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* May 7.
* May 27.

WILLIAM FRASER AND OTHERS.....APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Trial—Circumstantial evidence—Rule as to evidence consistent with innocence or guilt of accused—Verdict of guilty by the jury—Proper direction as to rule—Conviction affirmed by appellate court—Appeal to the Supreme Court of Canada—Whether this Court should interfere with the verdict of the jury.

Where the evidence in a criminal case is purely circumstantial and the jury has been properly instructed within the rule as to the value of circumstantial evidence, the verdict of the jury finding the accused

* PRESENT:—Rinfret, Cannon, Crocket, Davis and Hudson JJ.

guilty is equivalent to a finding that, in the minds of the jury, the inferences to be drawn from the evidence were consistent with the guilt of the accused and inconsistent with any other reasonable conclusion, i.e., with the absence of guilt. Likewise, an appellate court could also decide, on the evidence, whether the facts were such as to be equally consistent with the innocence as with the guilt of the accused, and accordingly quash the verdict. But, before this Court, when the accused does not urge any ground of complaint against the direction of the trial judge and the evidence is such that the jury might, and could, legally and properly draw an inference of guilt, as held by the appellate court, it is not for the Court to decide whether the jury ought or not to have inferred that the accused was guilty.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the conviction of the appellants by a jury on charges of conspiracy and other offences under the *Customs and Excise Act*.

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

Lucien Gendron K.C. for the appellant.

J. Crankshaw for the respondent.

The judgment of the Court was delivered by

RINFRET J.—The appellants were tried and convicted by a jury in the Court of King's Bench, district of Montreal.

The indictment laid against them contains some nine counts, charging them with the offences of conspiracy and with different offences under the *Customs and Excise Act*. The appellant Fraser was found guilty on all counts charged against him. The appellant Brabant was also found guilty on all counts charged against him (eight in number). The appellant Pharand was found guilty on four counts representing what may be called the overt acts, but not guilty on the different counts charging conspiracy.

An appeal was lodged by each of them to the Court of King's Bench (appeal side) which confirmed the verdict and maintained the sentences in each case. The judgment was unanimous; and the appellants are now before this Court as a result of leave granted by a judge of the Court (1).

(1) [1936] S.C.R. 1.

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Under the Criminal Code, no appeal lies to the Supreme Court of Canada on behalf of any person convicted of an indictable offence, whose conviction has been affirmed, except "on any question of law on which there has been dissent in the court of appeal" (Cr. Code, sec. 1023), or "if leave to appeal is granted by a judge" of the Court (Cr. Code, sec. 1025).

In the first case, the appeal is limited to the question of law which has been the object of the dissent in the court of appeal. In the second case, leave can be granted, and this Court holds jurisdiction, only

if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case.

In the present case, it was common ground that all the evidence upon which the appellants were found guilty was circumstantial evidence. And the point of law on which the judgment appealed from allegedly conflicted with judgments of other courts of appeal in Canada was that the well known rule laid down by Baron Alderson, as far back as the *Hodge* case (1), and generally accepted and acted upon throughout Canada, had been misinterpreted and misapplied by the Quebec court of appeal in this instance.

At the conclusion of the argument and having had the advantage of a complete perusal of the record, we had some doubt as to whether the conflict which seemed to be apparent at first sight—and which alone stands as the foundation of our jurisdiction—did not exist perhaps more in the expression rather than in the real intention of the judgment *a quo*.

As was observed in *McLean* v. *The King* (2), "there is no single exclusive formula" whereby the rule may be stated. It is, however, a rule of general application, and some of the statements made by the learned judge who delivered the judgment of the court were of a nature to convey the meaning that there were exceptions to the rule. After having stated that one fact in the chain of circumstances proven was conclusive of the appellants' guilt, the learned judge added:

On conviendra, je crois, qu'un tel fait, lorsqu'il se produit, doive mettre en *échec* la règle de droit sus-mentionnée

(1) (1838) 2 Lewin's Crown's Cas. 227.

(2) [1933] S.C.R. 688, at 690.

a statement apparently suggesting that the present case was one where the rule should not apply. But, at the hearing before the Court, counsel for the Crown was able to show that, taking the judgment as a whole, the statement was susceptible of being understood as indicating that, in view of the existence, in the chain of evidence, of this outstanding fact found to be conclusive, no further doubt could subsist as to the guilt of the accused. As a result of this interpretation of the learned judge's statement, instead of excepting this case from the application of the rule, on the contrary, he would thus be applying the rule and declaring that, as a consequence of that rule, the evidence surrounding the main pivoting fact established in the case was conclusive of the appellants' guilt and incompatible with the theory of their innocence.

However, having now heard the appeal, and more particularly in view of the result presently to be announced, there would not be much object in entering upon a more complete discussion of the issue in respect to the conflict, except in mentioning, as we have just done, the state of mind in which the Court was left after a full consideration of the able argument presented to us and a careful examination of the whole record.

We will, therefore, proceed to express our view upon the merits of the point submitted by counsel for the appellants which is, in effect, that there was no legal evidence upon which a jury might find a verdict of guilty in the circumstances. The argument of the learned counsel was that, in a case where all the evidence is circumstantial, should the court of appeal not be satisfied, upon its own findings, that the circumstances proven were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person, it ought to quash the verdict on the ground that there was not sufficient legal evidence to support it.

Although, as a general rule, the question whether the proper inference has been drawn by the jury from facts established in evidence is really not a question of law, but purely a question of fact, for their consideration (*Gauthier*

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v. *The King*) (1), there is authority for the view that the rule with regard to circumstantial evidence is not exclusively a rule in respect of the direction which it is the duty of the trial judge to give to the jury or a rule solely for the guidance of a trial judge unassisted by a jury.

We were referred to, at least, two cases where the Court of Criminal Appeal in England set aside verdicts and quashed convictions when, after having considered the evidence as a whole, it seemed to the Court to be clear that the evidence was as consistent with the innocence of the accused as with his guilt.

In *Rex.* v. *Bookbinder* (2), the accused was convicted of larceny by a jury at Derbyshire assizes upon wholly circumstantial evidence. The appeal was heard by Heward L.C.J., Avory and Acton JJ. Counsel for the Crown argued that the jury were entitled to convict as the case depended solely on the proper inference to be drawn from the evidence. The Court came to the conclusion that there was no evidence which was not as consistent with the innocence as with the guilt of the appellant. Mr. Justice Avory, speaking for the Court, said:

> We think that the verdict was unsatisfactory and cannot be supported, having regard to the evidence. The appeal will be allowed and the conviction quashed.

In *Rex* v. *Carter* (3), the accused appealed against his conviction for indecent assault at Cheshire sessions. The ground for the appeal was that there was not sufficient evidence for the jury in convicting the appellant. The Court was composed of Mr. Justice Avory, Mr. Justice Hawks and Mr. Justice Humphreys. The evidence was circumstantial only. Again Mr. Justice Avory pronounced the judgment of the Court. Summing up the case, he said:

> When we come to consider the evidence as a whole, it seems to be clear that the evidence is as consistent with the innocence of the appellant as with his guilt.
>
> In all the circumstances, we have come to the conclusion that this conviction was unsatisfactory and cannot be supported, having regard to the evidence.
>
> The appeal is allowed and the conviction quashed.

It would appear, therefore, that, when the evidence in a criminal case is purely circumstantial and at the same

(1) [1931] S.C.R. 417.

(2) (1931) 23 Cr. App. Reports 59.

(3) (1931) 23 Cr. App. Repts. 101.

time equally consistent with the innocence as with the guilt of the accused, the Court of Criminal Appeal in England regards that evidence as insufficient to justify the jury in convicting, holds the verdict unsatisfactory and quashes the conviction, on the ground that it cannot be supported, having regard to the evidence.

To a certain extent, this would assimilate verdicts based on circumstantial evidence "as consistent with the innocence as with the guilt of the accused" to verdicts where it is claimed that there is no evidence at all to support them, the view being that the court of appeal is empowered to set aside those verdicts on the ground that they are unsatisfactory, whether on account of a total lack of evidence or for want of sufficient legal evidence to support them.

Let it be granted, however, that such a question should be deemed a question of law, or of mixed law and fact, when once it is established that the evidence is of such a character that the inference of guilt of the accused might, and could, legally and properly be drawn therefrom, the further question whether guilt ought to be inferred in the premises is one of fact within the province of the jury (*Reinblatt* v. *The King*). (1)

The appellants do not complain of the judge's charge to the jury. No objection was entered by them at the trial; indeed, counsel for the appellants freely admitted at bar that the charge was not open to objection. The direction there given upon the particular point dealing with the duty of the jury with regard to the value of circumstantial evidence and the standard by which it should be measured in the premises appears to us to have been as comprehensive as could be required. The jury was in substance told that, in order to reach a verdict of guilty, it should be satisfied, not only that the circumstances proven were consistent with the appellants having committed the acts, but they should also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the appellants were guilty of the charges brought against them.

In the face of that direction, the jury found the appellants guilty. The jury having been properly instructed,

(1) [1933] S.C.R. 694, at 697.

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within the terms of the rule, their verdict is equivalent to a finding that the inferences to be drawn from the evidence were consistent with the guilt of the appellants, and inconsistent with any other reasonable conclusion, and that is to say: with the absence of guilt. After the direction they were given, the jury must be taken to have eliminated all possibility of the innocence of the appellants as a rational inference from the facts as they believed and understood them.

Likewise, the court of appeal, to which the case was brought under sec. 1013 of the Criminal Code, could decide, on the evidence in this case, that the facts were such as to be inconsistent with any other rational conclusion than that the appellants were guilty.

The appellants having no ground of complaint against the direction of the trial judge and the evidence being such that the jury might, and could, legally and properly draw the inference of guilt, as held by the Court of King's Bench (appeal side), it is not for this Court to decide whether the jury ought or not to have inferred that the appellants were guilty.

The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Gendron, Monette & Gaultier.*

Solicitor for the respondent: *James Crankshaw.*