HER MAJESTY THE QUEEN .....APPELLANT; 1962

AND *Mar. 7 Apr. 24

CORA CUMMING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Stealing from the mail—Decoy letter—Post Office investigators inserting money in decoy letter—Employee stealing same—Verdict of ordinary theft substituted by Court of Appeal—Whether letters "sent by post"—Whether intention of sender a determining factor—Activities conducted under direction of Postmaster General—Criminal Code, 1953-54 (Can.), c. 51, s. 298(1)(a).

Appeals—Leave to appeal to Supreme Court of Canada—Question of law—No dissent—Criminal Code, 1953-54 (Can.), c. 51, s. 597, as amended by 1960-61, c. 43, s. 27.

In order to secure evidence against the accused, a post office mail sorter suspected of stealing from mail passing through her hands, the post office investigators prepared three decoy letters in which they placed some money and which, after being addressed, stamped and the stamps cancelled, were put in a tray with other letters for the accused to sort. Subsequently the three letters were discovered to have been opened and the accused was found in possession of the money. She was convicted of stealing "anything sent by post, after it is deposited at a post office and before it is delivered" contrary to s. 298(1)(*a*)(i) of the *Criminal Code*. The Court of Appeal substituted a conviction of simple theft and varied the sentence. The Crown appealed to this Court to have the conviction at trial restored, and at the hearing the accused was allowed to apply for leave to appeal against the substituted conviction.

Held (Taschereau and Cartwright JJ. dissenting): The appeal should be allowed and the conviction for the offence as charged restored.

Per Fauteux, Judson and Ritchie JJ.: The letters were sent through and by means of activities conducted under the direction of the Postmaster General, and as such were sent by post within the meaning of s. 298(1)(*a*). The intention of the sender could not be a determining factor in deciding whether or not these letters were "sent by post" within the meaning of the section, and as the expression "post letter" has been dropped from the Criminal Code, the question of whether or not a "post letter" is necessarily a letter "sent by post" could not affect the interpretation to be placed on the section. It is true that the intention was to have them taken out of the mail, but if they had been missed, and had gone as addressed, they undoubtedly would have been sent "by post" in the colloquial sense of these words as well as in the special meaning assigned to them by the *Post Office Act*. Whether the intention to have them removed from the post had been carried out or not could not alter the fact that when they were opened and their contents stolen, they were passing through the hands of a person who was then engaged in the activities of the Canada Post Office and they were so passing because the investigator had sent them by that route.

*PRESENT: Taschereau, Cartwright, Fauteux, Judson and Ritchie JJ.

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Per Taschereau and Cartwright JJ., dissenting: It is only after it has been established that something has been "sent" that the question can arise whether it was "sent by post". In the case at bar nothing has been "sent". Three requisites are required to render the use of that word appropriate: (i) a sender, (ii) an object to be sent, and (iii) a destination to which the object is to be sent. In this case although there was an object to be sent, it would be a distortion of the meaning of a plain English word to say that the letters were sent by anyone or were sent anywhere.

Per Curiam: As to the appeal against the substituted charge, it did not lie without leave since it did not raise any question of law on which a judge of the Court of Appeal had dissented, and leave to appeal ought not to be granted.

APPEAL by the Crown from a judgment of the Court of Appeal for Ontario[1], substituting a conviction on a charge of theft for a conviction on a charge of stealing from the mail. Appeal allowed, Taschereau and Cartwright JJ. dissenting.

F. L. Wilson, for the appellant.

J. A. Hoolihan, for the respondent.

The judgment of Taschereau and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises are set out in the reasons of my brother Ritchie.

I have reached the conclusion that the appeal fails. I am in full agreement with the reasons of the majority in the Court of Appeal[1], delivered by Roach J.A. and concurred in by the learned Chief Justice of Ontario, but, in view of the differences of opinion in the Court of Appeal and in this Court, I propose to add a few words.

The wording of the information on which the respondent was convicted is as follows:

> that Cora Cumming on the 25th day of January in the year 1961 at the Municipality of Metropolitan Toronto, in the County of York, unlawfully did steal the contents of three letters, to wit: three one dollar bills, the property of the Post Master General of Canada, the letters having been sent by post, and after they had been deposited at a post office and before they were delivered.

There is no doubt that the respondent stole the three one dollar bills. The question is whether the letters from which she took them had been sent by post. If they were sent by

[1] (1961), 130 C.C.C. 107, 35 C.R. 163.

post there is no doubt that the theft occurred before they were delivered; they were never delivered and there was no intention that they should be.

In the case at bar the question is of importance because if the contents of the letters were sent by post the respondent, upon conviction, was, under s. 298(1) of the *Criminal Code,* liable to imprisonment for a maximum term of ten years and to a compulsory minimum term of six months, whereas if they were not sent by post she was, under s. 280(*b*), liable to a maximum term of two years and no minimum term was prescribed.

The only rule of construction to which reference need be made is that stated by Baron Parke in *Perry v. Skinner*[1]:

> The rule by which we are to be guided in construing Acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done.

The word of crucial importance in the information and in s. 298(1)(*a*)(i) is "sent". The transitive verb "send" of which it is the past participle is a word the plain and ordinary meaning of which is so well known that there is no need to refer to dictionaries, but it may be observed that the meaning given in the Concise Oxford Dictionary is "secure conveyance of to some destination (destination given by *to* or other preposition or by indirect object, or merely implied)". To render the use of the word appropriate there are three requisites, (i) a sender, (ii) an object to be sent, and (iii) a destination to which the object is to be sent. In the case at bar we have the second of these, the contents of the three letters, but the first and the third are lacking. In my respectful opinion, it is a distortion of the meaning of a plain English word to say that the letters were sent by anyone or were sent anywhere. Suppose the facts of the case were recited and the question were put: "By whom and to what destination were the three letters sent?" Can it be doubted that the same answer would be made by the man in the street as by the meticulous philologist: "No one sent them anywhere; they were placed in the tray to test the honesty of the sorter." It is only after it has been

[1] (1837), 2 M. & W. 471 at 476, 150 E.R. 843.

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established that something has been sent that the question can arise whether it was sent by post; and, in the case at bar, nothing has been sent.

Cartwright J.

I would dismiss the appeal.

Counsel for the respondent in addition to arguing that the appeal should be dismissed sought to appeal from the judgment of the Court of Appeal in so far as it ordered that a conviction on a charge of theft be substituted for the conviction of an offence under s. 298(1)(*a*)(i) of the *Criminal Code*. On this branch of the matter I agree with my brother Ritchie that the proposed appeal does not lie without leave and that leave to appeal ought not to be granted.

The judgment of Fauteux, Judson and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[1] from which Mr. Justice MacKay dissented, which allowed the appeal of the respondent from a conviction for stealing the contents of three letters,

> . . . the property of the Post Master General of Canada, the letters having been sent by post, and after they had been deposited at a post office and before they were delivered . . . .

The judgment now appealed from substituted a conviction on "a charge of theft" and varied the sentence imposed by the magistrate from a period of six months to one of three months' imprisonment.

The evidence, which is uncontradicted, discloses that the respondent was on duty in her capacity as a sorter of mail in the city delivery branch of the Toronto Post Office on the evening of January 25, 1961, when three envelopes bearing cancelled stamps, addressed to the Canadian National Telegraphs and each containing some coins and a $1 bill were introduced, on instructions from Post Office investigators, amongst other letters placed before her for sorting. These envelopes which had been prepared by the investigators, who had inserted the $1 bills after making a note of their serial numbers, were taken to the supervisor of the sortation unit in which the respondent worked by investigator Allen who gave certain instructions as a result of which the supervisor placed the envelopes in a tray of ordinary

[1] (1961), 130 C.C.C. 107, 35 C.R. 163.

mail to be sorted and then saw to it that this tray was placed in front of the respondent who was kept under supervision while she sorted it, after which it was taken directly to the supervisor's office where the same investigator, Allen, extracted the three envelopes and found that they had been opened and the $1 bills removed. The bills were later found in the respondent's possession and there is no doubt that they were removed from the envelopes by her.

It is apparent from the evidence that these envelopes were prepared and mingled with the mail for the sole purpose of testing the honesty of the respondent, and that the investigators did not intend that they would ever leave the Post Office building. The only question to be determined is whether, under these circumstances, it can be said that the envelopes were letters "sent by post" within the meaning of s. 298(1) of the *Criminal Code,* the relevant portions of which read:

> 298. (1) Every one who
>
> (*a*) steals
>
> (i) anything sent by post, after it is deposited at a post office and before it is delivered,
>
> * * *
>
> is guilty of an indictable offence and is liable to imprisonment for ten years and, where the offence is committed under paragraph (*a*), to imprisonment for not less than six months.

The point at issue is stated in the factum of the appellant in the following terms:

> Whether a letter is sent by post within the meaning of section 298(1)(*a*)(i) when the sender does not intend the letter to be delivered to the addressee and the letter is handed by the sender to the supervisor of sorters to be placed in the course of post.

The history of legislation having to do with theft of letters or their contents from the mails in Canada discloses that from the enactment of the *Criminal Code* in 1892 (s. 327) until the coming into force of the present *Criminal Code* in 1955 the offence was described as stealing "a post letter" or "from or out of a post letter", and the definition of "post letter" in the *Post Office Act* was originally limited to letters "to be transmitted or delivered through the post". Similarly, under the English *Post Office Act* (1837), 1 Vict., c. 36, a "post letter" was confined to any letter or packet

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"transmitted by the post under the authority of the Postmaster General", and in the cases of *Regina v. Rathbone*[1] and *Regina v. Shepherd*[2], decoy letters employed in much the same manner as they were in the present case were held not to be "post letters" within the meaning of this definition because they were not introduced into the mail in the ordinary way for transmission by post.

The definition of "post letter" in the Canadian *Post Office Act* was broadened by c. 19 of the Statutes of Canada (1901) whereby it was enacted that the expression meant, *inter alia*, "any letter . . . deposited in any post office . . . whether it is intended for transmission by post or delivery through the post or not." It was under this statute that the Ontario Court of Appeal decided in the case of *Rex v. Ryan*[3] that a decoy letter intended for the testing of a postman's honesty was a "post letter".

However, when all reference to "post letter" was omitted from the present *Code*, the offence became stealing "anything sent by post after it is deposited in a post office and before it is delivered", and it is contended on behalf of the respondent that the expression "sent by post" as used in this context cannot apply to the envelopes in question on the ground that, like the letters in *Regina v. Rathbone, supra,* and *Regina v. Shepherd, supra,* they were not introduced into the Post Office in the ordinary way for the purpose of transmission by post.

This latter reasoning appears to me to leave out of account the definitions of "send by post" and "Canada Post Office" which were introduced in to the *Post Office Act* by c. 57 of the Statutes of Canada (1951) and which control the meaning of the words "sent by post" as used in s. 298(1) of the *Criminal Code* (see s. 3(5) of the *Criminal Code*). Subsection 2(1)(*o*) and 2(1)(*a*) of the *Post Office Act* now read as follows:

> 2. (1) (*o*) "send by post" or "transmit by post" means to send by, through or by means of the Canada Post Office;
>
> 2. (1) (*a*) "Canada Post Office" means the activities conducted under the direction and control of the Postmaster General;

[1] (1841), 2 Mood. C.C. 242, 169 E.R. 96.
[2] (1856), Dears. C.C. 606, 169 E.R. 865.
[3] (1905), 9 C.C.C. 347.

It is to be noted that under the *Post Office Act* the Postmaster General is required to operate, and empowered to regulate the operation of, a "post office" which term includes, *inter alia,* any room or building for "sortation, handling or despatch of mail" (see ss. 5(1)(*a*), 6(*h*) and 2(1)(i) of the *Post Office Act*).

The basis of the judgment of the Court of Appeal in respect of the question here at issue appears to me to be epitomized in the following paragraph of the decision rendered by Roach J.A. on behalf of the majority of that Court:

> I can say at once also that, in my respectful opinion, while every letter that is "sent by post" is a "post letter", the converse is not true, that is to say, every post letter is not necessarily a letter "sent by post". In my respectful opinion, a letter is "sent by post" when the sender deposits it in a "post office" as defined in sec. 2(1)(i) of the Post Office Act, with the intention that it shall be conveyed or transported by means of the Canada Post Office to the person to whom it is being sent. It is not "sent by post" when, as here, it is placed somewhere in the post office by a post office official under such circumstances that he has it in his power and intends to intercept it so that it shall not be delivered to the person to whom it is addressed. In those circumstances it seems clear to me that the letter is not being sent to anyone; it is being retained under the control of the person who deposited it. In the instant case, the investigators did not send these three letters to the Canadian National Telegraph Company. They were decoy letters which they pretended had been "sent by post". If they had been "sent by post" within the meaning of the Act the inspectors would have had no right to interfere with or prevent their transmission; Section 41 Post Office Act. The fact that they did retrieve them shows that they did not regard them as being in the course of post, that is "sent by post".

With the greatest respect, I am unable to adopt the view that the intention of the sender can be a determining factor in deciding whether or not these envelopes were "sent by post" within the meaning of s. 298(1)(*a*), and as the expression "post letter" had been dropped from the *Criminal Code* I do not think that the question of whether or not a "post letter" is necessarily a letter "sent by post" can affect the interpretation to be placed on that section.

Speaking of the envelopes in question, one of the Post Office investigators, in the course of his evidence, after having agreed that the intention was to have them taken out of the mail in any event, went on to say, "but if they had missed them, they would go as addressed." If these envelopes had been "missed" and had gone "as addressed", it appears to me that they would undoubtedly have been

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sent "by post" in the colloquial sense of these words as well as in the special meaning assigned to them by the *Post Office Act* irrespective of the fact that the sender had never intended the addressee to receive them. I am unable to see how the fact that they were not "missed" can change their character in this regard.

These envelopes were sent by a Post Office investigator through a sortation unit of the Toronto Post Office for the purpose of testing the honesty of one of the sorters, and whether his intention to have them removed from the post before they reached the addressee had been carried out or not could not alter the fact that when they were opened and their contents stolen they were passing through the hands of a person who was then engaged in the activities of the Canada Post Office and that they were so passing because the investigator had sent them by that route. In my opinion, therefore, the envelopes were sent through and by means of activities conducted under the direction of the Postmaster General, and as such they were sent by post within the meaning of s. 298(1)(*a*).

The respondent also entered an appeal which raised questions based on the contention that there was no evidence that the envelopes in question were "the property of the Postmaster General of Canada" from whom the Information alleges that they were stolen. In my opinion, however, the appeal so entered must be quashed as it does not raise any question of law on which a judge of the Court of Appeal has dissented (see s. 597 of the *Criminal Code*). At the hearing of this appeal counsel on behalf of the respondent was allowed to apply for leave so to appeal, but there does not appear to me to be any ground for granting that application.

For the above reasons, I would allow this appeal and restore the conviction for the offence as charged in the Information.

Appeal allowed, TASCHEREAU *and* CARTWRIGHT JJ. *dissenting.*

Solicitor for the appellant: E. R. Pepper, Toronto.

Solicitors for the respondent: Fellowes, Hoolihan & Elaschuk, Toronto.