ABRAHAM STEINBERG .....APPELLANT; 1931

AND *May 20. *May 26.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Criminal law—Appeal to Supreme Court of Canada—Jurisdiction—Cr. Code, s. 1023—"Question of law"—Trial judge's charge to jury.

The general appellate jurisdiction of the Supreme Court of Canada is confined to civil matters; to found an appeal to the Court in any criminal matter, resort must be had to some special statutory provision enacted by the Dominion Parliament. Save for the special case provided for by s. 1025, *Cr. C.*, the only right of appeal to the Court in any criminal cause is that conferred by s. 1023, *Cr. C.* For an appeal to come within s. 1023, the conviction must have been affirmed by the court below and there must have been dissent by some member thereof on a question of law.

The present appeal was from the judgment of the Appellate Division, Ont., 40 Ont. W.N., 71,† affirming appellant's conviction for murder, two judges dissenting on what the order of the court declared (apparently in accordance with former subs. 5 of s. 1013, *Cr. C.*, but which subsection had been repealed by s. 28 of c. 11, 1930) to be questions of law. In the opinion of some of the members of this Court, this Court lacked jurisdiction to hear the appeal because, in their view, the grounds of dissent below were not on any question of law, but only on matters which it was competent for the jury to pass upon and which depended entirely upon an appreciation of the weight of evidence in regard to the points discussed. But the ground taken (unanimously) for dismissal of the appeal was that it failed on the merits, as the reasons for dissent below did not, on examination of the matters dealt with therein and of the trial judge's charge as a whole, shew justification for setting aside the conviction.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing the appellant's appeal against his conviction, on trial before Jeffery J. and a jury, for the murder of one Samuel Goldberg at Toronto. In the Appellate Division, Mulock, C.J.O., and Grant, J.A., dissented from the judgment of the majority of the court, and held that the summing up by the trial judge in his charge to the jury was not fair to the accused

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

†Not yet published in the Ontario Reports.

(1) (1931) 40 Ont. W.N. 71. Not yet published in the Ontario Reports.

1931

STEINBERG v. THE KING.

and might have caused a miscarriage of justice, and that, therefore, the conviction should be quashed and a new trial directed.

By the judgment now reported the appeal to this Court was dismissed.

I. F. Hellmuth K.C. for the appellant.

E. Bayly K.C. and *W. B. Common* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—This Court was created by the Dominion Parliament in 1875 as a "General Court of Appeal for Canada" by virtue of the power conferred by section 101 of the *British North America Act.* Purely statutory in its origin,—although the Court is, by the Supreme Court Act, declared to be a court of law and equity, and, by section 35 of that Act, is constituted an appellate court with "civil and criminal jurisdiction within and throughout Canada"—by section 36, criminal causes are expressly excluded from its appellate jurisdiction. It follows that the general appellate jurisdiction of this Court is confined to civil matters and that, as provided for by section 44 of the Act, resort must be had to some special statutory provision enacted by the Dominion Parliament to found an appeal to the Court in any criminal matter. Such a provision is made by section 1023 of the *Criminal Code,* which reads as follows:

> 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 on any question of law on which there has been dissent in the Court of Appeal. * * *

Save the special case provided for by section 1025 of the Code, I know of no other right of appeal in any criminal cause to this Court than that conferred by section 1023.

Two conditions must exist in order that an appeal may come within section 1023, viz., the conviction must have been affirmed by the court below, and there must have been dissent by some member of that court on a question of law. In the present case, the conviction was affirmed by a majority of the Appellate Division of the Supreme

Court of Ontario (1), two of its members dissenting on what the order of the court declared to be questions of law. Such a declaration was formerly necessary under section 1013 (5) (*Davis* v. *The King* (2)), and, notwithstanding the repeal of that provision in 1930 (Statutes of Canada, 1930, 20-21 Geo. V, c. 11, s. 28), is found in the order presently before the Court. Presumably, the repeal of subsection 5 escaped the notice of the Registrar and of the solicitors for the Crown and for the defendant who are responsible for the wording of the order; otherwise, it is difficult to account for the presence of the declaratory provision referred to. At all events, it is not binding upon us.

At the threshold of the present appeal, we are confronted with the question of the jurisdiction of this Court to entertain it, which depends upon whether or not the dissent rests upon " any question of law " within the meaning of section 1023 of the *Criminal Code.* Although notice of application for leave to appeal was given, the record before the Court contains nothing, save a passing reference to it by Hodgins J.A., to shew that such application was actually made, or as to its disposition. The appeal to the Appellate Division should probably, therefore, be regarded as having been confined to the subject matter of clause (*a*) of section 1013, which enables an appeal to be taken *de plano* " on any ground of appeal which involves a question of law alone." *Prima facie,* the words " any question of law " found in section 1023 of the Code should be read as referring to " any ground of appeal which involves a question of law alone," as set out in clause (*a*) of section 1013, and should receive the same construction as that obviously applicable to that clause, i.e., the grounds of appeal to this Court must be confined to " questions of law alone," the appeal to this Court under section 1023 being likewise *de plano.*

However that may be, some of my learned brothers are of the opinion that this Court lacks jurisdiction to hear the appeal because they are unable to find any question of law whatever in the grounds of dissent stated by the Chief Justice of Ontario, in which Mr. Justice Grant agreed, their

(1) (1931) 40 Ont. W.N. 71. Not yet published in the Ontario Reports.

(2) [1924] Can. S.C.R. 522.

1931

STEINBERG v. THE KING.

Anglin C.J.C.

view being that all matters dealt with by the learned Chief Justice are really matters which it was competent for the jury to pass upon, and depend entirely upon an appreciation of the weight of evidence in regard to the several points discussed. Personally, I am inclined strongly to this view.

But it seems unnecessary to dispose of the case on this ground, having regard to our view upon the merits in respect to which we are unanimous.

Assuming that there may be one or more points of law involved in the grounds of dissent, a careful examination of those grounds and the evidence referred to in them, and of the entire record, including the charge of the learned trial judge as a whole, has satisfied us that, while that charge may not have been ideally perfect, in that the learned judge (as was not at all improper) shewed, especially by his adverse comments on the evidence offered in support of the defence of alibi, that he had been more favourably impressed by the Crown's case than by that of the defence, the meticulous criticism made by the Chief Justice of Ontario of that charge cannot be justified. The defence of alibi was the main, if not the sole, defence raised at the trial and the evidence in support of it was fully presented to the jury, accompanied, it is true, by some comments, which may or may not have discredited that evidence. Such comments, if they had such a tendency, were quite within the competence of the trial judge and did not amount to a withdrawal of the issue as to alibi, or of any evidence in support of it from the consideration of the jury. On the contrary, they were told more than once by the learned trial judge that that issue, and the evidence offered in support of it, were matters exclusively for their consideration.

It is true that the learned Chief Justice concludes his judgment by stating that the charge, as a whole, was unfair to the accused, but he qualified that statement by adding, "For the reasons above mentioned." Examining these reasons one by one, we fail to find therein anything amounting to a withdrawal of any evidence from the jury, or any direction to the jury contrary to law. On the contrary, while criticising the evidence offered by the defence, at times, perhaps, somewhat severely, the learned trial

judge was always careful to add to his observations of that character a clear statement that the several matters so discussed were wholly for the jury to consider, both as to the credibility of the evidence offered thereupon, and the inferences to be drawn from it.

As Mr. Justice Middleton said,

> Here the charge of the learned Trial Judge is saturated from beginning to end with repeated statements that the weight and effect of evidence is for the jury and for the jury alone, and that the onus is always upon the Crown and that the prisoner is always entitled to the benefit of any doubt that has been raised in their minds.

Indeed, in connection with his comments upon the defence of alibi in particular, after devoting remarks, which cover several pages of the record, to a discussion of the evidence offered in support thereof, the learned trial judge proceeded to add that, if proved to their satisfaction, that defence would be a complete answer to the Crown's case, but he was careful to say in the very next sentence that, if any reasonable doubt remained in the minds of the jury on further consideration, the defendant was entitled to the benefit of such doubt.

Upon the whole case, therefore, we are of the opinion that the appeal fails.

Appeal dismissed.

Solicitor for the appellant: *T. Herbert Lennox.*

Solicitor for the respondent: *E. Bayly.*

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