

RENE CARDINAL APPELLANT;

1927

AND

*May 14.
*May 28.

HIS MAJESTY THE KING RESPONDENT.

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

Appeal—Leave to appeal—Criminal law—"Knowingly"—Burden of proof—Conflict of decisions—Article 1024a Cr. C.—Customs Act, (R.S.C. (1906), c. 48, s. 219 (as enacted by 15-16 Geo. V, c. 89) and s. 264).

The appellant was convicted for having "knowingly" harboured and kept an automobile of a value exceeding \$200 whereon the customs duty lawfully payable had not been paid (*Customs Act*, s. 219). The conviction was affirmed by the appellate court holding, under section 264 of the *Customs Act*, that the appellant had failed to discharge the onus of proving his innocent possession. The appellant now moves for leave to appeal to this court, on the ground that this decision conflicts with the judgments in *The King v. Beaver* (9 Can. Cr. Cas. 415) and *The King v. Macdougall* (15 Can. Cr. Cas. 466) where it was held that when under a statute the crime or offence consists in "knowingly" doing a certain thing, the onus of proof of the knowledge of the accused is upon the Crown.

Held that leave to appeal must be refused. The above judgments are not decisions "in a like case" within the meaning of section 1024a Cr. C., and they are not in conflict with the present judgment which is based on section 264 of the *Customs Act*.

MOTION for leave to appeal to this court from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the conviction of the appellant (1).

The material facts of the case are stated in the above head-note and in the judgment now reported.

Gustave Monette for the motion.

F. Monet contra.

MIGNAULT J.—This is an application for leave to appeal under section 1024a of the *Criminal Code* from the unanimous judgment of the Court of King's Bench (province of Quebec) dismissing an appeal by the appellant from his conviction before Mr. Justice Wilson and a jury for having "knowingly" harboured and kept an automobile of a value

*PRESENT:—Mr. Justice Mignault in Chambers.

(1) (1927) Q.R. 43 K.B. 110.

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exceeding \$200 whereon the customs duty lawfully payable had not been paid, the complaint having been laid under section 219 of the *Customs Act* (R.S.C. [1906], c. 48) as enacted in 1925 by 15-16 Geo. V, c. 39. This enactment merely added a third subsection to the two others which were already in the Act, and it is under this third subsection that the appellant was convicted.

In dismissing the appellant's appeal, Mr. Justice Guerin, on behalf of the Court of King's Bench, said:

It was proved at the trial that this machine had been smuggled into Canada and found in the possession of the appellant.

Thereupon it devolved upon the defendant to prove his innocent possession. This the defendant failed to do. Under section 264 of the *Customs Act* the burden of proof was upon the appellant to show that the proper duties payable were in fact duly paid and that all the requirements of the *Customs Act* had been fulfilled.

The appellant alleges three grounds of appeal, but on one only, the question of the onus of proving guilty knowledge, did he claim before me that there was any conflict between the judgment of the Court of King's Bench and a judgment of any other court of appeal in a like case.

In short, the appellant contends that in view of the word "knowingly" in section 219 of the *Customs Act* the onus was on the Crown to show that he, the appellant, knew that the customs duties had not been paid on the automobile in question.

In his reasons for judgment, Mr. Justice Guerin relies on section 264 of the *Customs Act* as obliging the appellant to shew that the proper duties payable were in fact duly paid.

The appellant referred me to a number of cases wherein it was held that when, under the statute, the crime or offence consists in "knowingly" doing a certain thing, the onus of proof of the knowledge of the accused is upon the Crown.

I need instance but two decisions of courts of appeal on which the appellant relies: *The King v. Beaver* (1), a judgment of the appellate court for Ontario in 1905; and *The King v. Macdougall* (2), a judgment of the Supreme Court of New Brunswick en banc in 1909.

(1) 9 Can. Cr. Cas. 415.

(2) 15 Can. Cr. Cas. 466.

In both these cases the prosecution was under section 207 of the Criminal Code (at the time of the first case, that section was section 179 of the same code), for having "knowingly, without lawful justification or excuse," circulated or distributed (I abbreviate) an obscene book or other printed, typewritten or otherwise written matter.

It was held, in the language of Maclaren J.A., in the first case, at p. 423, as follows:

With regard to the second point reserved, it was urged on behalf of the defendant, that it was not proved that she knew of the contents of the document she was distributing, and that consequently it was not done "knowingly." This brings up the question, whether the onus of proof on this point was on the prosecution or the defence. In my opinion, the insertion of the word "knowingly" in the place where it is found makes it incumbent on the prosecution to give some evidence of knowledge.

In the second case, the sixth item of the reporter's head-note shews that the same opinion was expressed as to the onus. It reads as follows:

6. The onus is upon the Crown to shew that the accused as editor and proprietor of a paper had "knowingly" published the obscene matter, but knowledge may be inferred, in the absence of evidence to the contrary, from proof that he had full control as to what should be published or not published, and that he published the paper under an assumed name.

In both cases, while the court expressed this opinion as to the burden of proof, the conviction was affirmed on the ground that knowledge of the accused could be inferred from the facts in evidence.

The question now is whether these decisions are decisions "in a like case" within the meaning of section 1024a of the Criminal Code. If they are, and if section 219 of the *Customs Act* were the only enactment to be considered in connection with the complaint brought against the appellant, I would hold, on the authority of *The King v. Boak* (1), that they are in conflict with the decision from which the appellant seeks leave to appeal.

It is to be observed however that while in section 219 of the *Customs Act* and in section 207 of the Criminal Code the word "knowingly" is used in the definition of the offence, the *Customs Act* contains a section (not to be found in the Criminal Code in connection with section 207), namely section 264, dealing specially with the burden of proof.

(1) [1926] S.C.R. 481.

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Section 264 of the *Customs Act*, which was not altered at the time of the enactment of section 219 in 1925, is as follows:

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264. The burden of proof that the proper duties payable with respect to any goods have been paid, and that all the requirements of this Act with regard to the entry of any goods have been complied with and fulfilled shall, in all cases, lie upon the person whose duty it was to comply with and fulfill the same, and, without restricting the generality of the foregoing provision, if any prosecution or suit is brought for any penalty or forfeiture for (*sic*) the recovery of any duty under this Act, or any other law relating to the customs, or to trade or navigation, or if any proceeding is taken against the Crown or any officer for the recovery of any goods seized or money deposited under the authority of this Act, or any other such law, and if any question arises as to the identity or origin of the goods seized, or as to the payment of the duties on any goods, or as to the lawful importation thereof, or as to the lawful lading or exportation of the same, or as to the doing or omission of any other thing by which such penalty or forfeiture or liability for duty would be incurred or avoided, the burden of proof shall lie on the owner or claimant of the goods seized or money deposited, and not on the Crown or on the party representing the Crown.

The judgment of the Court of King's Bench is clearly founded on section 264, under which the court held that the burden of proof was upon the appellant to shew that the proper duties had been paid. It may perhaps be open to question whether section 264 of the *Customs Act* applies to a prosecution under the third subsection of section 219 added by the 1925 amendment, but even were it without application, the decision of the Court of King's Bench would not be in conflict with the decisions above referred to where no question could arise as to such an enactment as section 264. These judgments, and the other English cases cited by the appellant to which I need not refer, were therefore not decisions "in a like case," and are not in conflict with a judgment based on section 264.

Leave to appeal must be refused.

Motion dismissed.
