

ISRAEL SCHAEFER.....APPELLANT;

1919
*Feb. 18.

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL
SIDE, PROVINCE OF QUEBEC.*Procedure—Motion—Special leave to inscribe—Supreme Court Rule 37.*

A motion for special leave to inscribe an appeal made necessary by the appellant's default should not be granted, if, in the opinion of the court, the judgment appealed from is so clearly right that an appeal from it would be hopeless.

MOTION before a judge in chambers for leave to inscribe an appeal from the Court of King's Bench, appeal side, Province of Quebec (1).

The material facts of the case are stated in the judgment now reported.

R. Stanley Weir K.C. for appellant.

Jos. Walsh K.C. for respondent.

ANGLIN J.—The defendant moves for leave to inscribe an appeal from the Court of King's Bench (Quebec) on the list for the current term. He was convicted on the 20th of June, 1916, upon an indictment charging him with having committed treason. The "overt acts" alleged, and to which evidence was directed, were the sale of tickets, after war was declared in 1914, to certain subjects of Austria-Hungary to enable them to leave Canada en route to Austria-Hungary for the purpose of assisting the Government of that country, a public enemy, and furnishing them for the same purpose with other documents to further

*PRESENT:—Anglin J. in chambers.

(1) Q. R. 27 K.B. 233.

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their transportation to Austria-Hungary, and counselling them to falsely assume the character of Roumanians. Having been refused a reserved case by the trial judge on the ground that the verdict was against the weight of evidence, the defendant applied to the Court of King's Bench (appeal side) for leave to appeal. His application was dismissed on the 4th of December, 1917, and from that judgment no appeal was taken. When called up for sentence on the 9th of April, 1918, the defendant moved in arrest of judgment on the ground that the indictment did not charge any indictable offence—did not charge him with assisting a public enemy at war with His Majesty, and did not aver overt acts as required by sect. 847 of the Criminal Code—and also that the trial judge had misdirected the jury by instructing them that the accused had assisted the Empire of Austria-Hungary in three ways; whereas the accused was not so charged. By his motion the defendant also asked for a reserved case on these points. That having been refused, he applied to the Court of King's Bench (appeal side) for leave to appeal and for an order directing that a case should be stated submitting these points. His application was dismissed by that court on the 21st of June, 1918, Lavergne J. dissenting. The alleged misdirection is not noticed in any of the judgments delivered. Indeed, the appeal on that ground was manifestly frivolous, the charge of the learned trial judge having been not merely scrupulously fair, but distinctly favourable to the accused. The majority of the Court of King's Bench dealt with the motion as depending solely on the sufficiency of the indictment, and the dissent of Mr. Justice Lavergne was based on the ground that the acts charged as "overt acts" are insufficient because they failed to "disclose any

hostile intention or action" on the part of the accused. He construed the indictment as charging the purpose of assisting the enemy against the ticket purchasers and not against the defendant. With deference, I think the learned judge was hypercritical. The statement of the purpose of aiding the enemy in the indictment immediately follows the statement that war was and is being prosecuted and carried on between Great Britain and Austria-Hungary "as the said Israel Schaefer then and there well knew." It is in my opinion reasonably clear that the purpose was charged as that of Schaefer, and not that of the ten ticket purchasers. That the evidence was sufficient to support the finding of the existence of that purpose involved in the verdict of "guilty" is *res adjudicata* under the unappealed judgment of the Court of King's Bench of the 4th of December, 1917. When the learned dissenting judge adds that:

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To assist persons who are not proved to have assisted the enemy in any way cannot surely be regarded as an offence,

I venture to think he misapprehends the essential elements of the crime of which the defendant has been convicted. That the rendering of actual assistance to the enemy was prevented by the timely intervention of the Canadian authorities is no answer to the charge.

I am, with respect, unable to appreciate the force of the learned dissenting judge's objection to the sufficiency of the indictment. "Overt acts" and a treasonable purpose in committing them are in my opinion charged by it.

The appellant is admittedly in gross default in the prosecution of his appeal to this court. No sufficient reason has been shewn for his omission to inscribe it for the October sittings. His failure to inscribe it for

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the present sittings is still less excusable. While counsel for the Crown does not actively oppose, he declines to consent to indulgence being extended. Under these circumstances, I think the motion before me should be disposed of on considerations similar to those which determine the granting or withholding of special leave to appeal to this court. Such leave is not granted where in the opinion of the court the judgment against which it is sought to appeal is clearly right. Being of the opinion that the judgment of the Court of King's Bench in the present case is so clearly right that an appeal from it would be hopeless, it would appear to be my duty to refuse the defendant's motion.