1927

*April 26.
*May 3.

ALEX DE BORTOLI.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA

Criminal law—Appeal to Supreme Court of Canada—Cr. Code, ss. 1013 (5), 1024—Difference of opinion in Court of Appeal—Absence of requisite direction under s. 1013 (5)—Misdescription of count in judge's charge to jury.

An appeal does not lie to this Court under s. 1024 of the *Cr. Code* in the absence of the direction of the court of appeal required by s. 1013 (5), which direction must be evidenced by the order of the court and should be plainly expressed (*Gouin* v. *The King*, [1926] S.C.R. 539); the plain operation and effect of s. 1013 (5) is not only to maintain the restriction of the right of appeal conferred by s. 1024 to questions of law, but also to restrict the cases in which upon questions of law lack of unanimity may be expressed to those in which the court of appeal considers it in the interest of justice that separate judgments should be pronounced by the members of the court (*Davis* v. *The King*, [1924] S.C.R. 522).

At the trial on a charge of perjury, the judge, when giving, near the conclusion of his address to the jury, a short recapitulation of each count in the indictment, by a slip of the tongue misdescribed a count (the one on which accused was found guilty), the substance of which he had, just before, correctly stated to the jury. An appeal from the accused's conviction to the Court of Appeal of British Columbia was dismissed ([1927] 2 W.W.R. 300), the majority of the judges holding that, notwithstanding the misstatement, no substantial wrong or miscarriage of justice had occurred. Two judges of the court expressed a different view on this point and were in favour of allowing the appeal and granting a new trial. On appeal to the Supreme Court of Canada on the ground of misdirection to the jury:

Held, the appeal to this Court was not open to accused, by reason of the absence of the requisite direction under s. 1013 (5); but, its absence not having been brought to this Court's attention, and the appeal having been heard on the merits, the Court expressed the view that, on the merits, the appeal could not have succeeded. *Quaere,* whether, even had a dissent been regularly and legally pronounced, a difference of opinion on such a question should be considered as a dissent upon a question of law.

APPEAL from the judgment of the Court of Appeal of British Columbia (1) dismissing an appeal from a conviction for perjury.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1927] 2 W.W.R. 300.

The appellant was charged with having, while a witness in a judicial proceeding, falsely and with intent to mislead the magistrate holding the proceeding, deposed and sworn that (1) he had not worked for one Joe Esposito during the year 1926; (2) he had not given any evidence during the year 1926 with regard to Joe Esposito dealing in liquor; and, (3) he did not know whether or not Joe Esposito had kept intoxicating liquor for sale between the 1st January and the 21st May, 1926. The jury found him guilty on the third count.

In his charge to the jury the trial judge referred to the third count and stated it in substance correctly; but, very shortly afterwards, near the close of his address, in giving a short recapitulation of each count in the indictment, he misdescribed the third count by stating it to be that the appellant had falsely sworn that "he had not given evidence with regard to Esposito having kept intoxicating liquor for sale."

The appellant appealed to the Court of Appeal of British Columbia on a number of grounds, including that of misdirection in reference to the third count. The appeal was dismissed (1). The majority of the court were of opinion that, notwithstanding the said misstatement, no substantial wrong or miscarriage of justice had occurred. Martin and McPhillips JJA., however, expressed a different opinion on this point and were in favour of allowing the appeal and granting a new trial.

The formal judgment of the Court of Appeal read as follows:—

> This appeal coming on for hearing on the 5th and 6th days of January, A.D. 1927, before this Honourable Court at Victoria, B.C., in the presence of Mr. Bruce Boyd of Counsel for the Appellant and Mr. C. L. McAlpine of Counsel for the Respondent and upon hearing read the Appeal Book herein and what was alleged by counsel aforesaid and judgment being reserved until this day.
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> This Court doth order and adjudge that this appeal be and the same is hereby dismissed.

The appellant appealed to the Supreme Court of Canada, on the ground that the learned trial judge misdirected the jury in reference to count 3 of the indictment, and that such misdirection confused, or may have confused, the jury.

(1) [1927] 2 W.W.R. 300.

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DE BORTOLI v. THE KING

E. F. Newcombe for the appellant.

J. A. Ritchie K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—The appellant, de Bortoli, was accused of perjury. Three different counts were laid against him in the indictment. He was charged with having falsely and with intent to mislead justice deposed and sworn that:—

1. He had not worked for one Joe Esposito;

2. He had not given evidence during the year 1926 with regard to Joe Esposito dealing in liquor;

3. He did not know whether or not Joe Esposito had kept intoxicating liquor for sale between the 1st January and the 21st May, 1926.

The jury found him guilty on the third count.

De Bortoli appealed on several grounds. They were all dismissed by the Court of Appeal of British Columbia. After the argument was concluded, the Chief Justice, who presided, declared that he would dismiss the appeal and would deliver his reasons later. Then the other members of the court proceeded in turn to give their reasons, two of the judges (Martin and McPhillips JJA.) being in favour of allowing the appeal, the two others (Galliher and M. A. Macdonald JJA.) concurring with the Chief Justice. The president of the court then announced: "The appeal is dismissed." In due course, came to be signed the formal judgment in which there is apparent neither dissent nor direction indicating that, in the opinion of the court, any question raised upon the appeal was "a question of law on which it would be convenient that separate judgments should be pronounced by the members of the Court." (*Crim. Code,* s. 1013 (5)).

This Court, in *Gouin* v. *The King* (1), has already indicated that the direction required by ss. 5 of s. 1013 of the *Criminal Code* "must be evidenced by the order of the Court and should be plainly expressed." It is further the unmistakable effect of our decision in *Davis* v. *The King* (2)

that the plain operation and effect of subsection 5 is, not only to maintain the restriction of the right of appeal conferred by section 1024 to

(1) [1926] S.C.R. 539 at p. 540. (2) [1924] S.C.R. 522.

questions of law, but also to regulate the cases in which upon questions of law lack of unanimity may be expressed so as to embrace only those cases in which the court of appeal considers it in the interest of justice that separate judgments should be pronounced by the members of the court.

Since *Davis* v. *The King* (1), s. 1024 was amended (15-16 Geo. V, c. 38, s. 27) and its language establishes still more clearly that no appeal in criminal matters can be taken to this Court except on a "question of law on which there has been dissent in the Court of Appeal." This amendment only confirmed the uniform interpretation which this Court had given to the former section.

Moreover, as was stated in the *Davis Case* (1), this Court could not "acquire jurisdiction by a learned judge of the court of appeal pronouncing a dissent which the statute forbids to be pronounced."

It follows that, upon the record in the present case, and having regard to the requirements of sections 1013 and 1024, an appeal to the Supreme Court of Canada was not open to the appellant.

The absence of the requisite direction under subsection 5 of section 1013 was, however, not brought to our attention and we have heard counsel on the merits of the case. We may therefore add that, had there been jurisdiction, the result could not, in our view, have been different from that reached by the Court of Appeal of British Columbia.

The ground of appeal was misdirection. The learned trial judge, when giving, at the conclusion of his address to the jury, a short recapitulation of each count in the indictment, by a slip of the tongue, misdescribed the third count, the substance of which he had, but a moment before, correctly stated to the jury. The three judges who concurred in dismissing the appeal were of opinion that, notwithstanding this misstatement, no substantial wrong or miscarriage of justice had actually occurred. The two other judges thought differently.

It is at least doubtful whether, even had a dissent been regularly and legally pronounced, a difference of opinion on such a question should be considered as a dissent upon a question of law. It is not necessary, however, to decide that point in this case, since a careful examina-

(1) [1924] S.C.R. 522.

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tion of the whole record and a full consideration of the able argument presented to us does not, in our view, warrant interference with the judgment of the court below.

Appeal dismissed.

Solicitor for the appellant: *Bruce Boyd.*

Solicitor for the respondent: *C. L. McAlpine.*