
REGINALD LAKE APPELLANT;

1968

*June 20, 21
Oct. 1

AND

HER MAJESTY THE QUEEN RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Obtaining money by false pretences and with intent to defraud—Evidence of obtaining lesser sum than that mentioned in charge—Conviction of obtaining amount mentioned in charge—Whether conviction for obtaining smaller amount should be confirmed—Whether conviction should be amended—Criminal Code, 1953-54 (Can.), c. 51, ss. 304(1)(a), 592(3), 600(1).

The appellant was convicted on a charge of obtaining a sum of \$285 by false pretences and with intent to defraud, contrary to s. 304(1)(a) of the *Criminal Code*. There was evidence on which the magistrate could find that the appellant had obtained by false pretences a sum of \$56. The conviction was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this Court.

Held: The appeal should be dismissed and a conviction entered for the lesser amount.

It was not possible to affirm the conviction as to the obtaining by false pretences of the entire sum of \$285, but the conviction for obtaining the smaller amount should be affirmed. *R. v. Scott*, 34 C.C.C. 180 and *R. v. Castle*, 68 C.C.C. 78. It was proper to amend the conviction as it appears that upon the evidence the appellant should only have been convicted of obtaining the amount of \$56. This Court has the jurisdiction to make the appropriate amendment by virtue of s. 600(1) of the Code.

*PRESENT: Cartwright C.J. and Fauteux, Martland, Ritchie and Spence JJ.

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Droit criminel—Obtenir de l'argent par faux-semblants et avec intention de frauder—Preuve de l'obtention d'une somme moindre que celle mentionnée à l'acte d'accusation—Déclaration de culpabilité d'avoir obtenu le montant mentionné à l'acte d'accusation—Confirmation de la déclaration d'avoir obtenu le montant moindre—Amendement de la déclaration de culpabilité—Code criminel, 1953-54 (Can.), c. 51, art. 304(1)(a), 592(3), 600(1).

L'appelant a été déclaré coupable d'avoir obtenu une somme de \$285 par faux-semblants et avec l'intention de frauder, contrairement à l'art. 304(1)(a) du *Code criminel*. Il y avait une preuve sur laquelle le magistrat pouvait se baser pour conclure que l'appelant avait obtenu une somme de \$56 par faux-semblants. La déclaration de culpabilité a été confirmée par la Cour d'appel. L'appelant a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être rejeté et une déclaration de culpabilité doit être enregistrée pour le montant moindre.

Il n'est pas possible de confirmer la déclaration de culpabilité quant à l'obtention par faux-semblants du plein montant de \$285, mais la déclaration de culpabilité d'avoir obtenu le montant moindre doit être confirmée. *R. v. Scott*, 34 C.C.C. 180 et *R. v. Castle*, 68 C.C.C. 78. Il s'agit ici d'un cas où la déclaration de culpabilité doit être amendée puisqu'il appert de la preuve que l'appelant n'aurait dû être déclaré coupable que d'avoir obtenu la somme de \$56. Cette Cour a juridiction, en vertu de l'art. 600(1) du Code, pour faire l'amendement qu'il convient.

APPEL d'un jugement de la Cour d'appel de l'Ontario, confirmant une déclaration de culpabilité. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the appellant's conviction. Appeal dismissed.

Reginald Lake, in person.

E. G. Achborn, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal by leave of this Court from the judgment of the Court of Appeal for Ontario pronounced November 23, 1967. By that judgment the Court of Appeal dismissed the appeal from the conviction registered by the Magistrate at Ottawa on October 14, 1966, upon the charge that:

Reginald Lake between the 6th day of June A.D. 1966 and the twenty-eighth day of July A.D. 1966, at the City of Ottawa, in said

County of Carleton, did unlawfully obtain a sum of or about \$285.00 from Wilfred Bauer, by false pretences and with intent to defraud, contrary to section 304(1)(a) of the Criminal Code.

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The leave to appeal granted by this Court was upon the following questions of law:

1. Was there any evidence on which it was open to the learned Magistrate to hold that there was a false pretence made by the appellant which induced Wilfred Bauer to pay money to him?
2. Was there any evidence on which it was open to the learned Magistrate to hold that the appellant had the intent to defraud Wilfred Bauer?
3. Was there any evidence on which it was open to the learned Magistrate to hold that Wilfred Bauer was defrauded of anything?

It is not necessary for these purposes to recite the evidence in any detail, and it is sufficient to say that there was evidence on which the Magistrate could find reasonably that the appellant did obtain from the said Wilfred Bauer by false pretences the sum of about \$56, the said false pretences being that the appellant falsely represented himself to be a bailiff of the Division Court at Ottawa acting on a process of that Court and in particular that he falsely represented that he was empowered to and did take a bond from the said Wilfred Bauer and demanded and obtained certain amounts of money for the "registration" of the said bond as fees therefor.

It is true that the Magistrate said in giving judgment after a recess:

Continuing my remarks regarding judgment in this case, and considering the evidence I would have to find that the whole of the monies obtained by Mr. Lake in this case—some \$285.00—that all of that money was obtained by false pretences, and I say this because of the use of the word "bailiff" by the accused when he wasn't a bailiff and knew it.

Although this Court is not ready to affirm the conviction as to the obtaining by false pretences of the whole \$285, it is apparent that the Magistrate had earlier in his reasons addressed his mind to the obtaining by false pretences of the smaller sum only when he said:

I find him guilty of obtaining funds by false pretences, and in particular, monies pertaining to the bond, six dollars whatever it was on this occasion, and the monies listed on those receipts for costs.

and that therefore the conviction for obtaining the smaller amount by false pretences should be confirmed. That such a course is a proper one is, I think, demonstrated by the

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judgments in *R. v. Scott*¹, Ontario Court of Appeal, as confirmed in this Court² in the same volume at p. 187, where at p. 186 Magee J. said:

The amount charged as being stolen \$7,835, no doubt corresponds with the total of the three credits; but if, instead of five cheques amounting to \$755, the accused had cashed one, two, or three cheques for \$7,000 in all, three days after the fraudulent entries, could it be said that, although his act amounted to theft, proof could not be given of it? What the Crown set out to prove, as I venture to think, is that Scott's employers had been defrauded out of \$7,835, or some greater or less sum, by some act which amounted to theft. The evidence might fail to shew theft at all. It would be sufficient if part were stolen. The Criminal Code, sec. 857, allows proof of three distinct charges of theft. (The underlining is my own.)

and the decision of the Ontario Court of Appeal in *R. v. Castle*³, where at p. 80, Rowell C.J.O. said:

In reference to the first ground of appeal, it is quite clear that a person accused of theft can be convicted upon an indictment charging theft upon proof of theft of a smaller sum than that charged in the indictment: *Rex v. Scott* (1920), 57 D.L.R. 309, 34 Can. C.C. 180, 48 O.L.R. 452, affirmed in the Supreme Court, 58 D.L.R. 242, 34 Can. C.C. 187.

The question arises whether this Court in dismissing the appeal and confirming the conviction should amend the latter. I am of the opinion that it is proper to do so. It would appear that upon the evidence the appellant should only have been convicted of obtaining by false pretences the amount of \$56. The charge as laid contained a reference to a figure of about \$285. This Court has the jurisdiction to make the appropriate amendment by virtue of s. 600(1) of the *Criminal Code* which provides:

600. (1) The Supreme Court of Canada may, on an appeal under this part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

The Court of Appeal for Ontario has power to amend the conviction to set out the smaller amount by virtue of s. 592(3) of the *Criminal Code* which provides:

592. (3) Where a court of appeal dismisses an appeal under subparagraph (i) of paragraph (b) of subsection (1), it may substitute the

¹ (1920), 34 C.C.C. 180, 48 O.L.R. 452, 57 D.L.R. 309.

² (1920), 34 C.C.C. 187, 58 D.L.R. 242.

³ (1937), 68 C.C.C. 78, [1937] O.W.N. 245.

verdict that in its opinion should have been found and affirm the sentence passed by the trial court or impose a sentence that is warranted by law.

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The paragraph referred to therein, i.e., 592(1)(b)(i), provides:

592. (1) On the hearing of an appeal against a conviction, the court of appeal

...

(b) may dismiss the appeal where

- (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(The underlining is my own.)

1. In *R. v. Norcross*⁴, (B.C.C.A.), the Court amended a conviction of theft by reducing the amount mentioned in the charge.

I would therefore dismiss the appeal. Acting under the provisions of the *Criminal Code*, I would substitute a conviction that the appellant between the 6th day of June 1966 and the 28th day of July 1966, at the City of Ottawa, in the County of Carleton, did unlawfully obtain the sum of \$56 from Wilfred Bauer by false pretences and with intent to defraud, contrary to s. 304(1)(a) of the *Criminal Code*.

Appeal dismissed.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: The Attorney General for Ontario.

⁴ (1957), 24 W.W.R. 160 at 165, 27 C.R. 220, 120 C.C.C. 108.