court of Appeal proceeded on the view that such leave was unnecessary it did not exercise the discretion conferred on it by the statute in respect to the giving or refusing of leave. It follows that its order setting aside the defendant's conviction and directing a new trial cannot be maintained on the ground on which it was based.

Under such circumstances the usual course would be to remit the case to the Court of Appeal in order that it should pass upon the defendant's application for leave to appeal. But we should not send the case back for that purpose if satisfied that, although the defendant should obtain leave, his appeal on the ground of the disqualification of the petit juror must fail, because, even though that disqualification should be established, it did not cause a miscarriage of justice (s. 1014 (1) (*c*)), or should be dismissed because "no substantial wrong or miscarriage of justice has actually occurred" (s. 1014 (2)). The pertinent facts are stated by Macdonald C.J.A. as follows:—

During the trial a rumour was started which came to the ears of the trial judge to the effect that one of the jurors was afflicted with deaf-

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ness. Counsel for the appellant urged that the trial should be proceeded with. He even went the length of offering an undertaking that no question would be raised concerning the juror in question in case of an appeal. This was practically a confession that there was no ground for the rumour; but be that as it may, the accused, through his counsel, had the opportunity of having the rumour confirmed or denied, and if confirmed of asking that the jury should be dismissed and a new jury called, but far from taking that course he gave as one of his reasons for urging that the trial be proceeded with, that some of his witnesses were from a distance and might not be available again. The undertaking was not accepted by the learned judge, but that does not affect the fact that the objection which counsel might then have taken against the proceeding at the trial was not taken. The appellant took his chance of success with the jury as it was then constituted, and with knowledge that there was a question respecting the hearing of one of the jurors, and it was only when he failed to secure an acquittal that this rumour was revived. * * * We were satisfied, on consultation with the learned trial judge, that the test made by him of having the sheriff call over, once in an ordinary tone of voice, and once in a lower tone, was not known to either the appellant or his counsel but there is no suggestion that the appellant was not made aware of the alleged deafness of the juror.

It is thus apparent that the question of the deafness of the juror Keown was canvassed during the trial and that, with the knowledge that the learned trial judge was aware that that question had been raised and must have satisfied himself that Keown's deafness was not so great as to be incompatible with his discharge of the duties of a juror before allowing the trial to proceed with him as a member of the petit jury, counsel representing the defendant, to suit his own purposes, acquiesced in that course being taken.

Under these circumstances we are not disposed to admit the right of the defendant to contend on appeal that the presence of Keown on the petit jury resulted in a miscarriage of justice; and, if he should be allowed to do so, we are fully convinced that

no substantial wrong or miscarriage of justice has actually occurred.

(Cr. C. s. 1014 (2)).

We, therefore, think that so far as the defendant's appeal to the Court of Appeal rests on this ground it should now be dismissed.

The objection to the constitution of the grand jury rests on the facts that an order of Mr. Justice Murphy, purporting to be made by him as presiding judge at the assizes, and directing the sheriff to summon other persons to serve on the grand and petit juries in the places of those whom the sheriff had been unable to serve (Jury Act, B.C. 1913,

c. 34, s. 31) was in fact made by him six days before the assizes opened and by inadvertence was drawn up to cover only the summoning of additional petit jurymen, although the record shews that it was sought in respect of the grand jury as well as of the petit jury. There is no doubt that the learned judge meant his order to cover both grand and petit jurors and there is equally no doubt that the omission of the words " the grand jury and " in the operative clause was a mere clerical error entirely due to a slip, or inadvertence, on the part of the solicitor who drew the order up.

Under these circumstances we incline to think the order as pronounced by the learned judge may be regarded as the order made by him rather than the order in the mistaken form in which it was drawn up. *Hatton* v. *Harris* (1); *Milson* v. *Carter* (2). In any case, however, if the consequences of the mistake made in drawing up the order should afford a ground on which " the appeal, might be decided in favour of the appellant," we are convinced that " no substantial wrong or miscarriage of justice has actually occurred " as a result of such mistake.

Although the statute authorizes " the presiding judge " to make the order and, on a strict construction, this might be held to confer jurisdiction only after the sittings of the Assize Court had begun, convenience obviously requires that the jury panels shall be filled in advance of the actual sitting of the court. Giving to s. 31 (of the Jury Act) a construction designed to advance the remedy it was meant to afford, we are of opinion that the judge designated to hold the assizes may in advance of the actual opening of the court for the purposes of the section be regarded as " the presiding judge " to whom the sheriff is to report and who may, on request made on behalf of the Crown, make the order.

Moreover, we incline to agree with Mr. Justice Galliher that s. 1011 of the Criminal Code, notwithstanding the absence from it of the word " summoning," was meant to preclude the impeaching of a verdict on the grounds such as these. The defendant's appeal to the Court of Appeal on this ground should, therefore, likewise stand dismissed.

(1) [1892] A.C. 547. (2) [1893] A.C. 638, 640.

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There remains the ground of misdirection. This was not discussed at bar and so far as appears from the material before us was not passed upon in the Court of Appeal. Moreover the charge of the learned judge is not in the record. Having regard to the further fact that the defendant was not represented on the argument of the appeal, we think the only course open to us is to remit the case to the Court of Appeal in order that that court may pass upon the grounds of appeal based on misdirection.

Appeal allowed.