D. J. McDONALD, H. CONTER, AND J. O'HEARN ..... } APPELLANTS;

1930
*June 11.
*June 14.

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Criminal law—Evidence—Tender of evidence given on former trial, under Cr. C., s. 999—Admission by accused's counsel of "every fact essential to the admission of the evidence" under s. 999—Extent of admission—Lack of proof that evidence put in was in fact the evidence given at former trial—Materiality of the evidence as affecting findings against accused—New trial—Warning to jury where evidence tendered under s. 999 which was given on former separate trials of persons now tried together.

The appellants were convicted of removing, and two of them of importing, goods of over $200 in value and liable to forfeiture, contrary to s. 193 of the *Customs Act*, R.S.C., 1927, c. 42. At their trial the Crown proposed to put in, under s. 999 of the *Cr. Code*, evidence given at previous trials (at which the juries had disagreed) by one W. Counsel for the accused admitted "every fact essential to the admission of the evidence of [W.] under s. 999 of the Code," and the evidence offered was put in.

Held: The admission of counsel, while it rendered unnecessary the establishment of the various facts required by s. 999 to be proved before the evidence of W. could have been admitted, did not in any way identify the documents read to the jury as the evidence given by W. on the former trials; and, there being no proof that the statements put in were in fact the evidence of W., and there being no consent that they were, they were wrongly received, and appellants were entitled to a new trial. The appellant C., convicted of removing but not of importing, was so entitled, notwithstanding that the depositions put in did not in terms incriminate him; they were important on the point that the goods in question were goods liable to forfeiture under the Act; that was an essential element of the charge and of the proof, and although C. might have been connected with it only through other evidence, it was not possible to appreciate how far the depositions on the main charge concerning the character of the goods imported might have influenced the jury in its findings.

The said previous trials had been, one of the appellant O. alone, and the other of the other appellants and one P. On the trial in question, at which said depositions were received, they were all tried together. One alleged ground for a new trial was that W.'s evidence on either previous trial was inadmissible against any accused who had not been a defendant on the previous trial at which it was given. The Court found it unnecessary to pass upon the point, but remarked that, should similar circumstances happen at the next trial, and W.'s depositions properly and legally identified be tendered, it would be most

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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advisable for the trial judge to warn the jury that each deposition should be considered as evidence only against the accused in whose former trial such deposition purported to have been taken.

APPEAL from the judgment of the Supreme Court of Nova Scotia *in banco,* sitting as a Court of Appeal under the provisions of the *Criminal Code,* dismissing the appeals of the present appellants from their convictions for violation of s. 193 of the *Customs Act,* R.S.C., 1927, c. 42.

The three appellants and one Petrie were tried together before Ross J. with a jury on an indictment containing three counts, the charges being that they, at Sydney in the County of Cape Breton, on or about the 3rd September, 1929, did knowingly and unlawfully, and without lawful excuse, assist, or were otherwise concerned in, (1) unshipping goods, (2) the importing of goods, (3) landing or removing goods; to wit (in each case): spirituous liquors over the value of $200 which said goods were liable to forfeiture under the *Customs Act,* contrary to the provisions of s. 193, c. 42, R.S.C., 1927, and amendments thereto.

The jury found the appellants McDonald and O'Hearn guilty on the second count (importing) and all three appellants guilty on the third count (removing). They found Petrie not guilty. The appellants were sentenced to terms of imprisonment, Conter for two years under the third count, and McDonald and O'Hearn for two years under each of the second and third counts, such sentences to run concurrently. Petrie was acquitted.

It appeared that at a previous sittings of the court, O'Hearn had been tried alone, and McDonald, Conter and Petrie had been tried together, and there were disagreements by both juries; that at each of those trials one Captain Wheeler had given evidence; and that he was now absent from Canada. At the present trial it was proposed by the prosecution to put in the evidence given by Captain Wheeler at the previous trials, under s. 999 of the *Criminal Code,* which reads as follows:

If upon the trial of an accused person such facts are proved upon oath or affirmation that it can be reasonably inferred therefrom that any person, whose evidence was given at any former trial upon the same charge, or whose deposition has been theretofore taken in the investigation of the charge against such accused person, is dead, or so ill as not to be able to travel, or is absent from Canada, or if such person refuses to be sworn

or to give evidence, and if it is proved that such evidence was given or such deposition was taken in the presence of the person accused, and that he or his counsel or solicitor if present had a full opportunity of cross-examining the witness, then if the evidence or deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution, without further proof thereof, unless it is proved that such evidence or deposition was not in fact signed by the judge or justice purporting to have signed the same.

Counsel for the accused made an admission in the following form

[Names of counsel] admit every fact essential to the admission of the evidence of Captain Wheeler under section 999 of the Code.

and the evidence offered was put in.

Appeals taken from the convictions were dismissed by the Court of Appeal, Mellish and Carroll JJ. dissenting, and, pursuant to order of the Court, pronouncing separate judgments.

The judgment of the majority of the court was delivered by Harris C.J. He held that the admission of counsel, on its face and as understood at the trial, meant that the evidence of Wheeler was to be admitted against all the defendants; that the authorities show that the consent of the accused or his counsel is binding in such cases; and the evidence of Wheeler given on the two previous trials was properly received and binding on all the defendants. He further stated:

We think it is proper to point out that the suggestion that the admission of the evidence was only intended to be for the purpose of making it available as against the particular defendant or defendants who had been on trial on the previous occasion is not in our opinion the meaning of the admission which contains no such limitation.

If that view had been maintainable it would have involved a consideration of various questions and among others as to what if any difference there was between the evidence of Captain Wheeler in the two cases and whether or not these differences affected all or any of the issues. It was strongly argued that these differences were immaterial and it was pointed out that even if they were material, none of Wheeler's evidence affected the question of the guilt, if any, of the accused under the third count of the indictment. The guilt of all the accused under that count was clearly established by other evidence and was in no way affected by the admission of Wheeler's evidence. This seems to be so, and as the same punishment was awarded upon each of the convictions to run concurrently it seems to follow that no injustice would have been done any of the prisoners even if we had reached a different conclusion as to the effect of the admission of Captain Wheeler's evidence.

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Another objection raised was that none of the evidence taken on the two previous trials purported to be signed by the Judge, but that objection is obviously covered by the admission of counsel.

The grounds of dissent of Mellish J. were "that the evidence given by Wheeler in the previous trial of McDonald, Conter and Petrie was inadmissible in this trial as evidence against O'Hearn," and "that the evidence given by Wheeler in the previous trial of O'Hearn was inadmissible in this trial as against Conter, McDonald and Petrie;" that s. 999 of the *Criminal Code* is clearly intended to deal with evidence given on the former trial of the same defendant and the admission of counsel aforesaid was therefore "wholly insufficient to allow of the reception of evidence taken on the previous trial of one party as against a different party on a later trial;" further, that "there is no proof that the statements put in were in fact the evidence of Captain Wheeler and there is no consent that they were." Carroll J. concurred with the reasons of Mellish J., and added some further reasons, including the ground (in connection with s. 999) that the evidence was not signed by the judge "before whom the same purports to have been taken;" that this fact of non-signature, apart from all other considerations, made all this evidence non-admissible.

By the judgment of the Supreme Court of Canada, now reported, the appeal was allowed and a new trial ordered as regards the three appellants.

J. W. Maddin K.C. and *M. A. Patterson* for the appellants.

D. A. Cameron K.C. for the respondent.

THE COURT.—In our opinion one ground upon which the appellants are entitled to a new trial is that taken by Mellish J., in his dissenting judgment, namely, that there is no proof that "the statements put in were in fact the evidence of Captain Wheeler and there is no consent that they were." The admission of counsel for the appellants rendered unnecessary the establishment, by the prosecution, of the various facts required by section 999 of the Code to be proved before the evidence of Captain Wheeler could have been admitted, but that admission did not, in any way, identify the document which was read to the jury, as the evidence given by him on the former trial.

It is true that the deposition of Captain Wheeler, as admitted, does not, in terms, incriminate the appellant Conter. The deposition is, however, very important on the point that the goods which the appellants were charged with having assisted or having been otherwise concerned in importing, unshipping, landing or removing were goods liable to forfeiture under the *Customs Act;* that was an essential element of the charge and of the proof, and although Conter may have been connected with it only through other evidence, it is not possible to appreciate how far the depositions of Captain Wheeler on the main charge concerning the character of the goods imported may have influenced the jury in its findings.

Our view on the above point makes it unnecessary to pass upon the other ground of dissent, to wit: " that the evidence given by Wheeler in the previous trial of McDonald, Conter and Petrie was inadmissible in this trial as evidence against O'Hearn " and " that the evidence given by Wheeler in the previous trial of O'Hearn was inadmissible in this trial as against Conter, McDonald and Petrie." We wish only to add that, should similar circumstances happen at the next trial and Wheeler's deposition properly and legally identified be tendered, it would be most advisable for the trial judge to warn the jury that each deposition should be considered as evidence only against the accused in whose former trial such deposition purported to have been taken.

The appeal is allowed and a new trial is ordered as regards the three appellants.

Appeal allowed.

Solicitor for the appellant O'Hearn: *J. W. Maddin.*

Solicitor for the appellants McDonald and Conter: *M. A. Patterson.*

Solicitors for the respondents: *N. R. MacArthur* (Crown Prosecutor) and *D. A. Cameron* (Solicitor for the Department of Inland Revenue of Canada).