1928
*Nov. 8.
1929
*Feb. 5.

STINSON-REEB BUILDERS SUPPLY COMPANY 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—Combine—Restraint of trade—Injury to the public—Business interests—Sections 496, 497, 498 Cr. C.

The proper test in a prosecution under section 498 of the Criminal Code, which deals with "restraint of trade," is the injury to the public by the hindering or suppressing of free competition, notwithstanding any advantage which may accrue to the business interests of the members of the combine. *Weidman* v. *Shragge* (46 Can. S.C.R. 1) foll.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, dismissing the appellants' appeal from a conviction and sentence rendered on the 29th January, 1926, when the trial judge, Wilson J., found the appellants guilty of a charge laid under section 498 of the Criminal Code and fined each of the appellants the sum of $2,000.

The material facts of the case are stated in the judgment now reported.

Aimé Geoffrion K.C. and *W. F. Chipman K.C.* for the appellants.

Ernest Bertrand K.C. for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—Stinson-Reeb Builders' Supply Co., Limited, W. & F. P. Currie & Co., Limited, and Ontario Gypsum Co., Limited, appeal from a judgment of the Court of King's Bench affirming their conviction on an indictment laid against them under section 498 of the Criminal Code. This indictment contains the following counts:—

For having

at the city of Montreal, during the years 1924 and 1925, doing business together with other unknown persons, conspired, combined, agreed and arranged with each other and other persons unknown with view to unduly limit the facilities for producing, manufacturing, supplying and dealing in

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

that certain commodity or article known as gypsum products, which said products are the subjects of trade and commerce;

For having

at the same time and place, conspired, combined, agreed and arranged with each other and with other persons unknown to restrain, injure trade and commerce in relation to such gypsum products;

For having

at the same time and place, unduly prevented and lessened competition in the purchase, sale and supply of such commodity and enhanced the price of the said commodity commonly known as gypsum products.

The appellants, with their consent, were tried before a judge (Mr. Justice Wilson) without a jury, were found guilty on the three counts and were sentenced to pay a fine of $2,000 each.

They appealed from their conviction to the Court of King's Bench on questions stated to be questions of law alone, and on questions stated to be questions of mixed law and fact. These appeals, heard before Howard, Bernier and Rivard, JJ., were dismissed. Leave having been given to pronounce separate judgments, Mr. Justice Howard delivered a dissenting judgment, and the appellants now appeal on his grounds of dissent. They had also applied for special leave to appeal to this court on the question of the constitutionality of section 498, but, as no conflict was shewn between the judgment of the court below and the judgment of any other court of appeal, the application was dismissed (1). The validity of section 498 Cr. C., therefore, is not in issue in this case, the only question submitted on the appeal, as I conceive it should be expressed, being whether there was evidence on which a jury properly directed or a judge sitting without a jury could convict the appellants on the charges laid against them. This is of course a question of law, and it is on this point that Howard J. dissented.

Section 498 of the Criminal Code—and we are concerned merely with its effect—is in a subdivision of the code bearing the title "Offences connected with trade and breaches of contract." It will be convenient to cite here sections 496, 497, 498 Cr. C., which together form a group dealing with what is known as "restraint of trade."

496. A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

(1) [1928] S.C.R. 402.

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497. The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section.

498. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,—

(*a*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade and commerce; or,

(*b*) to restrain or injure trade or commerce in relation to any such article or commodity; or,

(*c*) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or,

(*d*) to unduly prevent or lessen competition in the production, manufacturing, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.

These provisions, and more especially section 498 Cr. C., were construed by this court in *Weidman* v. *Shragge* (1), which, although not a criminal case, is authority with regard to their meaning. I may quote what was stated by Mr. Justice Duff at p. 37:—

> I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment.

And Mr. Justice Anglin (as he then was), discussing the meaning of the expression "unduly" in section 498 Cr. C., said at p. 42:—

> The prime question certainly must be, does it (the agreement alleged to be obnoxious to section 498), however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive or oppressive restrictions upon that competition the benefit of which is the right of every one?

In view of this statement of the rule, it will be unnecessary to refer to any of the English cases on which the appellants rely. What we have to determine is whether there is evidence bringing this case within the statute.

(1) (1912) 46 Can. S.C.R. 1.

There does not appear to be any dispute as to the material facts.

About the end of 1913 an association called "the plasterers' association" was formed between certain manufacturers of gypsum products and certain dealers in these commodities. It was composed of two branches, the manufacturers and the dealers. There were four manufacturers: The Albert Manufacturing Company, Limited, of Hillsborough, N.B.; The Windsor Plaster Company, Limited, of Windsor, N.S.; The Iona Gypsum Company, Limited, of Iona, N.S., and The Ontario Gypsum Company, of Paris, Ontario. There were originally six dealers, all of Montreal: Alex. Bremner, Limited; Stinson-Reeb Builders' Supply Co., Limited; Wm. McNally & Co., Limited; Webster & Sons, Limited; W. and F. P. Currie & Co., Limited, and Hyde & Sons.

Almost from the beginning and at all the times with which we are concerned, one Alfred E. Balfry of Montreal was the secretary of the association and practically its factotum, being paid by the manufacturers and the dealers, and he also acted as chairman at the occasional meetings of the association held in Montreal at his office, for the renting of which, and other expenses, the members paid. There were also meetings of the dealers alone, and at these Balfry presided, besides acting as secretary. Minutes of proceedings at meetings were kept by Balfry. The association was not incorporated.

I think there is no doubt that the forming of this association was an advantage to its members. From the manufacturers' point of view the question of freights, and of the quantities of gypsum products to be shipped to Montreal, was a material consideration. The freight rates were equalized, by taking as a basis the rate from Hillsborough, N.B., to Montreal. The manufacturers fixed their sale prices to the dealers, and also the price at which the latter would sell their products on the Montreal market, and no sales could be made for a lesser price. As far as concerned the Montreal market, the manufacturers agreed to sell to the dealers exclusively, and the dealers could buy only from the manufacturers. Orders by dealers for goods were handed by them to Balfry who distributed these orders among the manufacturers. The testimony shews that, as matters stood, the trade in Montreal

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could get these products only from the dealers, and through the latter from the manufacturers. Shipments by other and more distant manufacturers to Montreal were impracticable on account of the freight rates and because, if a large quantity of products was shipped to Montreal, it would have to be stored, which would increase its selling price. That a monopoly of the trade in Montreal in gypsum products was secured by the plasterers' association does not appear to be open to doubt.

It may be emphasized here that the advantage thus obtained by the manufacturers and dealers of the association is not the proper test. What is the true test was laid down by this court in *Weidman* v. *Shragge* (1) as above stated. Injury to the public by the hindering or suppressing of free competition, notwithstanding any advantage which may accrue to the business interests of the members of the combine, is what brings an agreement or a combination under the ban of section 498 Cr. C.

This injury is shewn by what occurred in January, 1925. The six dealers met on January 13, passed a resolution dissolving their association, and very shortly afterwards reformed it with five members instead of six, Hyde & Sons, who say they did not vote on the question of dissolution, being excluded. Of the forming of what he called a "family of five" Balfry immediately advised the manufacturers. The effect of the exclusion of Hyde & Sons was soon painfully apparent to the latter. They booked with Balfry orders for gypsum products which they required to fill contracts that they had made with builders. These products they were unable to procure either through Balfry or by applying directly to the manufacturers. They were told to go to one of the five dealers, which meant purchasing the goods at a considerably higher price, about $2 per ton more than the selling price of the manufacturers to the dealers. This rendered it impossible for them to fulfil their contracts and carry on their business. Balfry is very frank as to the policy adopted towards Hyde & Sons. He is asked:—

Q. What objection had you to this plaster coming to Montreal—what business had you in that—what interests had you in that?

A. To see that Hyde did not get any plaster in Montrea.

(1) 46 Can. S.C.R. 1.

Q. Why did you not want Mr. Hyde to have plaster in Montreal?
A. Because I had made arrangements to supply it only to the five other firms.

Counsel for the appellants contend that this is merely a case of a manufacturer freely choosing or changing his selling agents. It is very much more. It is a combination of manufacturers and dealers to control an important market wherein the goods in which they deal can be obtained only through them and at prices which they determine, free competition by others in the same market being suppressed.

This was clearly shewn in the case of one O'Neil who, shortly before the exclusion of Hyde & Sons, had brought to Montreal and stored there a large shipment of plaster. When he attempted to compete with the dealers, the latter reduced their prices, this operation being repeated several times, as O'Neil reduced his, so that eventually O'Neil was forced out of the market and constrained to sell the balance of his stock to one of the dealers. This is represented by the appellants as being merely a rate war brought about by O'Neil's action in underselling the dealers. I think it shews that the association had rendered competition impossible in the Montreal market. The evidence demonstrates that the manufacturers controlled the price at which these goods were sold by the dealers to the public. Just one quotation from the testimony of Balfry will establish this:—

Q. Dealers, as members of the association, after having bought, under your control, from the manufacturers, were not at liberty to sell to the public at whatever price they liked. Were they bound to sell at a fixed price, and at fixed terms?
A. They were compelled at the price the manufacturers thought right to charge the public.
Q. The dealers were not at liberty to sell to suit their convenience?
A. I suppose, if they got into collaboration with the manufacturers. they might be able to induce the manufacturers to do what they wanted.

By Mr. Bertrand, K.C.:

Q. They had to sell at a fixed price?
A. Yes.

By the Court:

Q. Not only the price, but the terms also?
A. Yes.

The prosecution here is against two of the dealers and one of the manufacturers. I think these three companies

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agreed to all that was done, and it is no objection that the others were not charged under the same indictment.

My conclusion is that there was evidence on which the learned judge could find the appellants guilty of an offence against section 498 of the Criminal Code, subsections (*a*), (*b*) and (*d*).

The appeal should therefore be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitor for the respondent: *Ernest Bertrand.*