HIS MAJESTY THE KING.....APPELLANT; 1922

*Jan. 17, 20.

AND

GEORGE JANOUSKY.....RESPONDENT.

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

Appeal—Leave to appeal—Criminal law—Conflict of decisions—Cr. C. sect. 1024a, as added by 10 & 11 Geo. V., c. 43, s. 16.

Section 1024*a* of the Criminal Code provides that "either the Attorney "General of the province or any person convicted of an in- "dictable offence may appeal to the Supreme Court of Canada "from the judgment of any court of appeal * * * , if the "judgment appealed from conflicts with the judgment of any "other court of appeal in a like case."

Held that the conffict must be one on a question of law.

MOTION for leave to appeal from a decision of the Court of King's Bench, appeal side, Province of Quebec, granting a new trial to the respondent, on the ground that he had been tried, against his will, jointly with another accused party.

The facts are fully stated in the judgment of Mr. Justice Idington on the application for leave by the appellant.

Lucien Cannon K.C. for the appellant.

Robert Laurier for the respondent.

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*PRESENT:—Mr. Justice Idington in Chambers.

1922

THE KING v. JANOUSKY.

Idington J.

IDINGTON J.—The Attorney General for Quebec applies under section 1024*a*, amending by s. 16 of ch. 43 of 10 & 11 Geo. V, the Criminal Code, for leave to appeal from the judgment of the Court of King's Bench, appeal side, whereby the above named George Janouski has been granted a new trial, and the ground taken is that said judgment conflicts with the judgment of the Court of Appeal for British Columbia in the case of *Rex* v. *Davis* (1) where a new trial was refused notwithstanding that the appellant had been tried, against his will, jointly with another accused party.

I am, after a perusal of the several notes of judgment herein and a comparison thereof with the several notes of judgment in the *Davis Case* (1) unable to recognize any such conflict between the judgment herein and that in the *Davis Case* (1) as to furnish a basis upon which I could properly rest such an order as applied for.

The result to the respective prisoner in each case is quite different, and so were the relevant facts and circumstances which the respective courts had to consider and pass upon quite different.

The court in the *Davis Case* (1) was able to say in the light of the said facts and circumstances to be considered that there was no miscarriage of justice; but in this case the court unanimously came to the conclusion that as the result of a joint trial there had been a miscarriage of justice.

In neither case were the reasons assigned such as to lead to the unanimous conclusion that a separate trial where several accused were jointly indicted could be claimed as of right.

(1) [1914] 19 B.C. Rep. 50; 22 Can. C.C. 431.

I think that the conflict had in view in the amendment, clearly must be one of law and not any one of the accidental results of litigation from a different set of facts and circumstances. The object thereby sought is to render the administration of the criminal law as uniform as possible.

I agree fully in the desirability of our doing what we can to bring about such result.

To give leave to appeal herein would not promote such an object but on the contrary, I fear, tend to confusion.

I doubt if the denial or granting of a separate trial to one jointly indicted which rests on the exercise of sound discretion can ever become the subject of leave to appeal under the amendment in question.

Having formed an opinion adverse to the application herein, I felt it advisable to consult such of my colleagues as available and may say that a sufficient number to constitute a majority of the court agree in the result reached, though in no way responsible for the foregoing reasons which I assign for refusing the order allowing appeal. I am by no means to be taken as having formed or desired to express any opinion upon the merits of the decisions either in this case or that relied upon.

Motion dismissed.