HER MAJESTY THE QUEEN .....APPELLANT;

AND

DENNIS KRAVENIA .....RESPONDENT.

1955

*May 11, 12
*June 28

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Criminal Law—Conspiracy—Trial judge having adequately charged jury as to elements requisite to support charge of conspiracy refused to indicate difference between crime charged and aiding and abetting—Whether new trial warranted.

The respondent, following a trial by a judge and jury, was convicted of conspiring with another to commit the indictable offence of illegally selling a drug. The trial judge adequately charged the jury as to the law relating to criminal conspiracy and as to its duty to give the accused the benefit of any reasonable doubt but, on the grounds that to do so might confuse the issue, refused accused counsel's request

*PRESENT: Taschereau, Estey, Locke, Cartwright and Fauteux JJ.

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to instruct the jury as to the difference in law between aiding and abetting and conspiring. The accused appealed contending that the trial judge by his refusal had deprived him of one of his grounds of defence. The Court of Appeal for British Columbia by a majority judgment allowed the appeal and ordered a new trial. The Crown appealed.

Held (Cartwright J. dissenting): That it clearly appeared from the evidence and from the trial judge's address that the only question left to the jury was whether or not the respondent had agreed to co-operate with his co-accused to bring about the illegal sale, that they could not convict unless they could so find, and that the jury clearly understood the issue to be decided by it.

Held: Also, that there was no obligation on the trial judge to instruct the jury as to the difference between the crime charged and another crime for which the accused was not indicted and which the jury was not called upon to consider.

Per Cartwright J. (dissenting): The objection of counsel was that when the trial judge came to relate the theory of the defence to the law, which he had correctly stated, he did so in words which may have misled the jury, and it could not be said that the conclusion of the majority of the Court of Appeal, that the jury may have been so misled, was wrong in law.

Decision of the Court of Appeal for British Columbia (1955) 14 W.W.R. 112 reversed and verdict of jury restored.

APPEAL by the Crown on questions of law from the judgment of the Court of Appeal for British Columbia (1) allowing respondent's appeal, Sidney Smith J.A. dissenting, from his conviction before Whittaker J. and a jury and ordering a new trial.

D. McK. Brown and *D. K. Christie* for the appellant.

H. J. McGivern for the accused, respondent.

The judgment of Taschereau, Locke and Fauteux JJ. was delivered by:—

FAUTEUX J.:—The respondent and one Tomilin were found guilty, by a jury, of having conspired together to commit an indictable offence, namely, to sell a drug to one Smith, contrary to the Opium and Narcotic Drugs Act.

Tomilin did not appeal the verdict; but respondent did so on several grounds, of which only one found favour with a majority of the Court of Appeal. The grievance was that the trial Judge, as required by counsel for the defence, should have instructed the jury

that there is a difference in law between two people aiding and abetting one another in a crime and in conspiring to commit a crime and that the mere fact that one aided and abetted in a crime might not be conspiracy to commit a crime;

(1) (1955) 14 W.W.R. 112.

the Court of Appeal found that, in effect, the refusal of the trial Judge to so direct the jury amounted to a withdrawal of one of the defences of the accused and constituted in the matter a ground of substance affecting the verdict. The verdict was then quashed and a new trial ordered. Hence the appeal of the Crown to this Court.

It is admittedly beyond question that there is, in the record, evidence justifying a jury, acting judicially, to find a verdict of guilty against both Tomilin and the respondent, as to the only offence for which they were indicted, i.e., conspiracy. Reference to the evidence is therefore unnecessary. It is also conceded that the directions given to the jury as to the gist and constituent elements of the crime of conspiracy were adequate; indeed, I am in respectful agreement with Smith J.A., dissenting, who said in this respect:—

> The trial Judge's conduct of this whole case bespeaks of the care and thought he bestowed upon its every phase.

Thus the narrow and simple point upon which this appeal now falls to be determined is whether, in the absence of the above direction which the trial Judge refused to give for the reason that it "would confuse the issue", the attention of the jury was plainly alerted, by the instructions actually given, as to the specific view, it was necessary for them to form on the evidence, before they could legally return a verdict of guilty against the two prisoners.

With deference for those who are of a contrary opinion, a consideration of the whole address leaves no doubt in my mind that any reasonable jury abiding by the instructions of the trial Judge could not conclude as to the guilt of the two accused unless convinced beyond doubt that there existed between them an agreement to co-operate in bringing about a sale of a drug to Smith. This conclusion is, I think, fully supported by the following extracts of the address of the Judge:—

> The accused person is always considered innocent until the opposite is proven. The burden is upon the Crown to prove the guilt of the accused, to prove every material fact necessary for conviction and prove all the material ingredients of the crime and that it was committed by these accused.
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> * * *
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> That presumption of innocence continues until there is put before you a body of evidence which establishes in your mind beyond a reasonable doubt, that the crime alleged has been committed and that it has been committed by these accused.

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* * *

The accused are not charged with selling or attempting to sell a drug nor with possession of drugs; they are charged with conspiracy to sell a drug.

* * *

A conspiracy is an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. We are concerned only with the first part of the definition that is, a conspiracy is an agreement of two or more persons to do an unlawful act.

* * *

Perhaps I could put it more simply, that the Crown must prove that the two accused combined together in a plan to sell a drug to constable Smith.

* * *

The essence of a crime of conspiracy is the agreement to co-operate in bringing about the sale of a drug. As soon as that agreement to co-operate has been formed, the crime is complete.

* * *

In conspiracy cases, it is the plot or plan to act together in committing the offence which the law forbids and punishes.

* * *

It takes at least two people to form a conspiracy. Of course it follows that if one is innocent, the other cannot be guilty.

* * *

What constitutes the essence of the crime of conspiracy was again and otherwise made explicit by the trial Judge when he dealt with the particular rule of evidence applicable in conspiracy cases and by the illustrations he then gave on the matter. In this respect, he said:—

For example, in this case, the Crown is endeavouring to prove a conspiracy between these two accused. If a witness had come before you and said: "I was hiding behind a curtain in a room and I heard these two men talking together, agreeing together to co-operate in the sale of drugs to Smith", that would be direct evidence.

* * *

It would be obviously impossible in a great majority of cases, conspiracy cases, for the Crown to prove that two or more people met together and said: "Let us enter into an agreement together to sell drugs to so and so".

* * *

A conspiracy may, when the evidence warrants, be inferred from the conduct of the parties, that is, from what they said and what they did.

* * *

Ordinarily, in criminal cases, anything said or done by one accused not in the presence of the other accused is not evidence against the other but in conspiracy cases, if the acts done or statements made are proved to be such as to show from their very nature that they are part of a common scheme and were in execution or furtherance of the common scheme, then such facts or statements are evidence against the other.

Let us assume, for the moment, that the man to whom constable Smith spoke on the telephone was the accused Kravenia. If you find as a fact that Kravenia said to Smith over the phone: "Give me your number and I will have Bill call you"; and if you find as a fact that the accused Kravenia then phoned the accused Tomilin; and if you think that those two phone communications were steps necessarily taken in furtherance of a conspiracy between the two accused to sell drugs to Smith, then you could regard those two acts of Kravenia as evidence against Tomilin. Also if you find that Tomilin, as a result of a communication which he received from Kravenia in furtherance of the same conspiracy, telephoned to Smith and later went out to the Shell Service Station with forty caps of drugs, you could regard that act of Tomilin as evidence against Kravenia.

With these instructions, the majority of the Court of Appeal, however, expressed the view that:—

The defence not put to the jury was that even if the jury found as a fact that the appellant knew from the telephone inquiries that an unknown person wished to speak to Tomilin in order to arrange to buy illegal drugs from the latter and that the appellant gave Tomilin's telephone number to that person and that person's number to Tomilin, then such knowledge and conduct would not be sufficient to convict the appellant of conspiracy unless the jury could find as an additional fact that this knowledge and conduct, tested in the light of all surrounding circumstances, prove him party to an agreement with Tomilin for the sale of drugs to Stancil Smith.

With deference, I must say that the directions actually given to the jury made it very plain that they could not convict either one of the prisoners of conspiracy and that indeed the two of them were entitled to an acquittal unless and until they could find, as the very essential fact in the case, that both had agreed to co-operate together in bringing about a sale of drugs to Smith.

To the foregoing must be added that, as further indicated to the jury by the trial Judge, the case as actually submitted to them by the Crown was "to draw from all the evidence the inference that these two accused were working together in disposing of drugs", and that, as submitted to them by counsel for the accused, the defence was, as stated to the police officers by Kravenia, that the latter "was not in the drug business", that Kravenia "denied that from the beginning to the end" and that the Crown had failed to prove that the prisoners had conspired together.

It thus appears from the address and the actual course of trial before the jury, that the true and only question they were left with for determination was whether or not the two accused were engaged in the drug traffic, were co-operating in the same and had planned to sell drugs to Smith.

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Once, as in this case, a jury is instructed that they must comply with the directions given as to the law, that the Crown must prove all the elements of the offence charged, which is single and does not include a lesser one, and that these elements are clearly explained, several times and in many ways, any reasonable jury ought to be taken to have understood that, unless they were convinced beyond a reasonable doubt that all these material elements were proved, it would be a violation of their oath to return a verdict of guilty of the crime charged. It is not necessary for the trial Judge to go over the matter again and tell them, what is necessarily and plainly implied in such directions, that it is not sufficient if only some of the essential facts are proved. Nor in such case is there an obligation—but it may be very well confusing—to instruct the jury as to the differences between the crime charged and another crime for which the accused is not indicted and as to which they are not called upon to give consideration and a verdict.

In brief, the real defence of respondent was that the Crown had failed to prove the only offence charged. The submission that he might be guilty of another offence was only another way to express the same defence; the trial Judge, anxious to avoid confusing the jury, refused to entertain the request of the defence; this refusal did not, in the slightest, affect the fact that the true defence of the accused was put to the jury and that what they were plainly required to consider and determine was whether or not the accused had agreed to co-operate in bringing about the sale of drugs to Smith.

For these reasons, I would allow the appeal for the Crown, quash the judgment of the Court of Appeal and restore the verdict of the jury.

ESTEY J.:—The respondent was convicted of conspiring with Tomilin to commit the indictable offence of selling a drug contrary to *The Opium and Narcotic Drug Act*. The respondent alone appealed and the appellate court directed a new trial, Mr. Justice Sydney Smith dissenting. The Crown, in this appeal, asks that the conviction at trial be restored.

The charge contained no other count than that of conspiracy. The learned trial judge, in instructing the jury, explained the relevant law in respect to conspiracy and dis-

cussed the evidence in relation thereto so completely and accurately that no exception has been taken thereto. However, at the conclusion of the charge counsel for the respondent asked that the learned judge instruct the jury as to the law in respect to aiding and abetting and that, if the jury found respondent did no more than aid and abet, he was not guilty of conspiracy. The learned judge refused, being of the opinion that would but tend to confuse the issue.

The offence of conspiracy is committed only if it be found that two or more persons agreed to commit an indictable offence. Once the agreement is made the offence is committed. That it was not carried out or executed is not an issue. Conspiracy is, therefore, an offence separate and distinct from the offence in respect to the commission of which the parties conspired. *Rex* v. *Weiss* (1) (1913) 22 C.C.C. 42; *Rex* v. *Brown* (2). Lawrence J., in a British case, stated: "A charge of conspiracy is not the same as one of aiding and abetting." *Rex* v. *Kupferberg* (3). The difference important in this case between the offence of conspiracy and that of aiding and abetting is that an agreement is not an essential element in the latter offence. However, in the latter those charged may have acted by mutual consent, or jointly, or even by virtue of an agreement. It may be added that, while at common law aiding and abetting was a separate and distinct offence, under the *Criminal Code,* by virtue of s. 69, one who aids and abets is a party to the principal offence.

The agreement essential to a conspiracy is not of a type that is normally reduced to writing. Almost invariably it must be found as an inference or conclusion to be drawn from a consideration of the conduct, including written or spoken words, of the parties. Whether there was such an agreement, or whether the parties were acting in concert, jointly or independently, often presents a problem difficult of solution and in respect of which confusion may arise where a charge contains a count of conspiracy and of the substantive offence. Because of this possibility the authorities indicate that a charge which contains a count of conspiracy and of the substantive offence, while permissible, imposes upon the presiding judge a duty to define and distinguish the respective issues with great care. As stated by

(1) (1913) 22 Can. C.C. 42.
(2) (1945) 85 Can. C.C. 91.
(3) 1918 13 Cr. App. R. 166 at 168.

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Sankey J. in *Rex* v. *Luberg* (1), where the indictment included a charge of conspiracy in obtaining goods by false pretences:

> It is a perfectly admissible and proper course to pursue, and a course which is often pursued, but we think that if that course is pursued, great care and great caution is necessary during the hearing of the evidence to be quite sure that no evidence is given which is inadmissible, and great care is required in the summing-up to keep all the several issues perfectly clear.

See also *Rex* v. *Hill and McDonald* (2).

While no other count than that of conspiracy was included in the judgment, the granting of counsel's request to instruct the jury with respect to aiding and abetting provided a similar possibility of confusion. That the learned trial judge had this in mind, both as he instructed the jury and when refusing the request of counsel on behalf of the respondent, would appear to be evident from his statement made in the course of his charge:

> The accused are not charged with selling or attempting to sell a drug, nor with possession of drugs. They are charged with conspiracy to sell a drug.
>
> A conspiracy is an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. We are concerned only with the first part of the definition, that is, a conspiracy is an agreement of two or more persons to do an unlawful act.

This is not a case where the accused was charged with an offence which, under the *Criminal Code,* contains one or more lesser offences. In those cases, where the evidence justifies it, there is a duty upon the trial judge to instruct the jury that if they do not find the accused guilty of the major offence they should then consider whether he is guilty of the lesser offence and should instruct them with regard thereto. The instruction with respect to the lesser offence is not by way of a defence to the major charge, but is relevant and to be considered only if the jury find him not guilty of the major offence.

Respondent's defence was that he had not agreed with Tomilin and, therefore, had not conspired to commit the offence of conspiracy as charged. Neither respondent nor Tomilin gave evidence or called witnesses. The learned trial judge, in the course of his instructions to the jury, stated:

(1) (1926) 19 Cr. App. R. 133 at 137.

(2) [1944] O.W.N. 581.

Now I come to the defence. The accused have put the Crown to the proof of the charge against them, as they are entitled to do. Defence counsel have argued that a case of conspiracy has not been made out. That is for you to say.

The accused Kravenia stated to police officers that he was not in the drug business, denied that from beginning to end; and the defence, as far as Kravenia is concerned, is that all he did was innocently to give Tomilin Smith's telephone number.

On behalf of the respondent it was contended that his conduct throughout was that if an innocent man, but, even if not entirely innocent, it could be no more than an aiding and abetting of Tomilin and, in any event, it could not support a conclusion that he had agreed with Tomilin to commit the offence of selling the drug and, therefore, he was innocent of the offence charged.

In all this the respondent's defence is that he had not agreed with Tomilin and, therefore, was not guilty. The learned trial judge, in language that was clear and explicit, made it abundantly plain that if there was no agreement the respondent was not guilty. That was the entire issue and, having regard to the evidence adduced and the charge to the jury, there can be no doubt that the jury clearly understood that issue. It was in order that the jury might not become confused in respect thereto that the learned trial judge was prompted to refuse the request of counsel for the respondent that he should embark upon a discussion of aiding and abetting.

It is suggested the learned trial judge, by his statement including the words "that all he did was innocently to give Tomilin Smith's telephone number," may have misled the jury to conclude that if they were not satisfied that respondent's relations with Tomilin were innocent they might conclude that he had conspired as alleged. It is difficult to conclude that a jury, apart from an affirmative suggestion not here present, would be so misled as to conclude that by negativing his innocence, without more, they might arrive at an affirmative conclusion to the effect that he and Tomilin had conspired. Even if an inference to that effect might be drawn from such a statement in another context, when read and construed with the charge as a whole, as it must be, it would appear, with great respect, that the jury would not be misled. The learned trial judge had already explained the essentials of the agreement and made it abundantly clear that in order to find the accused guilty

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they must find that the respondent and Tomilin had, in fact, agreed, and it was the conduct of both parties that had to be considered in order to determine whether such an agreement had been made. This the learned trial judge emphasized in the following statement:

> So what the Crown must prove in this case to your satisfaction beyond a reasonable doubt is that between the 6th and 9th days of January, 1954, at the City of Vancouver the two accused entered into an agreement or had a concerted purpose or a common design to sell diacetylmorphine hydrochloride to Constable Smith.

Moreover, that the jury would not be misled to draw such a conclusion or inference from the statement already referred to is strengthened by the caution which the learned trial judge immediately gave to the jury in the following terms:

> In this case as in most conspiracy cases, the evidence adduced in proof of the alleged conspiracy is circumstantial evidence. Where you are asked to infer conspiracy from the circumstances surrounding the case, as in all cases of circumstantial evidence, you must, before convicting, find not merely that the circumstances are consistent with guilt but also that they are inconsistent with innocence.

In my view the jury would not be misled as suggested. The appeal should be allowed and the conviction at trial restored.

CARTWRIGHT J. (dissenting):—On May 31, 1954, the respondent and one William Tomilin were convicted, after trial before Whittaker J. and a jury, of conspiring to commit an indictable offence, namely to sell a drug, to wit diacetylmorphine hydrochloride (heroin) to one Smith, without a licence or other lawful authority. The Court of Appeal for British Columbia, by a majority, allowed the respondent's appeal and directed a new trial. O'Halloran J.A., with whom Bird J.A. agreed, was of opinion that a defence open to the respondent on the evidence was not only not put to the jury by the learned trial judge but was in effect withdrawn from their consideration. Sidney Smith J.A. dissenting would have dismissed the appeal being of the view that the charge of the learned trial judge was sufficient. On this point of law the Attorney-General appeals to this Court pursuant to s. 1023 (3) (now s. 598 (1)) of the *Criminal Code*.

His Lordship proceeded to review the evidence in some detail and continued:—

It was not argued that there was not sufficient evidence to sustain the verdict and it was conceded that the learned trial judge instructed the jury fully and accurately as to the law relating to criminal conspiracy. He then pointed out to the jury that the evidence was circumstantial and instructed them as to the rule in *Hodge's Case* (1). He also instructed them fully as to their duty to give the accused the benefit of any reasonable doubt. His summary of the evidence was fair and accurate.

When, towards the end of his charge, the learned trial judge came to deal with the theories of the defence he did so as follows:—

> Now I come to the defence. The accused have put the Crown to the proof of the charge against them, as they are entitled to do. Defence counsel have argued that a case of conspiracy has not been made out. This is for you to say.
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> The accused Kravenia stated to police officers that he was not in the drug business, denied that from beginning to end; and the defence, as far as Kravenia is concerned, is that all he did was innocently to give Tomilin Smith's telephone number.

He then concluded his charge by reminding the jury of the rule in *Hodge's Case* and as to their duty to acquit if they had a reasonable doubt as to the guilt of the accused.

The view of the majority in the Court of Appeal as to the defect in the charge is stated as follows in the reasons of O'Halloran J.A.:—

> The defence not put to the jury was, that even if the jury found as a fact that appellant knew from the telephone enquiries that an unknown person wished to speak to Tomilin in order to arrange to buy illegal drugs from the latter, and that appellant gave Tomilin's telephone number to that person, and that person's number to Tomilin, then such knowledge and conduct would not be sufficient to convict appellant of conspiracy, unless the jury could find as an additional fact, that this knowledge and conduct tested in the light of all surrounding circumstances proved him party to an agreement with Tomilin for the sale of drugs to Stancil Smith.

As Mr. Brown points out, this passage is open to the construction that the learned Justice of Appeal mistakenly thought that the evidence was that Smith had told the respondent that he wished to speak to Tomilin in order to arrange to buy drugs, whereas actually it indicated that Smith had on each occasion asked for "Harry" and that it was the respondent who put forward the name of Tomilin

(1) (1838) 2 Lewin C.C. 227; 168 E.R. 1136.

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as a prospective vendor, but, assuming this to be so, I do not regard the suggested mistake as of decisive importance. The fact that the evidence for the prosecution was even stronger than the learned Justice of Appeal stated it to be would not affect the duty of the learned trial judge to place before the jury a defence open to the accused on the evidence.

The alleged defect in the charge is that the second of the two paragraphs, quoted above, in which the learned trial judge dealt with the theories of the defence might mislead the jury into thinking that if they rejected the submission that the respondent had acted innocently and found that, in his conversations with Smith, he was acting with guilty knowledge of the fact that Tomilin was selling drugs and with the guilty intention of facilitating a sale by Tomilin to Smith, that would be fatal to the defence of the respondent as "the" defence (i.e., the only defence) as far as he was concerned was that he was acting innocently, and so might prevent them from directing their minds to the question whether the respondent might not have done all that he did without any agreement or arrangement with Tomilin, and thus have been in the position not of a conspirator but merely of one who, (as it was put by Lawrence J. giving the judgment of the Court of Criminal Appeal in *R.* v. *Kupferberg* (1)) "appreciated what was going on and did something to further it." Counsel for the defence asked for a direction of the sort which the majority of the Court of Appeal have held to have been necessary, and, while in my view it was not incumbent upon the learned trial judge to deal with the law as to aiding and abetting the commission of an offence, I am of opinion that he should have acceded to the request of counsel to the extent of giving such further direction as would have removed the possibility of the jury being misled in the manner suggested above. It would, I think, have been sufficient if the learned trial judge had told the jury that, even if they rejected the theory of the defence, which he had put before them, that all that the respondent did was innocently done and found that he was acting with the guilty knowledge above referred to, still, in order to convict they must be satisfied beyond a reasonable doubt

(1) 13 Cr. App. R. 166 at 168.

that he was acting in concert with Tomilin and not merely doing, without agreement, something to further the guilty purpose of which he was aware.

I feel the force of Mr. Brown's argument that, in view of the full and clear direction given by the learned trial judge as to agreement between the accused being an essential element in the crime of conspiracy, it is difficult to suppose that the jury were misled by the omission complained of. But the objection of counsel was not that the learned trial judge had failed to state the law fully and clearly but rather that when he came to relate the theory of the defence to the law which he had correctly stated he did so in words which may have misled the jury, and I find myself unable to say that the conclusion of the majority of the Court of Appeal that the jury may have been so misled was wrong in law.

In the result, I would dismiss the appeal.

Appeal allowed and jury's verdict restored.

Solicitors for the appellant: *Russell & DuMoulin.*

Solicitors for the respondent: *McGivern & Vance.*