

1924

*Mar. 31.
*April 22.

ABRAHAM GOLDHAMER APPELLANT;

AND

HIS MAJESTY THE KING RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE,
PROVINCE OF QUEBEC*Appeal—Jurisdiction—Criminal law—Conviction—Appeal by the Attorney General—Addition to sentence—Art. 1013 Cr. C. as amended by 13-14 Geo. V, c. 41, s. 9—Art. 1024 Cr. C.*

The appellant was found guilty of a criminal offence and sentenced to pay a fine of \$400, or to be imprisoned during three months in default of payment. After the fine had been paid, the Attorney General appealed against the sentence under Art. 1013 Cr. C., as amended by 13-14 Geo. V, c. 41, s. 9; and by judgment of the appellate court, in addition to the fine the appellant was condemned to be imprisoned for a period of six months.

Held that there is no jurisdiction in the Supreme Court of Canada to entertain an appeal, as, under section 1024 Cr. C., the right of appeal is restricted to an appeal against the affirmance of a conviction. *Idington J. dubitante.*

APPEAL from a decision of the Court of King's Bench, Appeal Side, province of Quebec, increasing the sentence imposed on the appellant upon an appeal to that court by the Attorney General for Quebec under article 1013 Cr. C. as amended by 13-14 Geo. V, c. 41, s. 9.

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

Cohen for the appellant.

Bertrand for the respondent.

*PRESENT:—*Idington, Duff, Mignault and Malouin JJ. and Maclean J. ad hoc.*

1924
 GOLDHAME
 v.
 THE KING
 Idington J

 IDINGTON J.—The appellant was found guilty by one of the judges of the Sessions of the Peace for the District of Montreal of having fraudulently concealed and parted with much of his properties previous to his insolvency, and other like charges, and said learned judge sentenced him to pay a fine of \$400 and, on default of payment thereof, to imprisonment for six months.

The appellant immediately paid said fine. Thereupon, within what seems to me to have been a reasonable time, the Attorney General for Quebec, or the counsel for the Crown at the trial with his consent and direction, appealed to the Court of King's Bench for Quebec, under section 1013 of the Criminal Code, as amended by chapter 41 of 13-14 Geo. V, sec. 9, repealing the said section and others and substituting therefor in part section 1013 of said statute, of which subsection 2 thereof reads as follows:—

(2) A person convicted on indictment, or the Attorney General, or the counsel for the Crown at the trial, may with leave of a judge of the court of appeal, appeal to that court against the sentence passed by the trial court, unless that sentence is one fixed by law.

The Court of King's Bench having heard the case added to said sentence, imprisonment for six months.

Mr. Justice Bernier alone dissented but gave no reasons for said dissent.

Thereupon the appellant, so convicted and condemned to imprisonment, appealed from the said judgment of the Court of King's Bench to this court. Upon said appeal coming on for hearing herein, some members of our court took the objection that we had no jurisdiction.

I suggested to counsel for appellant, who was thereby taken by surprise, that he better urge anything he had to say on the merits, and take a few days to submit a further factum, answering the point of want of jurisdiction.

A week has elapsed but nothing further submitted, possibly because I had submitted to him that I could see no merits in the appeal, including the objection upon which he chiefly relied, that the fine having been paid there could be no appeal to the Court of King's Bench.

The only foundation for appeal here is the enactment in section 1024 of the Criminal Code, of which the first subsection reads as follows:—

1924
 GOLDHAMER
 v.
 THE KING.
 Idington J.

1024. Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the court of appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

Section 1013 of the Code, as it stood until repealed as above stated, had to be read in connection with said section 1024, to clearly understand same.

But I do not see in the section or sections substituted therefor any help for us in regard to the interpretation and construction of said section 1024.

In the initial words thereof

Any person convicted of an indictable offence, whose conviction has been affirmed

I find some doubt and difficulty.

In the common use of the words "convicted" and "conviction" a man found guilty is, even before sentence, referred to as having been convicted and the finding of him as guilty a conviction.

But is that to be our legal interpretation of these words, or proper legal use thereof, unless and until he has been sentenced, and only then inclusive of the actual sentence, and thus read in this section as necessarily including the sentence, and that as determined by the Court of King's Bench, sitting in appeal.

In this latter sense of these words it is fairly arguable that there is a right of appeal.

Turning to Stroud's Judicial Dictionary I find the following:—

CONVICTED.—The word "convicted," or the "conviction" of a person accused, is equivocal. "In common parlance no doubt it is taken to mean, the verdict at the time of trial; but in strict legal sense, it is used to denote the judgment of the court" (per Tindal C.J., *Burgess v. Boetseur*, cited *Acquittal*), and, accordingly, it was there held that a person who pleaded guilty to keeping a brothel, on an indictment instituted under s. 5, 25 G. 2, c. 36, and who at a subsequent Sessions came up for judgment, was not "convicted" when he pleaded, but when judgment was pronounced.

That is followed by citations of many decisions which may or may not be read as qualifying this dictum of Tindal C.J. I cannot therefore confidently assert and hold

that there is no appeal possible under such circumstances as involved herein.

1924
 GOLDHAMER
 v.
 THE KING.
 Duff J.

I, however, having come to the conclusion that even if there is jurisdiction there is no case submitted herein entitling us to exercise it, and would therefore dismiss the appeal.

DUFF J.—As my brother Idington points out, the word “conviction” cannot, perhaps, be said to be capable of only one necessarily exclusive meaning, and it may be capable of being employed with a signification including the sentence. Section 1013 does, however, I think, distinguish very clearly between the conviction and the sentence for the purposes of appeal, and the Act of 13-14 Geo. V, by which the present section was brought into force, made no change in section 1024. Accordingly, I think the word “conviction” in the last mentioned section should be read in its less technical sense, and consequently that there is no right of appeal to the Supreme Court of Canada from the judgment given by a court of appeal on an appeal under subsection (2) of section 1013.

The appeal should be dismissed.

MIGNAULT J.—The appellant was found guilty of an offence under “The Bankruptcy Act” by a judge of the Sessions of the Peace in Montreal, and was sentenced to pay a fine of \$400 or to be imprisoned during three months in default of payment. The fine was paid.

Under article 1013 of the Criminal Code as amended by 13-14 Geo. V, c. 41, s. 9 (1923), the Attorney General appealed against this sentence, and by judgment of the Court of King’s Bench, sitting in appeal, in addition to the fine, the appellant was condemned to be imprisoned in the common gaol for the period of six months. He now appeals to this court against this judgment.

Our jurisdiction is governed by article 1024 of the Criminal Code, which states, with a proviso which need not be mentioned here, that any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under article 1013, may appeal to the Supreme Court of Canada against the affirmance of such conviction.

As now amended, article 1013 gives a right of appeal against a conviction, and against a sentence pronounced

1924
GOLDHAMER
v.
THE KING.
Mignault J.

by the trial court against a person convicted on indictment. Article 1024 was not amended by the 1923 statute and under it the right of appeal is restricted to an appeal against the affirmance of the conviction. Reading it with article 1013, as amended, the appeal from the sentence under paragraph 2 of article 1013 cannot be brought before this court.

I would therefore quash the appeal.

MALOUIN J.—Je suis d'opinion qu'il n'y a pas d'appel à cette cour du jugement rendu par la cour du Banc du Roi, juridiction d'appel, pour les raisons données par le juge Mignault.

MACLEAN J.—I concur.

Appeal dismissed.
