

**Claude Larose** *Appellant*;

and

**Her Majesty The Queen** *Respondent*.

1978: December 13; 1978: December 21.

Present: Laskin C.J. and Martland, Ritchie, Spence,  
Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR  
QUEBEC

*Criminal law — Practice — Prosecution by indictment — Precondition — Previous conviction — Criminal Code, R.S.C. 1970, c. C-34, as amended by R.S.C. 1970 (2nd Supp.), c. 2, ss. 133(3), 133(7), 591.*

Section 133(3) of the *Criminal Code* provides that a person who fails to comply with a condition of his undertaking or recognizance “is guilty of (a) an indictable offence . . . , or (b) an offence punishable on summary conviction”. However according to s. 133(7) “where an accused is charged with an offence under subsection (3) . . . he shall not be prosecuted by indictment unless he has previously been convicted of an offence under this section”. Here the Crown proceeded by indictment but offered no proof of previous conviction. For this reason, the trial Judge acquitted the appellant. The Court of Appeal quashed the acquittal stating that the absence of a previous conviction did not exculpate the accused. Hence the appeal to this Court.

*Held:* The appeal should be allowed.

It is clear from the mandatory words of s. 133(7) that proof of a previous conviction is a precondition of proceeding by indictment and is jurisdictional in that respect. This does not mean that proof of a previous conviction must be offered before the indictment is laid but, rather, that the actual trial cannot proceed as the trial of an indictable offence until the Crown had provided proof of a previous conviction under s. 133.

APPEAL from a judgment of the Court of Appeal of Quebec setting aside the acquittal by the trial Judge. Appeal allowed.

*Bernard Lamarche*, for the appellant.

*Louis-Guy Robichaud*, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—There is one short but important point in this appeal. It is here as of right because the Quebec Court of Appeal set aside the acquittal of the accused on two charges under *Criminal Code*, s. 133(3)(a). The acquittal was based on the failure of the Crown to establish, as being fundamental under s. 133(7) to its right to proceed by indictment, that the accused had previously been convicted of an offence under s. 133.

Section 133(3) reads as follows:

133. ...

(3) Every one who, being at large on his undertaking or recognizance given to or entered into before a justice or a judge and being bound to comply with a condition of that undertaking or recognizance directed by a justice or a judge, fails, without lawful excuse, the proof of which lies upon him, to comply with that condition, is guilty of

(a) an indictable offence and is liable to imprisonment for two years, or

(b) an offence punishable on summary conviction.

The charges against the accused were laid expressly under s. 133(3)(a), hence exposing the accused to a greater penalty than if the charges were laid as summary conviction offences. Section 133(7), which is central to this appeal is in these terms:

133. ...

(7) Notwithstanding anything in this section, where an accused is charged with an offence under subsection (3), (4) or (5), he shall not be prosecuted by indictment unless he has previously been convicted of an offence under this section.

The Crown offered no proof of a previous conviction nor was an admission of such a conviction sought from the accused. The Crown's position was put as follows by Casey J.A., who accepted it

in speaking for the Quebec Court of Appeal:

The Crown now argues that C.C. 133(3) creates the offence leaving it to the Crown to proceed one way or the other, that a previous conviction is not an essential element and that Respondent should have raised the objection in limine. With this I agree. The absence of a previous conviction does not exculpate Respondent; it merely entitles him to be tried under Part XXIV which means, in this case, that the punishment cannot go beyond 722. In this case we are dealing only with a matter of procedure and so far Respondent has not been prejudiced. For these reasons I would quash the acquittal.

Casey J.A. concluded by ordering that the record be returned to the Court of first instance "placing the parties in the position they were in when the Crown declared its case closed".

The Crown's position in this Court was not that proof of a previous conviction was an element of the offence but that, although it was a pre-condition, its existence was to be presumed from the mere laying of the indictment and that it was for the accused to prove otherwise. I cannot agree with this view. It is clear from the mandatory words of s. 133(7), "he shall not be prosecuted by indictment unless" etc., that proof of a previous conviction is a precondition of proceeding by indictment and is jurisdictional in that respect. This does not mean that proof of a previous conviction must be offered before the indictment is laid but, rather, that the actual trial cannot proceed as the trial of an indictable offence until the Crown has provided proof of a previous conviction under s. 133. The situation here lies outside of *Criminal Code*, s. 591 which is concerned with a reference to previous convictions in an indictment and not to an *a priori* condition of trial if the Crown chooses to proceed by indictment.

It follows, therefore, that this appeal must be allowed and the judgment of the Court of Appeal set aside. The trial Judge, strictly speaking, ought

to have quashed the proceedings because of the Crown's failure to satisfy the condition upon which they depended. Since it does not appear, however, that the Crown had any proof of a previous conviction to support its choice of proceeding by indictment, I would not interfere at this late date (the time for summary conviction proceedings having long ago run) with the trial Judge's disposition made on July 15, 1976 and, consequently, I would restore his judgment of acquittal.

*Appeal allowed.*

*Solicitor for the appellant: Bernard Lamarche, Montreal.*

*Solicitor for the respondent: Louis-G. Robichaud, Montreal.*