RAYMOND BOYER (PETITIONER).....APPELLANT; 1948

AND *Dec. 8
*Dec. 17

HIS MAJESTY THE KING.....RESPONDENT.

MOTION FOR LEAVE TO APPEAL UNDER SECTION 1025 (1), (NEW) OF THE CRIMINAL CODE OF CANADA.

Criminal Law—Appeal—Jurisdiction—Statute giving new right of appeal not retrospective—11-12 Geo. VI c. 39, s. 42, enacting s. 1025 (1) Criminal Code.

By 11-12 Geo. VI, c. 39, s. 42, s. 1025 (1) of the *Criminal Code* was repealed and the following substituted therefor: "Either the Attorney General or any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside or affirming a conviction or verdict of acquittal in respect

*PRESENT: Rinfret C.J. in Chambers.

(1) [1937] A.C. 377 at 389.

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of an indictable offence, on any question of law, if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced, or within such extended time thereafter as the judge to whom the application is made may for special reasons allow; in an appeal by the Attorney General the judge may impose such terms, if any, as he may see fit."

Held: that the enactment creates a new right of appeal, where none existed before, on any question of law raised in the Court of Appeal.

Held: also, that legislation conferring a new jurisdiction on an appellate court to entertain an appeal cannot be construed retrospectively, so as to cover cases arising prior to such legislation, unless there is something making unmistakeable the legislative intention that it should be so construed. *(Singer* v. *The King),* [1932] S.C.R. 70, approved and followed.

Semble: that if the new legislation does not apply to a case which arose prior to its coming into force, the old legislation, by virtue of s. 19 of the *Interpretation Act,* continues to apply.

MOTION by appellant before the Chief Justice of Canada in Chambers, for leave to appeal to this Court under s. 1025 (1) *Criminal Code,* from the judgment rendered by the Court of King's Bench (Appeal Side) of the Province of Quebec on November 30, 1948 (1), confirming the jury's verdict rendered against him on December 6, 1947, by which he was found guilty of the crime of conspiracy.

The motion was made under s. 1025(1) of the Criminal Code (R.S.C. 1927, c. 36), as enacted by 11-12 Geo. VI c. 39, s. 42. By the said amending Act, (s. 42), the following was substituted for s. 1025:

1025 (1) Either the Attorney-General or any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside or affirming a conviction or dismissing an appeal against a judgment or verdict of acquittal in respect of an indictable offence, on any question of law, if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced, or within such extended time thereafter as the judge to whom the application is made may for special reasons allow; in an appeal by the Attorney General the judge may impose such terms, if any, as he may see fit.

Lucien H. Gendron K.C. for the motion.

Philippe Brais K.C. contra.

THE CHIEF JUSTICE:—The petitioner prays that permission be granted him to appeal to the Supreme Court of Canada from the judgment rendered by the Court of

(1) Que. 1948 K.B. 829.

King's Bench (Appeal Side) of the Province of Quebec, confirming the verdict rendered against him, by which he was found guilty of the crime of conspiracy.

The petition is based exclusively on the new subsection one of section 1025 of the *Criminal Code of Canada,* which came into force on the 1st of November, 1948.

The petitioner does not allege, nor was it a fact, that, in the judgment of the Court of King's Bench (Appeal Side), affirming his conviction, there was any question of law on which there was dissent in the Court of King's Bench (Appeal Side) (*Criminal Code,* s. 1023). He does not allege, either, that the judgment of the Court of King's Bench (Appeal Side) conflicts with the judgment of any other Court of Appeal in a like case (former ss. 1 of s. 1025 of the *Criminal Code*). He relies entirely and exclusively, as above mentioned, upon the new ss. 1 of s. 1025, being Chap. 39, 11-12 George VI, s. 42, which has only acquired the force of law since the 1st day of November, 1948.

The preliminary question which it is essential to consider and to decide is, therefore, whether the petitioner, against whom the information was laid long before this new amendment became effective—the jury's verdict was rendered on the 6th of December, 1947 and judgment delivered accordingly by the presiding judge; notice of appeal was dated the same day and lodged in the Court of King's Bench (Appeal Side) on December 9, 1947—may invoke, in his favour, the new ss. 1 of s. 1025 in order to ask a judge of the Supreme Court of Canada to grant him leave to appeal to that Court on the questions of law debated and decided by the Court of King's Bench (Appeal Side).

The judgment of the Court of King's Bench (Appeal Side) was delivered on the 30th of November, 1948; and the contention of the petitioner is that, since the judgment from which he wishes to appeal was posterior to the coming into force of the new amendment, that is sufficient to enable him to take advantage of the law.

The point to be decided is, therefore, one concerning the jurisdiction of a judge of the Supreme Court of Canada to grant leave in the circumstances; and it is of great and general importance, because it stands, of course, for the first time to be decided and will likely govern the applica-

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bility of that new section to all petitions for leave to appeal which may come from all parts of the Dominion in the future, or at least for as long as that section remains part of the *Criminal Code*.

The argument of the petitioner in support of his contention is that, as the judgment of the Court of King's Bench (Appeal Side) was delivered after the new subsection became effective, the date of that judgment is the material one to be considered for the purpose of deciding whether the section is applicable or not.

It is said that the right of appeal accruing to the petitioner, or to any convicted prisoner, was only eventual prior to the judgment of the Court of King's Bench (Appeal Side), and that the right of appeal which the petitioner now seeks to exercise only arose when that judgment was rendered. It is contended the fact that a man committed an indictable offence and was brought before the Courts did not vest a right in the Crown as against him, nor vest in the accused person an immediate right of appeal either to the Court of King's Bench (Appeal Side), or to the Supreme Court of Canada; that the date of the commission of the offence cannot be the date upon which the prisoner's rights should be decided, because, if that were so, as the former ss. 1 of s. 1025 has been repealed by the new legislation and if the new ss. 1 of s. 1025 does not apply to him, he would be deprived of any right of appeal.

Of course, I do not agree that, if the new subsection one of s. 1025 does not apply to the present petitioner in the circumstances of his case, he is deprived of the right of appeal as was provided by the former ss. 1 of s. 1025. It would seem to me in that case that s. 19 (*c*) of the *Interpretation Act* would come to his relief, and that, if the new legislation does not apply to a case which arose prior to its coming into force, by force of s. 19 of the *Interpretation Act* the old legislation continues to apply to the cases that are not governed by the new ss. 1 of s. 1025.

Alternatively, the petitioner contends that the right to apply for leave to appeal in virtue of the new subsection is not a new right, because the right to apply existed under

the repealed ss. 1 of the former s. 1025 in cases where there was a conflict of authority, and that the new subsection merely changes the procedure.

Further, when confronted with a number of decisions rendered in civil cases, he sought to distinguish between those cases and informations brought under the *criminal code* and asked that the rule in the civil cases should not be applied.

There are, of course, a series of decisions in this Court, dating back to almost the beginning of the time when the judicial functions of the Court took effect and could be exercised, whereby this Court is without jurisdiction when the judgment intended to be appealed from was signed, or entered, or pronounced previous to the date when, by proclamation issued by order of the Governor in Council, the right of appeal to this Court was brought into being. *Taylor* v. *The Queen* (1), contains a long exposition of the law as then interpreted by the full Court (Richards, C.J.C., Ritchie, Strong, Taschereau and Fournier, JJ.). All the members of the Court gave reasons on the point now before me and they were unanimous in reaching the conclusion that the provision of the law coming into force subsequent to the date when the judgment sought to be appealed from had been signed, pronounced, or entered, cannot be given a retrospective effect and operate in order to give jurisdiction to the Supreme Court of Canada to hear an appeal from the judgment so signed, pronounced, or entered prior to the date when the new law became effective.

In 1891, in the case of *Hurtubise* v. *Desmarteau* (2), again the Court was unanimous in denying the right of appeal in a case where the judgment sought to be appealed from was delivered on the same day on which the amending Act came into force. It was decided that the Court had no jurisdiction, the appellant not having shown that the judgment was delivered subsequent to the passing of the amending Act.

In 1893 in *Williams* v. *Irvine* (3), the decision of the Court was that a new right of appeal did not extend to cases standing for judgment in the Superior Court prior to the passing of the Act. Fournier J. expressed the view that

(1) (1877) 1 S.C.R. 65.
(2) (1891) 19 S.C.R. 562.
(3) 22 S.C.R. 108.

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the statute was not applicable to cases already instituted, or pending, before the Courts, where no special words to that effect had been used in the statute. Taschereau J. merely stated that he would have been of the opinion that the Court had jurisdiction, but he said that he would not take part in the judgment. Sedgewick J. stated that in his opinion the appeal should be dismissed upon the authority of the case of *Couture* v. *Bouchard* (1), decided by this Court in December, 1892.

In *Hyde* v. *Lindsay* (2), the Court decided that the Act 60 and 61 Victoria, chap. 34, which restricted the right of appeal to the Supreme Court in cases from Ontario as therein specified, did not apply to a case in which the action was pending when the Act came into force, although the judgment directly appealed from may not have been pronounced until afterwards. The judgment of the Court was delivered by Taschereau J. who referred to *Hurtubise* v. *Desmarteau, Couture* v. *Bouchard* and *Williams* v. *Irvine supra*; and to *Cowen* v. *Evans* (3), *Mills* v. *Limoges* (4) and *The Montreal Street Railway* v. *Carrière* (5), where a footnote at that page states that an appeal in an action for $5,000 damages was dismissed by the Superior Court prior to the passing of 54 and 55 Victoria, chap. 25, but maintained by the Court of Queen's Bench on the 26th of April, 1893, for $600, was also quashed for want of jurisdiction, following the case of *Cowen* v. *Evans* (*supra*).

In *Hyde* v. *Lindsay supra,* Taschereau J. at p. 103, said:—

> Here we have the question presented under a statute taking away the right of appeal in cases where it existed previously. ***If the statute in former cases does not apply to pending cases, I do not see upon what principle we could hold that the statute in the present case does apply to pending cases.

In 1914 in *Doran* v. *Jewell* (6) it was held that an Act of Parliament enlarging the right of appeal to the Supreme Court of Canada did not apply to a case in which the action was instituted before the Act came into force. In that case the motion was referred to the Court by the registrar for an order to have the jurisdiction of the Court to hear the appeal affirmed and it was unanimously dismissed on the ground that the motion was concluded

(1) (1892) 21 S.C.R. 281.
(2) (1898) 29 S.C.R. 99.
(3) (1893) 22 S.C.R. 331.
(4) (1893) 22 S.C.R. 334.
(5) (1893) 22 S.C.R. 335.
(6) (1914) 49 S.C.R. 88.

adversely to the appellant by the authority of the several judgments previously delivered in this Court on the same point and also as a result of the judgment of the Judicial Committee of the Privy Council in the case of *Colonial Sugar Refining Co.* v. *Irvine* (1). This judgment of the Privy Council may be immediately referred to. The Judicial Committee was composed of Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley, Sir Ford North and Sir Arthur Wilson. The judgment of their Lordships was delivered by Lord Macnaghten and it was held that, although the right of appeal from the Supreme Court of Queensland to His Majesty in Council, given by the Order in Council of June 30, 1860, had been taken away by the Australian Commonwealth Judiciary Act, 1903, s. 39, sub-s. 2, and the only appeal therefrom now laid to the High Court of Australia, yet the Act was not retrospective, and the right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court afterwards was not taken away. At p. 372 Lord Macnaghten said:—

> As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is: Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

In 1920, in *Upper Canada College* v. *Smith* (2), the Court had before it the statute 6 George V, c. 24, s. 19, amended by 8 George V, c. 20, s. 58, by which s. 13 of the Ontario Statute of Frauds, R.S.O. 1914, c. 102 was enacted as follows:—

> No action shall be brought to charge any person for the payment of commission or other remuneration for the sale of real property unless

(1) [1905] A.C. 369.

(2) (1920) 61 S.C.R. 413.

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the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

It was held that this enactment was not retrospective and did not bar an action to recover commission under a contract made before it came into force. The majority of the Court agreed with Anglin J., as he then was, who, in his reasons, referred to a great number of authorities. Duff J., as he then was, at p. 417 recalled the well-known passage of Lord Coke (2 Inst. 292) in which it is laid down that it is a "rule and law of Parliament that regularly *nova constitutio futuris formam imponere debet non praeteritis*". And Mr. Justice Duff continued:—

and the rule that statutory enactments generally are to be regarded as intended only to regulate the future conduct of persons is, as Parke B. said in *Moon* v. *Durden*, in 1848 (1), "deeply founded in good sense and strict justice", because speaking generally it would not only be widely inconvenient but "a flagrant violation of natural justice" to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.

At p. 419 of the same judgment Mr. Justice Duff said:—

And even more numerous instances might be adduced of dicta enunciating the doctrine that the intention must appear from the words of the statute itself. "The principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively."

Mr. Justice Duff referred to the *Midland Rly. Co.* v. *Pye*, in 1861 (2), where there is a passage in the judgment of Erle C.J. approved by the Privy Council in *Young* v. *Adams* (3), at p. 476, in these words:—

Those whose duty it is to administer the laws very properly guard against giving to an Act of Parliament a retrospective operation unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language; because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

Speaking on the point that the change in the *Upper Canada College* case was only one of procedure, Mr. Justice Duff, at p. 423, said:—

The last mentioned rule (about procedure) rests upon the simple and intelligible reason stated by Mellish L.J. in *Republic of Costa Rica* v. *Erlanger* in 1876 (4) at p. 69, in these words:—

(1) 2 Ex. 22, at pages 42 and 43.
(2) 10 C.B.N.S. 179 at 191.
(3) [1898] A.C. 469.
(4) 3 Ch. D. 62.

"No suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed provided, of course, that no injustice is done."

Mr. Justice Duff then referred to the passage in the judgment of Lord Macnaghten in *Colonial Sugar Refining Co.* v. *Irving supra* above quoted.

At p. 429 of the same judgment Mr. Justice Duff refers to *Moon* v. *Durden* and states that in that case *Helmore* v. *Shuter* (1), was accepted expressly by three of the judges, Platt, Rolfe and Parke BB., as being unquestionably a sound decision; and Rolfe and Parke BB. explicitly treated it as an example of the application of the rule that prima facie statutes are to be construed as prospective, which indeed is the ratio upon which the decision was in terms put by the Court that pronounced it.

In *Singer* v. *The King* (2), the Court held that: "Legislation conferring a new jurisdiction on an appellate court to entertain an appeal cannot be construed retrospectively, so as to cover cases arising prior to such legislation, unless there is something making unmistakeable the legislative intention that it should be so construed. The matter is one of substance and of right." *Doran* v. *Jewell* (3) *and Upper Canada College* v. *Smith* (4) were relied upon. In the *Singer* case it was held that 21-22 George V, c. 28, s. 15 (amending s. 1025 of the Criminal Code) did not give a right to appeal to the Supreme Court of Canada from the sustaining of the appellant's conviction by a judgment of the Appellate Division of Ontario rendered prior to such legislation.

Singer had been convicted on the 23rd of March, 1931, and his conviction was sustained by the Appellate Division on the 26th of June, 1931. The statute, in virtue of which Singer sought to appeal to this Court, became law on the 1st of September, 1931. Anglin C.J.C., delivering the judgment of the Court, at p. 72 stated:—

It is common ground that, unless there is something making unmistakeable the intention of the Legislature that a retrospective construction should be put upon the legislation so that it may cover cases arising prior thereto, no clause, conferring a new jurisdiction on an appellate court to entertain an appeal, can be so construed. The matter is one of substance and of right.

(1) 2 Sh. 17.
(2) [1932] S.C.R. 70.
(3) (1914) 49 S.C.R. 88.
(4) (1920) 61 S.C.R. 413.

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The decision in *Doran* v. *Jewell* (1) is binding upon us and is conclusive to that effect. If further authority be required on this point, it may be found in *Upper Canada College* v. *Smith* (2).

I wish to underline the following words in this decision of the Court:—

> Unless there is something making unmistakeable the intention of the Legislature that a retrospective construction should be put upon the legislation so that it may cover cases arising prior thereto, no clause, conferring a new jurisdiction on an appellate court to entertain an appeal, can be so construed. The matter is one of substance and of right.

This decision assumes an added importance from the fact that the amendment there considered was one enacted to modify the same section 1025 as is invoked in the present case, and the Court there said that legislation conferring a new jurisdiction on an appellate court to entertain an appeal cannot be construed retrospectively so as to cover "cases arising prior to such legislation"—words which might refer either to the institution of the case, or at least to the actual beginning of the trial in the original Court, but surely not to the mere incident of the judgment of the Court of Appeal.

Further, the decision in *Doran* v. *Jewell* (a civil case) is there stated to be "binding upon us and is conclusive to that effect"; and the decision in *Upper Canada College* v. *Smith* (another civil case) is also stated as being "a further authority on this point".

The question is not whether the case is civil or criminal. No distinction is made in that respect in the jurisprudence. The question is solely: What is the character of the legislation? If, in terms or by necessary intendment, it is retrospective, then, of course, it produces retroactive effects; but otherwise, it is prospective only and becomes applicable only for the future.

It would appear from the judgment in the *Singer* case that not only is legislation conferring a new jurisdiction upon an Appellate Court to entertain an appeal—which is the very case that we have in the present petition—not to be construed retrospectively so as to cover cases arising prior to such legislation, but also, although the *Singer* case was a criminal case, it was put exactly on the same footing

(1) (1914) 49 S.C.R. 88. (2) (1920) 61 S.C.R. 413.

in that respect as *Doran* v. *Jewell* and *Upper Canada College* v. *Smith,* both civil cases which were declared binding upon this Court and conclusive to that effect.

I cannot see any distinction that can be made between the *Singer* case and the present one. It covers exactly the situation that we have as a result of the petition which I now have before me; and I would say that it is *a fortiori* binding upon this Court and conclusive, because, although the two cases cited by Anglin C.J.C. were civil cases, the *Singer* case was not only a criminal case but it came before this Court precisely on the application of a new amendment to section 1025 of the Criminal Code, which was practically to the same effect as the new subsection one of section 1025 which is now invoked by the petitioner.

Further reference might be made to the judgment of the Appellate Division of the Supreme Court of Alberta in *Rex* v. *Rivet* (1), where it is stated:—

> Legislation creating or abolishing a right of appeal does not relate merely to procedure and will not be given a retrospective effect in the absence of an apparent intention to the contrary. Therefore, sub-para. (*k*) of para. (7) of s. 2 of the Criminal Code (am. 1943, c. 23, s. 1), designating a Court of Appeal in criminal matters for the Northwest Territories, is ineffective to confer jurisdiction upon the Alberta Court of Appeal in respect of appeals from convictions, made prior to the enactment of such legislation.

I might add that I do not agree with the contention of Counsel for the petitioner that the new subsection one of section 1025 does not create a new right of appeal. Up to the coming into force of that new subsection, there existed only two rights of appeal in favour of the person convicted, whose conviction had been affirmed by the Court of Appeal. One was under section 1023: "On any question of law on which there has been dissent in the Court of Appeal"; the other was under the former subsection one of section 1025: "If the judgment appealed from conflicts with the judgment of any other court of appeal in a like case".

Under the new subsection one of section 1025 "any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court

(1) 81 C.C.C. 377.

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of appeal setting aside or affirming a conviction or dismissing an appeal against a judgment or verdict of acquittal in respect of an indictable offence, on any question of law". The only requirement is that leave to appeal must be granted by a judge of the Supreme Court of Canada.

It is quite clear and evident that a new right of appeal is created where none existed before; that is, while section 1023 was left as it was, the new subsection one of section 1025, now substituted for the former one, has done away with the need of showing a conflict between two courts of appeal and a new right of appeal is created "on any question of law". It does not even require that there should be a dissent in the Court of Appeal, nor that any of the judges who took part in the judgment in that Court should have entertained the question of law upon which the convicted person may ask for leave to appeal. It is now sufficient that the person convicted may have raised a question of law in the Court of Appeal and, although every one of the judges in that Court refused to accept that proposition of law as being sound, the mere fact that the said question of law was raised by the convicted person in the Court appealed from is sufficient to give him a ground upon which he may ask a judge of the Supreme Court of Canada to grant leave to appeal on that question to this Court.

For these reasons I am of opinion that the petitioner herein cannot invoke the new subsection one of section 1025 in his case; that, as a consequence, since he does not allege either dissent or conflict and as, in fact, no dissent exists and no conflict has been shown, I am without jurisdiction to grant leave to appeal in the present instance.

Having come to that conclusion, I have nothing to say about the other questions raised by the petitioner.

The petition is dismissed.

Leave to appeal dismissed.