SUNBEAM CORPORATION (CANADA) LIMITED ..... APPELLANT;

1968

*Apr. 25, 26
Nov. 1

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Appeal to Court of Appeal—Question of law alone—Minimum resale price specified by manufacturer—Whether acquittal of attempt resale price maintenance subject to appeal—Presumptions—Whether sufficiency of evidence question of fact or law—Combines Investigation Act, R.S.C. 1952, c. 314, ss. 34(2), 41(2)—Criminal Code, 1953-54 (Can.), c. 51, s. 584(1)(a).

The appellant corporation, a manufacturer of electrical appliances, was indicted on four counts of attempting to induce retail dealers to resell its products at prices not less than the minimum prices specified by it, contrary to s. 34(2)(*b*) of the *Combines Investigation Act*, R.S.C. 1952, c. 314. The evidence tendered consisted in large measure of documents such as letters addressed to all dealers in certain commodities, price lists distributed to dealers and inter-departmental correspondence. The appellant was convicted on two counts and an order of prohibition was granted. The trial judge acquitted on the other two counts on the ground that there was insufficient evidence of inducement. An appeal by the Crown from the acquittal was allowed by a majority judgment of the Court of Appeal which also varied the order of prohibition. The corporation appealed to this Court.

Held (Judson, Spence and Pigeon JJ. dissenting): The appeal should be allowed in part and the verdict of acquittal restored.

Per Cartwright C.J. and Fauteux, Martland and Ritchie JJ.: The finding by the trial judge that the case presented by the Crown did not

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

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

establish the appellant's guilt beyond a reasonable doubt does not involve "a question of law alone" so as to entitle the Attorney General to appeal to the Court of Appeal under the provisions of s. 584(1)(*a*) of the *Criminal Code*. Section 41(2)(*c*) of the *Combines Investigation Act* provides that documents, such as the letters in this case, which were in the possession of the accused "shall be admitted in evidence without further proof thereof and shall be *prima facie* evidence" that the accused had knowledge of the documents and their contents and that anything recorded in them as having been done, said or agreed upon by the accused or its agent, was done, said or agreed upon. The trial judge is in no way precluded by that section from considering the weight to be attached to that evidence in considering the issue of the accused's guilt or innocence. Accepting the view of the Court of Appeal that the evidence here was sufficient to support a conviction, the further question of whether the guilt of the accused should be inferred from that evidence, was one of fact within the province of the judge. It is well settled that the sufficiency of evidence is a question of fact and not a question of law. However wrong the Court of Appeal or this Court may think that the trial judge was in reaching the conclusion that the evidence was not sufficient to satisfy him beyond a reasonable doubt, this error cannot be determined without passing judgment on the reasonableness of the verdict or the sufficiency of the evidence, and these are not matters over which the Court of Appeal has jurisdiction under s. 584(1)(*a*) of the Code.

Per Judson, Spence and Pigeon JJ., *dissenting:* The evidence contained in the documents produced at the trial amounted to an admission of an attempt to induce dealers to sell at not less than a specified minimum price. There was no evidence which could give rise to a reasonable doubt that the accused had committed the offence so as to rebut the presumption created by s. 41 of the *Combines Investigation Act*. Reasonable doubt must be based upon evidence adduced at the trial. There was therefore no course but to convict the accused.

The Court of Appeal had jurisdiction to consider the appeal from the acquittal by the trial judge. It was an error in law for the trial judge to charge himself, as it would appear that he did, that the Crown in order to support the charges had to prove an inducing by agreement, threat or promise. The Crown had only to prove the intent to induce and an overt act toward the accomplishment of that intent. These were proven on prima facie evidence which by lack of contradiction became conclusive evidence. When there is, as in the present case, a statutory presumption to be applied, once the facts necessary to give rise to it are found by the trial judge to be established beyond reasonable doubt, the question whether the inference of guilt should be made is no longer anything but a question of law alone.

Droit criminel—Appel à la Cour d'appel—Question de droit seulement—Prix minimum de revente spécifié par fabricant—Acquittement de l'accusation de tentative de maintenir un prix de revente est-il susceptible d'appel—Présomptions—Suffisance de la preuve est-elle une question de fait ou de droit—Loi relative aux enquêtes sur les coalitions, S.R.C. 1952, c. 314, art 34(2), 41(2)—Code criminel, 1953-54 (Can.), c. 51, art. 584(1)(a).

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

La compagnie appelante, qui fabrique des appareils électriques, a été poursuivie par acte d'accusation sous quatre chefs d'avoir tenté d'engager des marchands au détail à revendre ses produits à un prix non inférieur à un prix minimum spécifié par elle, le tout contrairement à l'art. 34(2)(*b*) de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1952, c. 314. La preuve offerte consistait en grande partie en documents tels que des lettres adressées à tous les marchands de certains produits, en listes de prix distribuées aux marchands et en correspondance interdépartementale. L'appelante a été déclarée coupable sous deux chefs et un ordre de prohibition a été émis. Le juge au procès a rendu un verdict d'acquittement sur les deux autres chefs pour le motif que la preuve d'incitation était insuffisante. Un appel de la Couronne du jugement d'acquittement a été accueilli par un jugement majoritaire de la Cour d'appel qui a aussi modifié l'ordre de prohibition. La compagnie en a appelé à cette Cour.

Arrêt: L'appel doit être accueilli en partie et le verdict d'acquittement rétabli, les Juges Judson, Spence et Pigeon étant dissidents.

Le Juge en Chef Cartwright et les Juges Fauteux, Martland et Ritchie: La conclusion du juge au procès que la preuve de la Couronne n'établissait pas hors d'un doute raisonnable la culpabilité de l'appelante ne comporte pas une «question de droit seulement» permettant au procureur général d'en appeler à la Cour d'appel en vertu des dispositions de l'art. 584(1)(*a*) du *Code Criminel*. L'article 41(2)(*c*) de la *Loi relative aux enquêtes sur les coalitions* stipule que les documents qui, tels que les lettres dans cette cause, étaient en la possession du prévenu «font foi sans autre preuve et attestent prima facie» que le prévenu connaissait les documents et leur contenu et que toute chose inscrite dans ces documents comme ayant été accomplie, dite ou convenue par le prévenu ou son agent, l'a été ainsi que le document le mentionne. Cet article n'empêche pas le juge au procès de considérer le poids qu'il doit attaché à cette preuve lorsqu'il considère la question de la culpabilité du prévenu. Si on accepte le point de vue de la Cour d'appel que la preuve était suffisante pour permettre de conclure à la culpabilité, la question supplémentaire de savoir si on doit tirer de cette preuve une conclusion de culpabilité, est une question de fait de la compétence du juge. D'après une jurisprudence bien établie, la suffisance de la preuve est une question de fait et non pas une question de droit. Même si la Cour d'appel ou cette Cour sont d'avis que le juge au procès a erré en concluant que la preuve n'était pas suffisante pour le convaincre hors d'un doute raisonnable, cette erreur ne peut pas être constatée sans passer un jugement sur le caractère raisonnable du verdict ou la suffisance de la preuve, et ce ne sont pas là des questions sur lesquelles la Cour d'appel a juridiction en vertu de l'art. 584(1)(*a*) du Code.

Les Juges Judson, Spence et Pigeon, dissidents: La preuve qui se trouve dans les documents produits au procès équivaut à l'aveu d'une tentative d'engager les marchands à vendre à pas moins qu'à un prix minimum spécifié. Il n'y a aucune preuve pouvant faire naître un doute raisonnable que le prévenu a commis l'infraction de manière à ce que la présomption créée par l'art. 41 de la *Loi relative aux enquêtes sur les coalitions* puisse être réfutée. Le doute raisonnable doit être basé sur la preuve produite au procès. Dans le cas présent, il n'y avait pas d'autre alternative qu'une déclaration de culpabilité.

La Cour d'appel avait juridiction pour déterminer l'appel du verdict d'acquittement. Le juge au procès a erré en droit en se donnant les

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

directives, ainsi qu'il semble l'avoir fait, que la Couronne devait, en vue de supporter les chefs d'accusation, prouver une incitation par entente, menace ou promesse. La Couronne n'avait qu'à prouver l'intention d'engager les marchands et un acte manifeste en vue de l'accomplissement de cette intention. Ces choses ont été prouvées par une preuve prima facie qui, vu l'absence de contradiction, est devenue une preuve concluante. Lorsqu'il s'agit, comme dans le cas présent, de l'application d'une présomption statutaire, et que le juge a conclu que les faits nécessaires pour la faire naître sont établis hors d'un doute raisonnable, la question de savoir si on doit en tirer une conclusion de culpabilité est une question de droit seulement.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1] accueillant un appel de la Couronne à l'encontre d'un verdict d'acquittement. Appel accueilli en partie, les Juges Judson, Spence et Pigeon étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1] allowing an appeal by the Crown from an acquittal. Appeal allowed in part, Judson, Spence and Pigeon JJ. dissenting.

George D. Finlayson, Q.C. and *Burton Tait,* for the appellant.

B. J. MacKinnon, Q.C. and *R. B. Tuer,* for the respondent.

The judgment of Cartwright C.J. and of Fauteux, Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] (Laskin J.A. dissenting) whereby that Court allowed an appeal by the Crown from the acquittal of the appellant on the 3rd and 4th counts of an indictment charging attempted resale price maintenance contrary to s. 34(2)(*b*) of the *Combines Investigation Act,* which reads as follows:

34. (2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatsoever, require or induce or attempt to require or induce any other person to resell an article or commodity

(*b*) at a price not less than a minimum price specified by the dealer or established by agreement.

---

[1] [1967] 1 O.R. 661, 1 C.R.N.S. 183, [1967] 3 C.C.C. 149, 53 C.P.R. 102, 62 D.L.R. (2nd) 75.

The indictment contains four counts, each specifying offences contrary to s. 34(2)(*b*) and the evidence tendered consisted in large measure of documents such as letters addressed to "all dealers" in certain commodities, price lists distributed by the appellant to various dealers, and inter-departmental correspondence between some of the appellant company's salesmen and the company's head office.

The circumstances giving rise to these charges were that the appellant had devised and was seeking to implement a plan which it described as its "minimum profitable resale price plan" or "M.R.P." plan. This plan purported to be conceived in conformity with the provisions of s. 34(5) of the Act which are generally accepted as having been enacted in order to enable dealers to control the practice employed by some retailers of selling a product or products at a loss in order to induce customers to patronize their sales outlet for other products. Section 34(5) reads as follows:

(5) Where, in a prosecution under this section, it is proved that the person charged refused or counselled the refusal to sell or supply an article to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe

(*a*) that the other person was making a practice of using articles supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(*b*) that the other person was making a practice of using articles supplied by the person charged not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles;

(*c*) that the other person was making a practice of engaging in misleading advertising in respect of articles supplied by the person charged; or

(*d*) that the other person made a practice of not providing the level of servicing that purchasers of such articles might reasonably expect from such other person.

There was ample evidence to show that in putting its "M.R.P." plan into effect, in purported compliance with this section, the appellant had in fact violated s. 34(2)(*b*) of the Act in the cities of Toronto and St. Catharines in the Province of Ontario in the manner alleged in the 1st

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Ritchie J.

and 2nd counts of the indictment upon which it was convicted, but the 3rd and 4th counts related to attempts to induce retailers in the City of Vancouver to comply with the plan in the same fashion and, as I have indicated, the learned trial judge did not find that these charges had been proved beyond a reasonable doubt.

The evidence has been extensively reviewed in the judgment rendered by Mr. Justice Schroeder on behalf of the majority of the Court of Appeal and I do not find it necessary to deal with it in any detail because I am satisfied that the point to be determined on this appeal is a very narrow one and turns on the question of whether or not the grounds of appeal alleged before the Court of Appeal involved "a question of law alone" so as to give that court jurisdiction under the provisions of s. 584(1) of the *Criminal Code* which read as follows:

> 584. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> (*a*) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone, ...

In support of the allegations of attempted inducement contained in the 3rd and 4th counts, the Crown produced correspondence between two of the Company's salesmen in Vancouver, (Schell and Thompson) and the Company's head office which described their dealings with the Army and Navy Department Store Limited and ABC Television & Appliances Limited respectively in furtherance of the Company's "M.R.P." plan.

As to the allegation respecting the Army and Navy Department Store Limited, (count 3), the learned trial judge, after reviewing the Schell correspondence and pointing out that the Company's representative at head office had written to say that he had never called on this retailer during the whole time that he was in Vancouver, went on to say:

> This would indicate that Army & Navy was not a Sunbeam retailer and may not have received copies of Exhibits 4 and 5. While it would appear that the period of three weeks in which the calls were made by Schell on Army & Navy Stores was within the period set out in the count,

such fact is not clear. The evidence as to inducement on this count does not bear that quality of certainty that ought to exist in the case of a criminal charge and it will therefore be dismissed.

In considering the 4th count, the learned trial judge reviewed the evidence contained in the letter from Thompson to his head office concerning ABC Television & Appliances Limited and concluded:

> There is here neither *sufficient* evidence of inducement on the part of the accused nor that the alleged offence took place within the time charged. This charge must therefore be dismissed.

The italics are my own.

As the evidence on the 3rd and 4th charges was almost entirely documentary, the judgment of the majority of the Court of Appeal turns in some measure on the meaning to be attached to the provisions of s. 41(2) of the Act which read as follows:

> (2) In a prosecution under Part V,
>
> (*a*) anything done, said or agreed upon by an agent of a participant shall *prima facie* be deemed to have been done, said or agreed upon, as the case may be, with the authority of that participant;
>
> (*b*) a document written or received by an agent of a participant shall *prima facie* be deemed to have been written or received, as the case may be, with the authority of that participant; and
>
> (*c*) a document proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and shall be *prima facie* evidence
>
> (i) that the participant had knowledge of the document and its contents,
>
> (ii) that anything recorded in or by the document as having been done, said or agreed upon by any participant or by an agent of a participant was done, said or agreed upon as recorded and, where anything is recorded in or by the document as having been done, said or agreed upon by an agent of a participant, that it was done, said or agreed upon with the authority of that participant,
>
> (iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

In the course of his reasons for judgment, Mr. Justice Schroeder expressed the view that the Crown's proof as to the 3rd and 4th counts was "*sufficiently* clear and cogent to support a conviction on these charges" (the italics are

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Ritchie J.

my own) and that as no evidence was called on behalf of the defence, the trial judge was not justified as a matter of law in acquitting the accused. In reaching this conclusion, Mr. Justice Schroeder cited, amongst other cases, the decision of this Court in *Girvin v. The King*[2] where Sir Charles Fitzpatrick C.J.C., speaking for the Court at page 169, said:

> I have always understood the rule to be that the Crown in a criminal case is not required to do more than produce evidence which if unanswered and believed is sufficient to raise a *prima facie* case upon which the jury might be justified in finding a verdict.

I do not think that any authority is needed for the proposition that, when the Crown has proved a *prima facie* case and no evidence is given on behalf of the accused, the jury *may* convict, but I know of no authority to the effect that the trier of fact is *required* to convict under such circumstances. The *Girvin* case was an appeal from the verdict of a jury which had found that the Crown's evidence established the accused's guilt beyond a reasonable doubt, and it was held that there was sufficient evidence to support that verdict. In the present case the learned trial judge found that the case presented by the Crown did not establish the appellant's guilt beyond a reasonable doubt, and as I have indicated, the main question raised by this appeal is whether that finding involved a question of law alone so as to entitle the Attorney General to appeal to the Court of Appeal under the provisions of s. 585(1)(*a*) of the *Criminal Code,* or whether it was a finding of fact or one of mixed fact and law.

In dealing with the evidence contained in the letters from the appellant's salesmen in which reference was made to their conversations with the retailers named in counts 3 and 4 of the indictment, Mr. Justice Schroeder, applying the provisions of s. 41(2), found that the statements so made by the salesmen "constitute direct proof by way of admissions of the attempts charged against the respondent in both counts" and he went on to say:

> That evidence is not only *sufficient* to get the case past the judge to the jury, but there being no issue as to the *weight* or credit to be given to

[2] (1911), 45 S.C.R. 167.

it, it is *sufficient* to counterbalance the general presumption of innocence and require affirmative action by the court in convicting the accused where, as here, it is not countered or controlled by evidence tending to contradict it or render it improbable, or to prove facts inconsistent with it.

The italics are my own.

With the greatest respect I cannot agree with Mr. Justice Schroeder that the provisions of s. 41(2) in any way preclude a judge or jury from considering the *weight* to be attached to the evidence contained in the letters in question in determining the issue of whether the Crown has proved its case beyond a reasonable doubt.

Section 4(2)(*c*) simply provides that documents, such as these letters, which were in the possession of the accused "shall be admitted in evidence without further proof thereof and shall be *prima facie* evidence" that the accused had knowledge of the documents and their contents and that anything recorded in them as having been done, said or agreed upon by the accused or its agent, was done, said or agreed upon. This does not mean that the trial judge, having accepted the letters as *prima facie* evidence of their contents, is precluded from assessing the weight to be attached to that evidence in considering the issue of the accused's guilt or innocence.

Mr. Justice Schroeder, however, went on to say:

> Looking at the correspondence between these two salesmen and the Assistant General Sales Manager of the respondent in the light of all the evidence as to the formulation of its carefully conceived plan and the various steps taken to put it into execution across the country, there is no ground upon which their statements—in effect admissions—should be disbelieved. In simply basing his dismissal of the charge against the accused on counts 3 and 4 on the doctrine of reasonable doubt, the learned Judge failed to direct his mind to the fact that the Crown had raised a *prima facie* case against the accused which clearly afforded evidence of facts from which the accused might have cleared itself, but which it did not even attempt to answer or explain. In the absence of such explanation or contradiction the Crown's proof was confirmed and became *sufficiently* clear and cogent to support a conviction. The learned Judge's failure to direct himself upon this well-settled principle was nondirection amounting to misdirection, and his consequent non-observance of it constituted an error in law which afforded the Crown a right of appeal against the acquittal.

The italics are my own.

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Ritchie J.

It appears to me that Mr. Justice Schroeder's reasoning in the last quoted paragraph is predicated on his finding that the Crown's proof was "sufficiently clear and cogent to support a conviction". This may well be so and if a judge or jury had convicted the accused on the 3rd and 4th counts on the evidence tendered by the Crown, I doubt very much whether such a conviction could have been set aside, but we are not dealing with an appeal from a conviction; here the accused was acquitted by the trial judge and the appeal to the Court of Appeal for Ontario was an appeal from that acquittal. While the reasoning employed by Mr. Justice Schroeder would be sound in the case of an appeal from a conviction it is not, in my respectful opinion, applicable to such an appeal as this.

In considering whether or not this appeal "involves a question of law alone" I think that reference may usefully be had to what was said by Rinfret J., speaking on behalf of this Court in *Fraser v. The King*[3], where he was considering the submission made on behalf of the accused that circumstantial evidence adduced by the Crown was equally consistent with innocence as with guilt, and he had occasion to say of that argument, at p. 301:

> To a certain extent, this would assimilate verdicts based on circumstantial evidence 'as consistent with the innocence as with the guilt of the accused' to verdicts where it is claimed that there is no evidence at all to support them, the view being that the court of appeal is empowered to set aside those verdicts on the ground that they are unsatisfactory, whether on account of a total lack of evidence or for want of sufficient legal evidence to support them.
>
> Let it be granted, however, that such a question should be deemed a question of law, or of mixed law and fact, when once it is established that the evidence is of such a character that the inference of guilt of the accused might, and could, legally and properly be drawn therefrom, the further question whether guilt ought to be inferred in the premises is one of fact within the province of the jury...

I think that these observations have a direct bearing on the present case and that, accepting the view of Mr. Justice Schroeder that the evidence here was sufficient to support a conviction, the further question of whether the guilt of the accused should be inferred from that evidence, was one of fact within the province of the judge.

---

[3] [1936] S.C.R. 296, 66 C.C.C. 240, [1936] 3 D.L.R. 463.

The law applicable to the meaning to be placed on s. 584(1)(*a*) under the present circumstances is stated in the judgment of this Court delivered by Taschereau J. in *Rose v. The Queen*[4], where he said at p. 443:

> The trial judge sitting without a jury was fulfilling a dual capacity. He had, therefore, to discharge the duties attached to the function of a judge and also the duty of a jury. As a judge he had to direct himself as to whether any facts had been established by evidence from which criminal negligence may be reasonably inferred. As a jury he had to say whether from these facts submitted, *criminal negligence ought to be inferred. Metropolitan Railway Company v. Jackson,* 1877 3 A.C. 193 at 197, *The King v. Morabilo,* 1949 S.C.R. 172 at 174. I think that the trial judge directed himself properly and that when he decided on the facts submitted to him that criminal negligence *ought not to be inferred,* he was fulfilling the functions of a jury *on a question of fact.*

The italics are in the original judgment.

In the quotations which I have taken from the judgment of the trial judge and of Mr. Justice Schroeder, I have italicized the words "sufficient" and "sufficiently" wherever they occur, as it appears to me that the fundamental difference between the trial judge and the majority of the Court of Appeal was that the Court of Appeal was of opinion that the evidence on the 3rd and 4th counts was *sufficient to require* a verdict of guilty, whereas the trial judge did not consider it to be *sufficient* to support such a verdict. It is well-settled that the *sufficiency* of evidence is a question of fact and not a question of law and the law in this regard is well stated by Trenholme J., speaking on behalf of the Quebec Court of King's Bench in *Rex v. White*[5], where he said at p. 75:

> We hold White had gone through his trial legally and the question of sufficiency of the evidence to convict is a question of fact for the judgment of the magistrate. A question of no evidence is a question of law. But it is a question of sufficiency of evidence here; it is not a question of law. Sufficiency of evidence, is always a matter for the jury to decide, or the Judge in place of the jury, and the Judge is entitled to say there is no evidence to go to the jury, but as to whether the evidence brought before the jury supports the condemnation or acquittal is for the jury alone, and is a question of fact. Therefore, the question of the sufficiency of the evidence in the case is a question of fact and not a question of law, ...

---

[4] [1959] S.C.R. 441, 31 C.R. 27, 123 C.C.C. 175.

[5] (1914), 21 R.L.N.S. 23, 24 C.C.C. 74.

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Ritchie J.

The reasons for judgment of Mr. Justice St. Jacques in *Regina v. Boisjoly*[6] are to the same effect. He there said, at page 23:

> Alors, le jury a rendu son verdict et a déclaré le prévenu non coupable, et cela a été dit par chacun des jurés. Il y a donc eu un verdict et c'est, en effet, ce verdict que la Couronne demande à la Cour d'Appel de mettre de côté.
>
> Comment cette Cour peut-elle le faire, à moins de prendre connaissance de toute la preuve versée au dossier, afin de déclarer, contrairement à l'opinion du juge et au verdict du jury, qu'il y avait suffisamment de preuve pour rendre un autre verdict que celui qui a été prononcé? Est-ce là un appel en droit uniquement? Assurément non, puisque la Cour aurait à étudier les faits prouvés pour déduire une autre conclusion que celle à laquelle le jury en est arrivé.

These cases were both followed in the Quebec Court of Queen's Bench in 1961 in the case of *Regina v. Ferland*[7], and it will be found that the courts of the other Provinces have been uniform in their adoption of the views above expressed. See for example, *Rex v. Gross*[8], per Roach J.A., page 19; *R. v. J.*[9] (Alberta); *The King v. Toubret and Davis*[10] (N.S.); *Rex v. F. W. Woolworth Company*[11] (B.C.), in which latter case the respondent company was charged with discriminating against its employees contrary to s. 4(2)(*a*) of the *Industrial Conciliation Arbitration Act*, 1947 (B.C.), c. 44, and Chief Justice Sloan, speaking on behalf of the Court of Appeal for British Columbia, said, at page 176:

> I am unable to see how we can say that the learned judge below erred in finding that the Crown had failed to prove the offence charged, unless we ourselves weigh the evidence and reach our own and differing conclusions of fact thereon.
>
> This, however, as a Crown appeal, is limited to questions of law alone. It follows therefore that in my opinion we have no jurisdiction to entertain it.

In the case of *The Queen v. Warner*[12], the Court of Appeal of Alberta had allowed an appeal from a conviction of murder on the ground that the evidence at trial was not sufficient to support it and this Court decided that

---

6 (1956), 22 C.R. 19, 115 C.C.C. 264.
7 (1964), 41 C.R. 1, [1961] Que. Q.B. 819.
8 [1946] O.R. 1, 86 C.C.C. 68.
9 (1957), 21 W.W.R. 248, 26 C.R. 57, 118 C.C.C. 30.
10 (1951), 29 M.P.R. 260, 14 C.R. 54, 102 C.C.C. 226.
11 [1949] 1 W.W.R. 175.
12 [1961] S.C.R. 144, 34 C.R. 246, 128 C.C.C. 366.

that ground did not raise a question of law so as to give it jurisdiction to hear a further appeal. In the course of the reasons for judgment which he rendered on behalf of himself, Taschereau and Abbott J., Chief Justice Kerwin said, at page 147:

> In my opinion there is no jurisdiction in the Court to hear this appeal. The first two sentences of the reasons for judgment of the Chief Justice of Alberta, speaking on behalf of the Appellate Division, are as follows:
>
> > I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.
>
> I read the first sentence as meaning that the Chief Justice considered that the evidence was not sufficient to support a conviction,—which is a question of fact.

In the same case, the present Chief Justice, with whom Taschereau and Abbott J. agreed, said, at page 149:

> I do not find it necessary to consider the several errors of law alleged by the appellant to have been made by the Appellate Division as I think it is clear that the Appellate Division allowed the appeal on two main grounds:
>
> (1) that, in the opinion of the Appellate Division, the verdict of guilty of murder should be set aside on the ground that it could not be supported by the evidence, and
>
> (2) that there had been errors in law in the charge of the learned trial judge.
>
> So far as the judgment of the Appellate Division is based on the first ground mentioned, this Court is powerless to interfere with it. The question whether the Appellate Division was right in proceeding on this ground is not a question of law in the strict sense. It is a question of fact or, at the best from the point of view of the appellant, a mixed question of fact and law.

The effect of these observations, which represent the view of the majority of the Court, is that the question of whether or not the evidence was sufficient to support a conviction is a question of fact.

Mr. Justice Schroeder, however, while recognizing that there was nothing in the reasons for judgment of the learned trial judge to "disclose *ex facie* what may be denoted as a positive error of law . . ." went on to say:

> It is not essential that a misconception of law should appear on the face of the judgment or the reasons therefor if the determination upon the evidence was such that, in the opinion of a reviewing court, no person acting judicially and properly instructed as to the relevant principles of law could have reached. If that is readily apparent, as I believe it is here, then this Court is entitled to assume that some misconception of law is responsible for the decision.

1968

SUNBEAM CORPORATION (CANADA) LTD. v THE QUEEN

Ritchie J.

It appears to me that Mr. Justice Schroeder has cited an excerpt from the reasons delivered on behalf of this Court by Anglin C.J., in *Belyea and Weinraub v. The King*[13] as some authority in support of this proposition. That was a case in which the trial judge had acquitted the appellants on charges of offences against the *Combines Investigation Act*, R.S.C. 1927, c. 26, and of conspiracy contrary to the provisions of s. 498 of the *Criminal Code* and, holding that the error of the trial judge raised a question of law, this Court affirmed the judgment of the Appellate Division of the Supreme Court of Ontario which had reversed the acquittal on the following grounds:

> . . . the Appellate Division . . . was of the opinion that the learned trial judge had misdirected himself, in that he held that, although it was proven, if not admitted, that they (the appellants) 'took an active part in the original scheme,—the conspiracy which formed the basis for the prosecution, . . . because (they) were not proved to have taken part in subsequent overt acts,' they should be acquitted, . . .

In my view that case is distinguishable from the case at bar because the trial judge had there made a clear finding of fact against the accused, (*i.e.*, that they had participated in the formation of the combine or agreement which was charged as a conspiracy) from which it followed as a matter of law that they were guilty of the offence with which they were charged. The trial judge did not appear to appreciate the fact that the agreement was the essence of the offence and seems to have thought that in order to find the accused guilty there had to be evidence from which he could conclude beyond a reasonable doubt that they had participated in overt acts done in furtherance of the agreement. This was a manifest error in law which raised a question over which the Court of Appeal had jurisdiction. I cannot see that any such question as was there decided arises in the present case because here there was no finding of fact against the accused in respect of the 3rd and 4th counts which, as a matter of law, required the trial judge to convict.

In the present case the trial judge accepted the evidence as contained in the letters above referred to and thus gave

[13] [1932] S.C.R. 279, 57 C.C.C. 318, [1932] 2 D.L.R. 88.

full effect to s. 41(2) of the *Combines Investigation Act*, but he concluded that this evidence was not sufficient to satisfy him beyond a reasonable doubt that the accused were guilty on the 3rd and 4th counts. However wrong the Court of Appeal or this Court may think that he was in reaching this conclusion, I am of opinion, with all respect for those who hold a different view, that this error cannot be determined without passing judgment on the reasonableness of the verdict or the sufficiency of the evidence, and in my view these are not matters over which the Court of Appeal has jurisdiction under s. 584(1)(*a*) of the *Criminal Code*.

Mr. Justice Schroeder, however, further relies upon the case of *Edwards (Inspector of Taxes) v. Bairstow*[14] and he makes particular reference to the reasons for judgment of Lord Radcliffe in that case. That was an appeal from a decision of the Commissioners for the General Purpose of the Income Tax Act on a case stated by them. The facts were not in dispute and the sole question was whether a taxpayer's profits arose out of an "adventure or concern in the nature of trade" within the meaning of s. 237 of the English *Income Tax Act*, 1918.

In the course of his reasons for judgment, Lord Radcliffe said, at page 33:

> My Lords, I think that it is a question of law what meaning is to be given to the words of the Income Tax Act 'trade, manufacture, adventure or concern in the nature of trade' and for that matter what constitute 'profits or gains' arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the courts to interpret its meaning, having regard to the context in which it occurs and to the principles which they bring to bear upon the meaning of income.

His Lordship then observed that:

> . . . the law does not supply a precise definition of the word 'trade': . . .

and went on to say:

> In effect it lays down the limits within which it would be permissible to say that a 'trade' as interpreted by section 237 of the Act does or does not exist.
>
> But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems

[14] [1956] A.C. 14.

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Ritchie J.

to me that it necessarily follows that the determination of the Commissioners, Special or General, to the effect that a trade does or does not exist is not 'erroneous in point of law'; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being upset by the court of appeal. I except the occasions when the commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the case that they have misunderstood the law in some relevant particular.

All these cases in which the facts warrant a determination either way can be described as questions of degree and therefore as questions of fact.

Lord Radcliffe was, however, of the opinion that the agreed facts in the *Bairstow* case were consistent only with the conclusion that the profit there in question "was the profit of an adventure in the nature of trade". In concluding his judgment, Lord Radcliffe made the following general observation concerning appeals from income tax commissioners at page 38:

> As I see it, the reason why the courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the commissioners are the first tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

I am satisfied, after having read the reasons for judgment of Lord Radcliffe, that the *Bairstow* case was one in which the court was required to decide whether the facts found by the Commissioners were such as to bring the taxpayer within the language employed in s. 237 of the English *Income Tax Act*, 1918, and that the question of law upon which the House of Lords decided that case was "what is the meaning to be given to the words of the *Income Tax Act* of 'trade, manufacture, adventure or concern in the nature of trade' "? I must say, with all respect, that that case does not appear to me to afford any authority

for the proposition that in an appeal against a judgment of acquittal under s. 584(1)(*a*) of the *Criminal Code* "a question of law alone" is involved whenever a reviewing court is of opinion that the finding of the trial judge was unreasonable and improper having regard to the evidence.

If the phrase "a question of law alone" as it occurs in that section were to be so construed, then the result in my opinion would be not only to extend the Attorney General's right to appeal under that section, but also to enlarge the meaning of the phrase "a question of law" as it occurs in other sections of the *Criminal Code* dealing with appeals not only to the Court of Appeal but to this Court. In my opinion such an interpretation could result in a broadening of the scope of appellate jurisdiction under the *Criminal Code* beyond the limitations which are stipulated in the express language of the Code itself.

The provisions of s. 592(1)(*a*) of the Code provide that:

> 592. (1) On the hearing of an appeal against a conviction, the court of appeal
>
> (*a*) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is *unreasonable or cannot be supported by the evidence.*
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice; . . .

The italics are my own.

Parliament has thus conferred jurisdiction on the Court of Appeal to allow an appeal against a conviction on three separate grounds, one of which is the very ground upon which the Court of Appeal allowed the present appeal, i.e., that "the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence". The fact that s. 592(1)(*a*) recognizes this ground as being separate and distinct from "the ground of a wrong decision on a question of law" appears to me to be the best kind of evidence of the fact that Parliament did not intend the phrase "a question of law" as it is used in the Code to include the question of whether the verdict at trial was unreasonable or could not be supported by the evidence. It is noteworthy that having accorded the Court of Appeal

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Ritchie J.

jurisdiction to hear appeals against conviction on the ground that the verdict was unreasonable, Parliament did not confer the same jurisdiction on that Court in appeals by the Crown. No authority is needed for the proposition that appellate jurisdiction must be expressly conferred and with all respect for those who may hold a different view, I am of opinion that the Court of Appeal has exceeded its jurisdiction by allowing this appeal on a ground reserved for appeals against conviction which does not extend to appeals by the Attorney General.

For all these reasons I would allow the appellant's appeal against the verdict of guilty on counts 3 and 4 of the indictment which was substituted by the Court of Appeal for the verdict of acquittal at trial on these counts and I would set aside the judgment of the Court of Appeal in this regard.

The appellant has also appealed from that part of the judgment of the Court of Appeal which varied the Order of Prohibition made by the learned trial judge. As Mr. Justice Laskin has said:

> The heart of the variation lies in extending the prohibition to cover the commission of the like offence in respect of any person other than the retailers particularly mentioned in the counts on which convictions were made and to cover the use of any other means by which, within the definition of the offence, it may be committed. In my view, section 31 of the Combines Investigation Act is ample enough to comprehend a prohibitory order in such terms.

I would not disturb the order of the Court of Appeal in this regard.

In the result, I would allow the appellant's appeal in part.

The judgment of Judson, Spence and Pigeon JJ. was delivered by

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario[15] delivered on March 31, 1967, whereby that Court in a majority judgment allowed an appeal from the judgment of Grant J. delivered

[15] [1967] 1 O.R. 661, 1 C.R.N.S. 183, [1967] 3 C.C.C. 149, 53 C.P.R. 102, 62 D.L.R. (2d) 75.

on March 18, 1966, by which he convicted the accused (here appellant) on counts 1 and 2 in the indictment and acquitted the accused (here appellant) on counts 3 and 4 in the said indictment.

From the acquittal on counts 3 and 4, the Crown appealed to the Court of Appeal and the accused (here appellant) cross-appealed from the conviction on counts 1 and 2.

At the hearing of the appeal before the Court of Appeal for Ontario, the accused abandoned its appeal against the conviction on counts 1 and 2. The Court of Appeal for Ontario by reasons delivered by Schroeder J.A. and concurred in by Porter C.J.O., F. G. MacKay and J. L. McLennan JJ.A., allowed the appeal of the Crown and registered a conviction upon the said counts 3 and 4, and also altered and extended the form of the order for prohibition which had been granted by Grant J. after trial. Laskin J.A., dissenting, would have dismissed the appeal by the Crown.

The accused corporation was charged as follows:

1. The Jurors for Her Majesty the Queen present that Sunbeam Corporation (Canada) Limited, a corporation having its chief place of business at the City of Toronto, in the County of York and being a dealer within the meaning of Section 34 of The Combines Investigation Act, between the 1st day of September, 1960 and the 31st day of December, 1960, by actions taking place partly in the Municipality of Metropolitan Toronto in the County of York, in the Province of Ontario and culminating in the City of St. Catharines, in the Province of Ontario, unlawfully did by agreement, threat, promise or other means attempt to induce Cavers Brothers Limited, sometimes known as Cavers Bros., of the said City of St. Catharines to resell articles or commodities, to wit, electric shavers at prices not less than the minimum prices specified therefor by said Sunbeam Corporation (Canada) Limited and did thereby contravene the provisions of The Combines Investigation Act, Section 34(2)(*b*).

2. The said Jurors further present that Sunbeam Corporation (Canada) Limited, a corporation having its chief place of business at the City of Toronto, in the County of York and being a dealer within the meaning of Section 34 of The Combines Investigation Act, between the 1st day of September, 1960 and the 31st day of December, 1960 at the Municipality of Metropolitan Toronto in the County of York, unlawfully did, by agreement, threat, promise or other means attempt to induce New Era Home Appliances Limited sometimes known as New Era, of the City of Toronto, to resell articles or commodities, to wit, electric floor conditioners at prices not less than the minimum prices specified therefor by Sunbeam Corporation (Canada) Limited and did thereby contravene the provisions of The Combines Investigation Act, Section 34(2)(*b*).

3. The said Jurors further present that Sunbeam Corporation (Canada) Limited, a corporation having its chief place of business at the City of

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Spence J.

Toronto, in the County of York and being a dealer within the meaning of Section 34 of The Combines Investigation Act, between the 1st day of September, 1960 and the 31st day of December, 1960, by actions taking place partly in the Municipality of Metropolitan Toronto in the County of York, in the Province of Ontario and culminating in the City of Vancouver, in the Province of British Columbia, unlawfully did by agreement, threat, promise or other means attempt to induce Army & Navy Department Store Limited, sometimes known as Army & Navy Stores, of the said City of Vancouver to resell articles or commodities, to wit, electric fry pans at prices not less than the minimum prices specified therefor by said Sunbeam Corporation (Canada) Limited and did thereby contravene the provisions of The Combines Investigation Act, Section 34(2)(*b*).

4. The said Jurors further present that Sunbeam Corporation (Canada) Limited, a corporation having its chief place of business at the City of Toronto, in the County of York and being a dealer within the meaning of Section 34 of The Combines Investigation Act, between the 1st day of September, 1960 and the 31st day of December, 1960 by actions taking place partly in the Municipality of Metropolitan Toronto in the County of York, in the Province of Ontario and culminating in the City of Vancouver, in the Province of British Columbia, unlawfully did by agreement, threat, promise or other means attempt to induce ABC Television & Appliances Ltd., sometimes known as ABC T.V. to resell articles or commodities, to wit, electric floor conditioners at prices not less than the minimum prices specified therefor by said Sunbeam Corporation (Canada) Limited and did thereby contravene the provisions of The Combines Investigation Act, Section 34(2)(*b*).

At trial, before Grant J. sitting without a jury, as directed by s. 40(3) of the *Combines Investigation Act*, R.S.C. 1952, c. 314, the Crown's case was put simply by the production of the admission of the accused given under the provisions of s. 562 of the *Criminal Code*, and by producing and having filed as exhibits a very large number of documents which had been seized by investigators in the premises of the accused corporation in Toronto, Ontario, and which were submitted as proof under the provisions of s. 41 of the said *Combines Investigation Act*, as amended. Specified reference will be made to this section hereafter.

Section 34 of the said *Combines Investigation Act* was amended in the year 1960 by c. 45 of the Statutes of Canada for that year by the addition of subs. (5) thereto. This section, which has been referred to from time to time as the "loss leader section", was as Schroeder J.A. points out in his reasons for judgment, enacted as a measure of relief to a dealer who had refused to sell or supply or who had counselled the refusal to supply of commodities contrary to s. 34(3) of the statute if he could establish certain things.

Almost immediately thereafter the accused corporation evolved a scheme known as the Minimum Profitable Resale Price Scheme, to which I shall refer hereafter as MPRP, and proceeded to put into effect throughout Canada the said MPRP scheme.

The representatives of the accused attended meetings with retail dealers in many cities throughout Canada, forwarded, first to their distributors and later to the retail dealers, literature outlining the scheme making statements therein which statements proved relevant to the counts in the indictment.

To summarize very briefly, the scheme was as follows: The accused corporation was in the business of manufacturing and selling a very large range of electrical appliances including such things as electric razors, toasters, coffee percolators, floor polishers, and many others. The accused corporation sold directly to a very limited number of large retailers such as the T. Eaton Company Limited, the Robert Simpson Company Limited, the Hudson Bay Company and some few others. The remainder of its sales was made by the accused corporation to distributors throughout Canada and those distributors in turn sold the products to retail dealers who again resold to the consuming public. The accused corporation purported, through its long experience in the marketing of electrical appliances, to know the average gross profit which a distributor needed in order to carry on its business profitably and also the average gross profit which a retail dealer, in turn, needed to carry on its own business profitably. The accused corporation having fixed its selling price on each of the appliances to the distributors calculated the gross profit which in its opinion any distributor should obtain on the sale of such appliances to a retail dealer and thereby to use its own words, "establish the distributors' price". Then again it calculated the gross profit which a retail dealer should obtain upon its cost on the purchase of an appliance from the distributor and established what it calls the Minimum Profitable Resale Price, i.e., the MPRP. The circular which was forwarded to all the distributors and with which was

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Spence J.

enclosed a schedule showing the various appliances and in successive columns the distributors' net price, the suggested dealers' price (i.e., the price from distributor to dealer), the Minimum Profitable Resale Price (i.e., the price from dealer to consumer), the fair retail value and sales tax allowance, concluded with a paragraph:

> hereafter if we find that sales are being made at prices less than those suggested above, we shall give consideration as to whether such sales are loss leader sales and assess our position as it relates to the marketing of our products.

Similarly, the circular to retail dealers in which was included a price list containing in columns the suggested dealer price, the minimum profitable resale price (MPRP), and fair retail value, contained these two paragraphs:

> It is our opinion that a person loss-leads our products when he sells them at a gross margin less than his average cost of doing business plus a reasonable profit.
>
> We have drawn conclusions from evidence available as to the operating costs of a variety of dealers who sell appliances and are efficiently organized to merchandise effectively and provide reasonable service. These conclusions are set forth specifically in the column headed "Minimum Profitable Resale Price" in our new Dealer Price Sheet enclosed, effective September 15, 1960. The offering of our products below these prices will be investigated as cases of loss-leading. It is our intention to withhold supply, from persons who make a practice
>
> —of loss leading our products...

It was the contention of counsel for the accused corporation throughout that this MPRP scheme was only intended as notice that distributors and dealers advertising for sale and selling at less than that MPRP price would be investigated as possible examples of loss leading and that if after investigation such loss leading were established then supply could be cut off from the offending dealer.

The Crown showed as to the first two counts involving Cavers Brothers Limited of St. Catharines, and the New Era Home Appliances Limited of Toronto, that in fact the said corporation had attempted to induce the dealer to sell the article at not less than a specified minimum price. The learned trial judge therefore convicted the accused corporation on those counts which were, it should be noted, counts of breach of s. 34(2)(*b*) of the *Combines Investigation Act*, which provides:

34. (2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatsoever, require or induce or attempt to require or induce any other person to resell an article or commodity

(*b*) at a price not less than a minimum price specified by the dealer or established by agreement.

Count 3 in the indictment laid exactly the same charge against the accused corporation as to the Army and Navy Stores of the City of Vancouver, and count 4 of the said indictment again laid the same charge against the accused corporation as to ABC Television and Appliances Limited, also of the City of Vancouver. It should be noted that the charge was of an attempt to induce the specified dealer to resell appliances at not less than the specified minimum price. The same evidence as to those two counts as had been relevant to counts 1 and 2, was adduced, i.e., the circular letter to the distributor with its attached price list and the circular letter to the dealer with its attached price list. I have already referred to these documents.

There was in addition as to count 3, the count in reference to the Army and Navy Stores, a letter from one A. R. D. Schell, an employee of the accused corporation in British Columbia, to one J. C. Hall, an officer in the head office of the corporation in Toronto, dated October 9, 1960, which I quote in full:

Dear Joe:

Army & Navy Stores, Vancouver, have been stocking some of our items and selling them at very low prices. For instance, they have the S 5 iron on at $14.49, FPM—$15.95 FPL $19.49 and a few other items.

I have called on Mr. Ludwig who is in charge of this department and presented our resale pricing programme to him. Each time I called, he would agree to bring the prices up to the minimum, but when I went back, they were exactly the same. This has now been going on for three weeks, in which time I have called on Mr. Ludwig five times.

As yet I have had no complaints from any Account on this matter, but I feel should we let it go, it just might start something. He has been giving G.E. the same run around.

They have been buying their Sunbeam and G.E. from Mc. & Mc.

Joe, these are the details, and am passing them on to you for your advice.

R. D. Schell.

(The underlining is my own.)

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Spence J.

The learned trial judge pointed out that that letter had been replied to by one from Mr. J. C. Hall to R. D. Schell, dated October 14, 1960, which read, in part:

> I would suggest, Dick, that seeing you are going in and calling on this Mr. Ludwig that you continue to do so endeavouring to obtain his co-operation by pointing out that no one will be selling any less than he is and doing your best to get him to come up to our prices on this basis.

The trial judge pointed out that there is no evidence that Schell ever made any further calls on Ludwig or in any way thereafter attempted to carry out Hall's suggestion or passed on any of the contents of Hall's letter to Ludwig, and the learned trial judge then concluded:

> The evidence as to inducement on this count does not bear that quality of certainty that ought to exist in the case of a criminal charge and it will therefore be dismissed.

It must be remembered that the evidence at trial as I have pointed out consisted so far as the Crown's case was concerned of the admissions and of the production of all of these documents. Counsel for the accused corporation called two witnesses neither of whom in his evidence dealt with the two letters of October 9 and of October 14, 1960, to which I have just referred.

Section 41 of the *Combines Investigation Act* provides:

> 41. (1) In this section,
>
> (*a*) "agent of a participant" means a person who by a document admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant,
>
> (*b*) "document" includes any document appearing to be a carbon, photographic or other copy of a document, and
>
> (*c*) "participant" means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.
>
> (2) In a prosecution under Part V,
>
> (*a*) anything done, said or agreed upon by an agent of a participant shall *prima facie* be deemed to have been done, said or agreed upon, as the case may be, with the authority of that participant;
>
> (*b*) a document written or received by an agent of a participant shall *prima facie* be deemed to have been written or received, as the case may be, with the authority of that participant; and
>
> (*c*) a document proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and shall be *prima facie* evidence

(i) that the participant had knowledge of the document and its contents,

(ii) that anything recorded in or by the document as having been done, said or agreed upon by any participant or by an agent of a participant was done, said or agreed upon as recorded and, where anything is recorded in or by the document as having been done, said or agreed upon with the authority of that participant,

(iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

Therefore, by virtue of s. 41(2)(*c*), the documents, *i.e.*, those two letters of the 9th and 14th of October 1960, having been proved to be in the possession of the accused or on its premises, were *prima facie* evidence (1) that the accused had knowledge of the documents and their contents, and (2) that anything recorded therein as having been done was done and was done by the agent with the authority of the accused. Therefore, the only evidence before the learned trial judge as to count 3 was the evidence that the agent Schell with the authority of the accused, had on five occasions in the three weeks prior to October 9, 1960, called on Mr. Ludwig in the Army and Navy Stores in Vancouver and presented to him a resale pricing programme and that on each of those occasions Ludwig "would agree to bring the prices up to the minimum". Under those circumstances, it matters not whether Mr. Ludwig or the Army and Navy Stores had ever received a copy of the circular to dealers to which I have referred above, or had any previous knowledge of the MPRP programme, the plain statement in the letter reporting is that on five different occasions Schell had attempted to have Ludwig agree to increase his prices to a specified minimum price.

There can be no doubt as to the occasions having been within the time specified in the indictment and that therefore the attempt in count 3 was between September 1, 1960, and December 31, 1960. The letter reporting was dated October 9, 1960, and it speaks of actions within the previous three weeks, *i.e.*, commencing some time after September 1, 1960. In fact, the letters to distributors had only gone out on September 14, 1960, and the report by the head office

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Spence J.

of the accused corporation in Toronto to the U.S. head office in Chicago, Illinois, outlining the MPRP scheme which was produced at trial as an exhibit was only forwarded on September 14, 1960.

As I have already pointed out, this was the only evidence before the learned trial judge. Reasonable doubt must be based upon evidence adduced at the trial and there was, therefore, no basis upon which reasonable doubt that the accused had committed the offence as charged in the indictment could arise.

In prosecuting on the 4th count, *i.e.*, that dealing with ABC Television, the Crown relied on the said circulars to distributors and dealers to which reference has been made above, and also on a letter from one Bill Thompson, an agent of the accused corporation in Vancouver, to Mr. J. C. Hall, dated September 20, 1960, the third paragraph of which read:

> I have been checking with dealers, and not one of the dealers I have contacted have received the letter from Sunbeam that I understood was to be sent out the 15th. Has there been a change of plans? Dick and I are trying to get prices set here, and without actual price sheets it is a difficult job. As far as my Floor Care Div dealers go, the only dealer that is cutting our polishers at present (that I know about) is Collin Ryan of A.B.C. TV. I talked to Collin today, but he wouldn't assure me of raising and I hesitate to do anything until the beforementioned letters and price sheets are here.

Mr. Hall replied to that letter by his of September 29, 1960. The third paragraph of that letter reads as follows:

> I can imagine that Collin Ryan of A.B.C. Television is causing you a problem. I have had similar ones with him in the past, Bill, but after a lot of hard talking I have managed to persuade him to come up to the price that I wanted him to do so. I can only suggest first that you try every means you can to get him to raise his prices to our minimum profitable resale prices, then if he absolutely refuses and if he runs any ads, let us have them and we will take action immediately. I would like you to keep me posted on this or any other discrepancies there may be with other dealers in the British Columbia area.

(The underlining is my own.)

The learned trial judge in dealing with count 4 concluded:

> There is no evidence that Thompson carried out Hall's instructions concerning Ryan except that the latter had put his prices up after a

long talk. There is here neither sufficient evidence of inducement on the part of the accused nor that the alleged offence took place within the time charged. This charge must therefore be dismissed.

Therefore, the only evidence upon this count in addition to the outline of the scheme as contained in the circulars to dealers and distributors was Thompson's report of September 20, in which he said "I talked to Collin today but he wouldn't assure me of raising and I hesitate to do anything until the before mentioned letters and price sheets are here" and his report of October 15 where he said Ryan had put his price up yesterday "after quite a long talk". Surely, this being the only evidence, it is the plain statement by Thompson, the agent of the accused corporation, that he had attempted, before the 20th of September, to induce Ryan to raise his sale price to a specified minimum price and that he had again made an attempt, which was successful, on October 13, 1960, there can be no other conclusion than that none of the acts took place prior to the 1st of September 1960 as the scheme only went into effect in the middle of that month and since the inducement and successful inducement was reported on October 14, 1960, and that the acts took place within the period charged. Again I point out that the charge was a charge of attempting to induce and these letters amount to an admission of an attempt to induce a dealer to sell at not less than a specified minimum. That such minimum was the MPRP price is shown clearly by Mr. Hall's letter to Bill Thompson dated September 29, 1960 which I have quoted. Since a reasonable doubt must be based on evidence and there was no evidence which could give rise to any such reasonable doubt to rebut the presumption created by s. 41 of the *Combines Investigation Act,* there was no course but to convict the accused.

The problem arises as to the jurisdiction of the Court of Appeal to consider the appeal from the acquittal by the learned trial judge. The appeal to the Court of Appeal was taken by virtue of s. 584 of the *Criminal Code* which provides:

584. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Spence J.

(a) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone, . . .

(The underlining is my own.)

Counsel for the accused corporation took the position before the Court of Appeal for Ontario and before this Court that the appeal of the Crown was not based on a ground of law alone but at best was upon a ground of mixed law and fact and upon such ground no appeal lay.

Schroeder J.A. in his reasons sets out the grounds of law advanced by the Crown in the Court of Appeal for Ontario as follows:

1. He erred in law in refusing to consider the entire documentation as relevant to each count;
2. He erred in law in failing to give effect to uncontradicted documentary evidence which had made out a prima facie case under section 41 and which, not having been contradicted or explained by the accused, became conclusive;
3. He erred in the effect which he gave to the words "attempt to induce" as they are used in section 34(2)(*b*).

With respect, I agree with Schroeder J.A. that it does not appear from the record that the learned trial judge erred in refusing to consider the entire documentation as relevant to each count and that ground, therefore, need not be considered further.

I turn next to ground 3 in the list above. Laskin J.A. said in his reasons:

> Counsel for the Crown did not press the third ground because it did not involve a question of law alone on the basis on which he proposed to argue it.

I am unable to understand this statement. It would appear at any rate that counsel for the Crown held no such view before this Court as in the first paragraph of the argument in the respondent's factum it is set out:

> 37. It is respectfully submitted that the learned trial judge misdirected himself as to the meaning and effect of Section 34(2)(*b*) of The Combines Investigation Act in considering the evidence relating to inducement and thereby erred in law.

Schroeder J.A. in reference to the third ground of appeal said:

> The third ground of error assigned by counsel is more serious, since in stating that the "evidence of inducement" in counts 3 and 4 was

inadequate to support a criminal charge, the learned Judge either overlooked the fact that the charge was confined to attempted inducement or disregarded the decision of this court in *Regina v. Moffatts Limited.* (1957) O.R. 93, as stated at p. 106, ...

With respect, I agree with Schroeder J.A. Although the learned trial judge on the same page of his reasons said:

> The substance of the third count is that the accused within the same period of time by actions taken [sic] place partly in Metropolitan Toronto, partly in the City of Vancouver, unlawfully by agreement, threat, promise or other means attempted to induce Army and Navy Department Stores to resell . . .

(The underlining is my own.)

when he concluded his consideration of the third count, he said:

> The evidence as to inducement on this count does not bear that quality of certainty that ought to exist in the case of a criminal charge and it will therefore be dismissed.

(The underlining is my own.)

The learned trial judge pointed out earlier in his reasons what Estey J. said in this court in *Rex v. Quinton*[16]:

> This section requires that one to be guilty of an attempt must intend to commit the completed offence and to have done some act toward the accomplishment of that objective, that act must be beyond preparation and go so far toward the commission of the completed offence that but for some intervention he is prevented or desists from the completion thereof. It is the existence of both the intent and the act in such a relationship that the former may be regarded as the cause of the latter. The intent unaccompanied by the act does not constitute a criminal offence.

In the present case, the charge in count 3 was that the accused, here appellant, "... unlawfully did by agreement, threat, promise or other means, attempt to induce Army and Navy Department Stores ... to resell articles or commodities ... at prices not less than the minimum prices specified ...".

The intention to commit the completed offence is quite clearly demonstrated by Mr. Hall's letter to Mr. Schell dated October 14, 1960, to which I have referred, when he states:

> I would suggest, Dick, that seeing you are going in and calling on this Mr. Ludwig that you continue to do so endeavouring to obtain his

[16] [1947] S.C.R. 234 at 235-6, 88 C.C.C. 231, [1948] 3 D.L.R. 625.

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Spence J.

co-operation by pointing out that no one will be selling any less than he is and doing your best to get him to come up to our prices on this basis.

(The underlining is my own.)

Again, in his general reporting letter dated September 13, 1960, to Mr. R. P. Gwinn, the chief officer of the U.S. head office, E. F. Bond, the vice-president of the appellant corporation said, in part:

> We have held and will hold distributor meetings in all major marketing centres throughout Canada for the purpose of explaining our programme. Actually it is similar to GE's in that we will do the following two things:
>
> (1) Establish maximum discounts allowed by distributors for quantity purchases by dealers (5% on any assortment of 12)
>
> (2) Establish minimum profitable resale prices for dealers.

The second item is a clear statement of the intent. The acts toward the accomplishment of the objective in the case of count 3 were Schell's five attendances upon Mr. Ludwig in an attempt to obtain Ludwig's agreement to sell only at the specified minimum prices. Whether or not Schell was successful in such attempt is irrelevant. I accept the law as outlined in *Regina v. Moffatts Limited*[17] that it is not essential on an attempt charge under s. 34(2)(*b*) of the *Combines Investigation Act* to prove that the attempt was successful.

Similarly, when one deals with count 4 which was that the appellant, "unlawfully did by agreement, threat, promise or other means attempt to induce ... ABC Television and Appliances Ltd. to resell articles or commodities ... at prices not less than the minimum prices specified ...", one finds the attempt specified in the Bond letter to Gwinn of September 13, 1960, to which I have referred, and also in the paragraph I have quoted from the letter of Bill Thompson to J. C. Hall dated September 20, 1960. The overt act toward the accomplishment of the objective is set out in the same letter, *i.e.*, the attendance upon Collin Ryan, and in the further report of October 15,

[17] [1957] O.R. 93, 25 C.R. 201, 118 C.C.C. 4, 28 C.P.R. 57, 7 D.L.R. (2d) 405.

1960 "Collin Ryan of ABC TV took his price up to that figure yesterday after quite a long talk". Again, in this case, both elements necessary to prove an attempt to induce, which was the offence charged, are proved conclusively in the documentation. There was no evidence given to contradict them although Mr. Bond was called as a witness for the defence. The prima facie case wrought by s. 41(2)(*c*) of the *Combines Investigation Act* being the only evidence upon the topic therefore becomes the uncontradicted evidence and it was the duty of the learned trial judge upon such uncontradicted evidence to register convictions. It was an error in law to charge himself as, with respect, it would appear that the learned trial judge had charged himself, that the Crown in order to support the charges had to prove an inducing by agreement, threat or promise. "Other means" seems to have been forgotten. In order to prove the offence charged all the Crown had to prove was the intent to induce and an overt act toward the accomplishment of that intent. As I have said the Crown in each of the counts proved these on prima facie evidence which by lack of contradiction became conclusive evidence.

There is, therefore, in this ground 3 submitted by the appellant an error in law sufficient to give the Court of Appeal jurisdiction under the provisions of s. 584(1) of the *Criminal Code*. It will be realized that in coming to this conclusion I have in fact dealt with the second ground of appeal in that I have stated that the prima facie evidence wrought by the provisions of s. 41 of the *Combines Investigation Act* not having been contradicted became conclusive. It has been objected by counsel that such a view of the effect of s. 41 takes from the learned trial judge the right and the duty to weigh all the evidence and to come to his conclusion upon the whole case whether the Crown has proved the necessary ingredients of the offence beyond a reasonable doubt.

I, of course, agree that the Court is always under the duty of so weighing all the evidence in order to come to that conclusion. The learned trial judge had already con-

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Spence J.

sidered in reference to counts 1 and 2 and in his general outline of the MPRP scheme the establishment of the intent to induce the dealers to resell at not less than the minimum specified prices and before he could have registered a conviction on counts 1 and 2 had come to the conclusion that such intent had been established beyond reasonable doubt. The intent was exactly the same in the case of counts 3 and 4 as it had been in the case of counts 1 and 2. If it were established beyond reasonable doubt as to counts 1 and 2 it had been established also beyond reasonable doubt as to counts 3 and 4.

The only evidence as to the overt act toward the accomplishment of that end in the case of counts 3 and 4 is in the correspondence to which I have referred. If the learned trial judge had weighed that evidence upon the question as to whether it proved beyond reasonable doubt that such overt act had taken place rather than upon the question of whether or not there had been an inducing then he could not have failed to find such an overt act proved beyond reasonable doubt as there was no evidence to weigh contra. The faults which the learned trial judge cites as to this evidence were faults as to its evidentiary value in proving beyond reasonable doubt the inducing and not the overt act in a charge of attempting to induce.

In my view, my conclusion, therefore does not infringe on the right and duty of a trial judge to weigh all the evidence in order to determine whether the Crown has proved its case beyond reasonable doubt.

So in *Girvin v. The King*[18], as pointed out by Schroeder J.A. in his reasons for judgment, Fitzpatrick C.J. said at p. 169:

> I have always understood the rule to be that the Crown, in a criminal case is not required to do more than produce evidence which, if unanswered, and believed, is sufficient to raise a prima facie case upon which the jury might be justified in finding a verdict.

And in *Belyea v. The King*[19], the learned trial judge had found as a fact upon the evidence and this Court was of

[18] (1911), 45 S.C.R. 167.

[19] [1932] S.C.R. 279, 57 C.C.C. 318, [1932] 2 D.L.R. 88.

the opinion that such was fully justified on the evidence, that the accused took an active part in the original scheme —the conspiracy which formed the basis of the prosecution—but acquitted him on the ground that there was no evidence which connected him with any of the illegal operations subsequent thereto. The Appellate Division was of the opinion that the learned trial judge had misdirected himself in that he held that the latter finding entitled the accused to an acquittal. This Court upheld the decision of the Appellate Division finding that there was a ground of error in law which entitled the Crown to appeal to the Appellate Division.

In that case as in the instant case, it must be noted, the trial judge's error in law was not expressly formulated in his judgment. On the contrary he had, as here, expressed his erroneous conclusion as resting on a question of fact:

> In arriving at this conclusion I have in mind the provisions of s. 69 of the Criminal Code, but, notwithstanding that section, I cannot find upon the evidence that there was any participation or complicity by O'Connor in the offences established in evidence and therefore a verdict of not guilty must be found in this case.

(The underlining is my own.)

However, having quoted, among others, the above passage, Anglin C.J.C. speaking for the Court had no difficulty in holding that on the basis of the whole judgment and record, the acquittal was not actually based on wrong findings of fact nor on an incorrect weighing of the evidence, but on an unstated error of law that should be inferred. He said at p. 292:

> Presumably on the ground that the purpose of the organization was "professedly" (i.e., ostensibly) lawful, and that there is not sufficient evidence that the appellants participated in, or were privy to, the subsequent admittedly illegal acts of the Windsor group, the learned judge acquitted them.

And at p. 296:

> Here, the learned trial judge apparently had already found facts from which the conclusion was inevitable that there was participation on the part of Belyea and Weinraub in the formation of the illegal combine and the conspiracy, the existence of which he had already found to be proven. On these findings, coupled with the admissions made by Belyea

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Spence J.

and Weinraub in their testimony, and the documents of which they were proved to have had knowledge, their convictions, as was held by the Appellate Division, were a necessary consequence.

Concerning the extent of the jurisdiction of this Court in such a case, the Chief Justice said on the same page:

> The right of appeal by the Attorney-General, conferred by s. 1013(4), Cr.C., as enacted by c. 11, s. 28, of the Statutes of Canada, 1930, is, no doubt, confined to "questions of law". That implies, if it means anything at all, that there can be no attack by him in the Appellate Divisional Court on the correctness of any of the findings of fact. But we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the legal effect of certain findings of fact made by the judge or the jury, as the case may be, to enquire into the soundness of that conclusion, since we cannot regard it as anything else but a question of law,—especially where, as here, it is a clear result of misdirection of himself in law by the learned trial judge.

It is contended that even if the evidence is found to be sufficient to support a conviction, the further question of whether the guilt of the accused should be inferred from that evidence is a question of fact and reference is made to *Fraser v. The King*[20] and *Rose v. The Queen*[21]. Those were cases in which facts necessary to establish the guilt of the accused had to be inferred, in the first, from circumstantial evidence, in the other, from other proven facts. In neither case was there a statutory provision enacting that the proven facts would constitute *prima facie* evidence of the other facts required to establish the guilt of the accused and, therefore, the making or not making of an inference was not a question of law alone although it might be unreasonable. However, when there is, as in this case, a statutory presumption to be applied, once the facts necessary to give rise to it are found by the trial judge to be established beyond reasonable doubt, the question whether the inference should be made is no longer anything but a question of law alone: the statute does not provide that the facts to be inferred *may* be deemed to exist but that they *shall* be. To say that such evidence does not bear the quality of certainty that ought to exist

[20] [1936] S.C.R. 296, 66 C.C.C. 240, [1936] 3 D.L.R. 463.
[21] [1959] S.C.R. 441, 31 C.R. 27, 123 C.C.C. 175.

in the case of a criminal charge is to ignore or contradict the statute and is, therefore, an error in law and nothing else.

As against this, it is contended that the legal presumption is not a presumption of guilt but a presumption of some facts and that the trier of the facts has to weigh the evidence before reaching a final conclusion.

In *Rose v. The Queen, supra,* Taschereau J., as he then was, said at p. 443:

> The trial judge sitting without a jury was fulfilling a dual capacity. He had, therefore, to discharge the duties attached to the functions of a judge, and also the duties of a jury. As a judge he had to direct himself as to whether any facts had been established by evidence from which criminal negligence may be reasonably inferred. As a jury he had to say whether, from those facts submitted, *criminal negligence ought to be inferred. Metropolitan Railway Company v. Jackson,* (1877), 3 App. Cas. 193 at 197, *King v. Morabito,* [1949] S.C.R. 172 at 174. I think that the trial judge directed himself properly, and that when he decided on the facts submitted to him that criminal negligence *ought not to be inferred,* he was fulfilling the functions of a jury *on a question of fact.*

However, in that case, the trial judge in coming to his decision that the accused should have been acquitted was performing a function of weighing the evidence. The charge was one of causing death by the operation of a motor vehicle, and the evidence dealt with the conduct of the accused in driving his automobile against a red traffic signal. The learned trial judge found that the accused was not keeping a proper lookout but that his speed was not above the normal at the intersection and reached the conclusion that the accused had not seen the red light. The trial judge, weighing those facts, came to the conclusion that they did not show the wanton or reckless disregard for the lives or safety of other persons required for conviction of the offence charged. Therefore, the learned trial judge had evidence one way and the other way to weigh and a conclusion to arrive at as a result of that weighing whether such conduct showed the standard of negligence required by the provisions of the *Criminal Code.* In the present case, the learned trial judge had no such task of weighing. There was no evidence contra; there was nothing which needed to be inferred

1968

SUNBEAM CORPORATION (CANADA) LTD. v. THE QUEEN

Spence J.

beyond the inference required by the section of the statute. There was a simple admission established as prima facie evidence by the provisions of s. 41 of the *Combines Investigation Act* that the accused through its agent had attempted to induce these persons to sell at not less than the specified minimum price. I am, therefore, of the opinion that the enunciation of the varying duties of the judge and jury as set out above with which, with respect, I agree, do not apply in the present case to make the learned trial judge's acquittal of the accused a mere matter of fact.

With respect, I agree with the view expressed by Evans J.A. in *Regina v. Torrie*[22] where he said at p. 11:

> I recognize that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this proposition to mean that the Crown must negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.

For these reasons, I would dismiss the appeal and confirm the judgment of the Court of Appeal for Ontario including its direction as to the amendments of the Order of Prohibition issued by Grant J.

Appeal allowed in part, JUDSON, SPENCE *and* PIGEON JJ. *dissenting.*

[22] [1967] 2 O.R. 8, [1967] 3 C.C.C. 303.