1926

*Dec. 14.

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*Jan. 18.

J. GURDITTA .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Perjury—Ground of appeal—No evidence as to accused having been a witness—Motion for leave to appeal to Supreme Court of Canada under s. 1024a Cr. Code—Alleged conflict with decision in Rex v. Drummond (1905) 10 Ont. L.R. 546—Production at the trial of the judgment in the civil action.

The appellant having been found guilty of perjury committed in the trial of a civil action, one of the grounds of appeal to the appellate court was that there had been no evidence that the appellant was a witness in a judicial proceeding. The conviction having been affirmed, the appellant moved for leave to appeal to this court under s. 1024*a* Cr. Code, on the ground that the judgment sought to be appealed from conflicts with a judgment of an Ontario appellate court in a like case: *Rex* v. *Drummond* 10 Ont. L.R. 546.

*PRESENT:—Anglin C.J.C. in chambers.

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Held that the decision in the *Drummond Case* did not conflict with the judgment in this case: in the former case there was no record whatever produced, while in the present case the copy of the pleadings made use of as a record by the trial judge was put in evidence. The application for leave to appeal was dismissed.

Semble that, although production, at the trial, of the judgment disposing of the civil action was not necessary, it would have been better practice that it should be put in in order to complete the record.

MOTION for leave to appeal to the Supreme Court of Canada, under section 1024*a* of the Criminal Code, from the judgment of the Court of Appeal for British Columbia (1) upholding the conviction of the appellant for perjury in the trial of a civil action. The material facts of the case are stated in the judgments now reported.

Smellie K.C. for the motion.

Ritchie K.C. contra.

December 14, 1926.

ANGLIN C.J.C.—Motion for leave to appeal under s. 1024 (*a*) of the Criminal Code on the ground that the judgment sought to be appealed from conflicts with a judgment of the Ontario Appellate Division in a like case. In the case at bar one of the grounds of appeal to the Appellate Division was that

there is no evidence that Gurditta was a witness in a judicial proceeding when he made the assertion which is charged as a perjury.

The alleged perjury was committed in the trial of the civil action of *Brama* v. *Gurditta*. At the trial of the perjury charge the clerk of assize proved from the entries in his court record that Gurditta had been sworn as a witness and had given evidence on the trial of the civil action. The court stenographer proved the evidence given by Gurditta at that trial. Counsel for the Crown put in evidence, as exhibit I, the record prepared for the use of the judge at the trial pursuant to rule 454, consisting of a certified copy of the endorsement upon the writ of summons and of the statement of defence, being the whole of the pleadings. The clerk of assize gave evidence that the case of *Brama* v. *Gurditta*, in which this record was used, was tried at the assize held before Mr. Justice Morrison on the 22nd of February, 1926, on which date the indictment charges the

(1) [1927] 1 W.W.R. 273.

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perjury was committed. The judgment disposing of the civil action does not appear to have been put in evidence.

In the judgment of the Appellate Division in the present proceeding Mr. Justice Martin, delivering the opinion of the court, held, on the authority of *Regina* v. *Scott* (1), that it had been sufficiently established that Gurditta had given the evidence on which the perjury charge rests in a judicial proceeding, i.e., upon the trial before Mr. Justice Morrison of the civil action of *Brama* v. *Gurditta* of which the record was put in evidence.

This conclusion is said to conflict with the decision of the Ontario Appellate Division in *Rex* v. *Drummond* (2), followed in *Rex* v. *Legros* (3); *Rex* v. *Farrell* (4). As is pointed out, however, by Osler J.A., in the *Drummond Case* (2), at page 547, the only evidence there given was that of the clerk of assize for the county of Brant who swore that the defendant Drummond had been called as a witness on Kennedy's trial for murder and had been sworn by him as clerk of assize; and he produced his record book containing entries shewing that the defendant had given evidence at Kennedy's trial at which the alleged perjury was committed. The only other evidence was that of the court stenographer who related the evidence given by the accused at the Kennedy trial.

Neither the indictment on which Drummond had been tried nor any copy, or sworn copy of it, was produced.

The court held that there was no proper evidence of a fact essential to the proof of the crime charged, viz., that there had been a judicial proceeding in which the alleged perjury was committed inasmuch as neither the indictment and formal record of such proceeding or a certificate under s. 691 of the Criminal Code had been produced.

I am unable to find any conflict between the decision in the *Drummond Case* (2) and the case now before me. In the *Drummond Case* (2) there was no record whatever produced. Here the copy of the pleadings made use of as a record by the trial judge was put in evidence. This suffices to dispose of the application for leave under s. 1024 (*a*).

(1) (1877) L.R. 2 Q.B.D. 415; 13 Cox C.C. 594; 36 L.T. 476.
(2) (1905) 10 Ont. L.R. 546.
(3) (1908) 17 Ont. L.R. 427.
(4) (1909) 20 Ont. L.R. 182.

I should perhaps add that, as at present advised, production at the trial of the judgment disposing of the action of *Brama* v. *Gurditta* was not necessary since the perjury was complete when the evidence was given at the trial and prosecution could have been instituted for it and conviction had although no judgment had ever been rendered in the civil action. Doubtless it would be better practice where judgment has been pronounced that it should be put in in order to complete the record.

Leave to appeal will accordingly be refused.

January 18, 1927.

ANGLIN C.J.C.—The defendant renews his application for leave to appeal under s. 1024 (*a*) of the Criminal Code, relying upon other opinions which have been delivered by judges of the Appellate Division since his former motion for leave to appeal was refused. As the case now stands three of the five members of the Appellate Division (Martin, Galliher, and McPhillips JJ.A.) are of the opinion that it was sufficiently proven at the trial that the defendant was a witness in a judicial proceeding when he gave the evidence for the giving of which he has been convicted of perjury. In the view of three members of the Appellate Division (the Chief Justice, M. A. Macdonald and McPhillips JJ.A.), if the proof was technically incomplete because of the omission to adduce evidence of the writ of summons which began the civil action in which the alleged perjury was committed,

no substantial wrong or miscarriage of justice had actually occurred (s. 1014 (2)).

I find nothing in the added opinions now before me to bring this case within the purview of s. 1024 (*a*). The *Drummond Case* (1) is again invoked by the applicant as the judgment of another court of appeal which conflicts with the judgment appealed from. My reasons for not regarding the case of *Rex* v. *Drummond* (1) as " a like case " I have already stated.

The motion will be refused.

Motion dismissed.

(1) 10 Ont. L.R. 546.