[COURT OF APPEAL.]

Rex v. Lunan.

International Law—Diplomatic Immunity—Extent and Limits of Privilege—How Asserted—Documents Taken from Embassy and Produced by Resident of Canada on Trial of Canadian for Offence against Canadian Criminal Law

On the trial of a resident of Canada for conspiracy to commit an indictable offence, evidence was given by one G, also a resident of Canada, and a former employee of a foreign embassy. G gave evidence respecting certain documents which he had improperly taken from the embassy when leaving, and identified some of those documents. It was objected, on behalf of the accused, that the documents were the property of the embassy, and were privileged from production under the doctrine of diplomatic immunity. No objection was made by or on behalf of the ambassador or the foreign government concerned.

Held, the documents were properly admitted in evidence. The doctrine of diplomatic immunity was well established in international law, but there was ample authority in the decided cases for saying that the privilege was that of the ambassador himself. *Fisher v. Begrez* (1833), 2 Cr. & M. 240; *Rex v. A.B.*, [1941] 1 K.B. 454, referred to. No process of the Court had been required against the ambassador or anyone to whom the immunity might be extended, and the proceeding in no way affected his person or property, or that of anyone on his staff. The accused had no status to raise the objection. *Haile Selassie v. Cable and Wireless Limited*, [1938] Ch. 839; *In re Russian Bank for Foreign Trade*, [1933] Ch. 745 at 749, referred to.

Quaere, whether, even if the accused had been found to have the necessary status, the privilege would have applied, or the ambassador himself would have been entitled to immunity, where the acts with which the prosecution was concerned were contrary to the safety and welfare of Canada. Hall's International Law, 8th ed. 1924, pp. 223-4, referred to.

Evidence—Admissibility of Evidence Given on Oath in Former Proceedings — Incriminating Answers — Royal Commission — The Canada Evidence Act, R.S.C. 1927, *c.* 59, *ss.* 2, 5—*The Inquiries Act, R.S.C.* 1927, *c.* 99.

There is nothing in s. 2 of The Canada Evidence Act to restrict the application of the Act to judicial proceedings in the strict sense, and the Act applies to a Royal Commission appointed under The Inquiries Act to investigate the communication of information to the agents of a foreign power by public officials and other persons in positions of trust. Evidence given before such a Commission is therefore subject to s. 5 of the Act, and is admissible in evidence in subsequent proceedings against the person giving it, if he has not objected to answer, subject to the rules laid down in *Rex v. Mazerall*, [1946] O.R. 762.

AN APPEAL by an accused from his conviction for conspiracy to commit a breach of s. 3(1)(*c*) of The Official Secrets Act, 1939 (Dom.), c. 49.

6th February 1947. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

G. A. Martin, K.C., for the accused, appellant: 1. There was no jurisdiction in the trial judge for want of proof of any proper election. The accused was committed for trial, and an indict-

ment was found against him by the grand jury in the Supreme Court. After this, he is alleged to have appeared and elected for a speedy trial, but there is no formal record of such election. Counsel, on the accused's arraignment, took formal objection to the jurisdiction, and no new election was then taken. The Court is one of limited jurisdiction, and the record must contain everything necessary to show jurisdiction. The Criminal Code, R.S.C. 1927, c. 36, s. 833, and Form 61, contemplate a formal record showing the fact of election. [LAIDLAW J.A.: If the accused did in fact elect before the County Court Judge, do you say that there was no jurisdiction because there is no record of such election?] Yes, and we submit further that the affidavit submitted by the respondent (even if it is received by this Court) does not establish a valid election, because it does not show compliance with ss. 825(2) and 827: *Rex v. Yong Jong,* 50 B.C.R. 433, 66 C.C.C. 62, [1936] 2 W.W.R. 147, [1936] 3 D.L.R. 60.

2. Gouzenko's evidence, and the documents which he identified, were inadmissible because of the recognized principle of diplomatic immunity. They were taken by Gouzenko from the embassy, and were the property of the Russian Government. Gouzenko, as a member of the embassy staff, was privileged against giving evidence in a Canadian court, and that privilege could be waived only by his sovereign or by the ambassador, not by Gouzenko himself. Similarly, the documents were protected, and could not be produced without the express consent of the sovereign or ambassador.

Diplomatic immunity extends not only to the person, but also to the papers, of the ambassador and his staff: Moore, International Law Digest, 1906, vol. 4, pp. 642, 646, 648; Oppenheim, International Law, 4th ed. 1928, vol. 1, p. 626; Taylor, International Public Law, 1901, p. 338. [ROBERTSON C.J.O.: The question that naturally arises is whether this appellant is entitled to any advantage from this immunity.] If my argument is correct, the evidence should never have been admitted at all, and we are surely entitled to avail ourselves of that. [LAIDLAW J.A.: If a person has lost his diplomatic character, is he not entitled to give evidence as to something affecting a citizen of this country?] Not where his knowledge, and the documents which he produces, came into his possession while the privilege existed. [ROBERTSON C.J.O.: Is not the privilege

one which must be asserted?] No, it exists unless there is an express waiver: *In re Republic of Bolivia Exploration Syndicate, Limited,* [1914] 1 Ch. 139; *Rex v. A.B.,* [1941] 1 K.B. 454.

[ROBERTSON C.J.O.: Do you argue that international law overrides the ordinary law of the land?] No, but there is a presumption that the common law is not in conflict with international law.

Other authorities are: *The Amazone,* [1940] P. 40; *In re Suarez; Suarez v. Suarez,* [1918] 1 Ch. 176. The judgment of the Quebec Court of King's Bench, Appeal Side, in *Rex v. Rose* (not yet reported) is not binding on this Court, and should not be followed, because it is wrongly decided. *Engelke v. Musmann,* [1928] A.C. 433, does not support the reasoning which is there based upon it. The status of the documents here is determined by the facts that Zabotin was a duly accredited representative of a foreign State, and that they came from his safe in the embassy. The legal results of that status are for the Court to determine.

[ROACH J.A.: One would have thought that an immunity granted by the Crown to a foreign State could not be invoked by a subject of the Crown to the prejudice of the Crown.] It is a matter of public policy that such evidence should not be admitted in the courts.

The general principle that illegality in obtaining evidence does not affect its admissibility does not make these documents admissible if they are protected by diplomatic immunity.

3. The trial judge refused to hold a *voir dire* as to the admissibility of the evidence given by the accused before the Royal Commission, considering himself bound by *Rex v. Mazerall,* [1946] O.R. 762, 86 C.C.C. 321, 2 C.R. 261, [1946] 4 D.L.R. 791. The *Mazerall* case did not decide that question, and nothing in that decision precludes the accused from giving evidence on the issue of admissibility, and as to whether or not the conditions of admissibility were present. [ROBERTSON C.J.O.: There is nothing to prevent his objecting, without a *voir dire,* and giving evidence he wishes on the issue.] But the evidence on that point should be given before the depositions are admitted in evidence. [ROBERTSON C.J.O.: But as Lord Sumner pointed out in *Ibrahim v. The King,* [1914] A.C. 599, the rule requiring a *voir dire* in the case of a confession is an exceptional one, devised for particular circumstances.]

The Canada Evidence Act, R.S.C. 1927, c. 59, does not apply to the evidence and proceedings before the Royal Commission, because s. 2 of that Act presupposes a tribunal which is applying the ordinary rules of evidence, which these Commissioners clearly were not doing. That being so, the accused was not a "witness" within the meaning of s. 5, and could not have protection under that section.

J. R. Cartwright, K.C. (*Lee A. Kelley, K.C.,* with him), for the Crown, respondent: 1. The indictment was the first time a charge of conspiracy was laid against the accused, the committal for trial having been made on charges of substantive offences under The Official Secrets Act. It was on the indictment so found that the accused was taken before the County Court Judge, and elected a speedy trial. The previous finding of the indictment clearly did not deprive him of his right to elect: *Re Rex v. Daly et al.,* 55 O.L.R. 156, 41 C.C.C. 354, [1924] 1 D.L.R. 819; *Giroux v. The King* (1917), 56 S.C.R. 63, 29 C.C.C. 258, 39 D.L.R. 190; *Rex v. Bryden* (1921), 54 N.S.R. 411, 24 C.C.C. 198, 61 D.L.R. 477.

As to what took place, we ask leave to file an affidavit setting out the proceedings before the County Court Judge which are not embodied in the record. If authority is needed for the reception of this affidavit in the exercise of the Court's powers under s. 1021, we refer to *Rex v. Duff,* 23 Sask. L.R. 151, 50 C.C.C. 246, [1928] 3 W.W.R. 550, [1929] 1 D.L.R. 152. The affidavit need not set out the exact words used by the judge: *Rex v. Tresegne* (1928), 58 O.L.R. 634, 45 C.C.C. 270. This affidavit clearly shows that an election was in fact made on 13th May, and that the appellant did not wish to be tried by a jury. Following the election, there were several adjournments, and a date was finally fixed to suit the convenience of defence counsel, and it was not until after an application for an adjournment had been refused that any objection to jurisdiction on this ground was made.

It is the fact, not the record, of election, which is decisive: *Rex v. Duff, supra,* at p. 248 (C.C.C.) Given consent in fact, the formal record is at most a procedural matter, which does not go to jurisdiction. There is no case that says that the failure to make a record at the time deprives the judge of jurisdiction. *Rex v. Yong Jong, supra,* was a proceeding by way of *habeas corpus,* where only the formal record could be looked at.

Even if this objection is well taken, the appeal should be dismissed under s. 1014(2) of the Code, since there has obviously been no miscarriage of justice in this respect.

2. Neither this appellant nor his counsel has any status to raise the question of diplomatic immunity. The appellant was charged with a grave crime against the State, and counsel for the Attorneys General of both Canada and Ontario called this witness and produced the documents. The only persons who might have been entitled to take this point were either some person instructed by the ambassador, or, conceivably, Gouzenko himself. We rely in the *Engelke* case, *supra,* and on the reasons of Barclay J. in *Rex v. Rose, supra;* also on the rule that the admissibility of evidence is not affected by illegality in obtaining it: Wigmore on Evidence, 3rd ed. 1940, vol. 8, p. 5, s. 2183.

3. This Court expressly said in *Rex v. Mazerall, supra,* that no *voir dire* was necessary before the admission of evidence of this type. Trials cannot be constantly interrupted to take evidence on subsidiary points. All the facts which the accused might have established on a *voir dire* would have gone to weight rather than admissibility.

The Canada Evidence Act obviously applies to this inquiry: s. 2 of the Act; *Rex v. Mazerall, supra.* Even if s. 5 were not applicable, the common law rule would have made the evidence admissible, because of the appellant's failure to object to answer the questions.

G. A. Martin, K.C., in reply: Compliance with s. 827 goes to jurisdiction, regardless of the wishes of the accused.

Cur. adv. vult.

28th February 1947. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant on his trial before Judge McDougall, sitting in the County Court Judges' Criminal Court of the County of Carleton, on the 18th November 1946. The charge upon which the appellant was tried and convicted was that "he, the said David Gordon Lunan, during the year 1945 at the City of Ottawa in the County of Carleton, and elsewhere in the Province of Ontario and in the Province of Quebec did unlawfully conspire together and with Colonel Nicolai Zabotin, Lieutenant Colonel

Vasili M. Rogov, Israel Halperin, Edward Wilfrid Mazerall, and Philip Durnford Pemberton Smith, one with another or others of them, and with other persons unknown, to commit an indictable offence, to wit, a breach of section 3, subsection 1(*c*) of the Official Secrets Act, being chapter 49 of the Statutes of Canada, 1939, 3 George VI, that is to say, for purposes prejudicial to the safety or interests of the State to obtain, collect, record, publish or communicate to another person or persons documents or information which were calculated to be or might be or were intended to be directly or indirectly useful to a foreign power, to wit, the Union of Soviet Socialist Republics, contrary to section 573 of The Criminal Code, in such case made and provided".

Counsel for the appellant contended that there had been no proper election by the appellant to be tried before a judge under Part XVIII of The Criminal Code, R.S.C. 1927, c. 36, and that, therefore, he was not properly tried in the County Court Judges' Criminal Court. In connection with this objection we permitted counsel for the Crown to file an affidavit of Mr. Howard, one of the counsel retained for the prosecution of this case in its earlier stages. The filing of this affidavit was not objected to by counsel for the appellant. In his affidavit Mr. Howard sets forth in detail the proceedings in relation to the preferring of an indictment before the grand jury for the charge upon which the appellant was later tried in the County Court Judges' Criminal Court, and the later proceedings when the appellant requested that he be taken before the County Court Judge for the purpose of electing a trial under Part XVIII of The Criminal Code. The appellant was accordingly taken before the County Court Judge, as he had requested, and thereupon he elected trial by him. The appellant himself confirmed this election on a later occasion when it became necessary to fix a later date for his trial. Such cases as *Giroux v. The King* (1917), 56 S.C.R. 63, 29 C.C.C. 258, 39 D.L.R. 190, and *Re Rex v. Daly et al.*, 55 O.L.R. 156, 41 C.C.C. 354, [1924] 1 D.L.R. 819, are relevant.

It was said by counsel for the appellant that no entry was made of the consent of the appellant to be so tried at the time the consent was given, as provided in s. 825(2) of The Criminal Code. We have no means of knowing whether or not such an entry was made. The statute does not say whose duty it is to make the entry, but, in any event, I cannot conceive that the failure of some officer to make such an entry at the proper time

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can have the effect of either depriving the accused of the right to be tried in the manner he elects, or making a trial in that manner a futile proceeding, whether there is a conviction or an acquittal.

It was further objected that the evidence of the witness Gouzenko was inadmissible on the ground that he was not competent to produce or to give evidence in respect of certain documents which he had removed from the Russian Embassy, and, further, that his evidence was irrelevant. Gouzenko is a native of Russia. He came to Canada in June 1943 as an employee of the Russian Embassy at Ottawa. He left the Embassy in September 1945, taking with him a number of documents from the files there, and it may be said that he took them without authority. Before appellant was put on trial, Gouzenko had been called as a witness for the prosecution on the trials of other persons charged with offences similar to that upon which the appellant was tried, and he had given evidence and had produced, or identified certain documents taken by him from the Embassy upon which the Crown relied in proving the existence of a conspiracy such as the appellant was charged with. These documents had been filed as exhibits on the earlier trials, and had thereby gone out of the possession of Gouzenko and come into the custody of the Courts in which the trials were held. Objection was taken on behalf of the appellant to the admission of these documents in evidence on his trial, and to Gouzenko giving evidence in relation thereto, on the ground that the documents were the property of the Embassy and were improperly removed from the Embassy by Gouzenko, and were privileged. The appellant sought to have this class of evidence excluded on the ground that under the rules of international law in relation to diplomatic immunity a privilege arose that prevented their production or use in evidence. No objection to their production and use in evidence at this trial was taken on behalf of the Russian Ambassador, or by or on behalf of anyone else other than the appellant.

The principles of international law in relation to diplomatic immunity are stated and discussed in numerous reported cases, and in many well-known text-books of recognized authority. For convenience I quote from the second edition of Halsbury's Laws of England, vol. 6 (1932), p. 506, as follows:

"The immunities accorded to public ministers by the usages of nations, which have come to be known as international law, are expressly recognized in the law of England.

"In accordance with the principle *Omnis coactio abesse a legato debet*, a public minister does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and has at least as great an immunity from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the State in which he exercises his functions, and is for all juridical purposes supposed to be still in his own country. He is exempt from the criminal jurisdiction of the State in which he resides, and is not subject to interference or arrest except, possibly, in the one instance of his engaging in acts contrary to its safety and welfare. In such case it seems that he may be arrested and detained until he can be conveyed out of the country, and his house may be searched and his papers seized.

"But diplomatic privilege does not impart immunity from legal liability, but only exemption from local jurisdiction.

"All writs and processes whereby the person of a public minister, authorised and received as such, may be arrested or imprisoned, or his goods distrained, seized, or attached, are null and void."

And at p. 510: "The immunities of a diplomatic agent are extended to his family living with him, because of their relationship to him; to secretaries and attachés, whether civil or military, forming part of the mission, but not personally accredited, because of their necessity to him in his official relations; and to domestics and other persons in his service not possessing a diplomatic character, because of their necessity to his dignity or comfort. The privilege is that of the minister himself, and only attaches to them so far as it is necessary for his convenience."

There is ample authority to be found in the reported cases for the statement that the privilege is that of the Minister himself. An early case is that of *Fisher v. Begrez* (1833), 2 Cr. & M. 240, 149 E.R. 750. A recent case is *Rex v. A.B.*, [1941] 1 K.B. 454. No case was cited to us, nor have I been able to find any, as authority for allowing one in the position of the appellant here to set up a claim of diplomatic immunity as a ground for the exclusion of evidence upon his trial on a criminal charge. The privilege is not his, nor is there any authority for extending the diplomatic immunity to him. For all that appears, the

Russian Ambassador, or his Government, may have no concern with the prosecution of the appellant and the evidence by which it is sought to establish his guilt. This proceeding is not one that affects either the person or the property of the Ambassador, or anyone to whom, by the established principles of international law, the diplomatic privilege may be extended. No process of the Court was required to be issued against the Ambassador, or against anyone in his service or in any way attached to the Embassy. This proceeding is simply the trial of a resident of Canada for a criminal offence alleged to have been committed within Canada. Reference may be made to *Haile Selassie v. Cable and Wireless, Limited,* [1938] Ch. 839, where it was held that as the rights of the plaintiff (the *de jure* sovereign of a foreign country) could be adjudicated upon without directly or indirectly impleading the *de facto* sovereign of that country, the Court had jurisdiction to hear and determine the action notwithstanding that the Ambassador of the *de facto* sovereign of that country had given notice to the company that his Government claimed to be entitled to the sum of money claimed by the plaintiff. See also *In re Russian Bank for Foreign Trade,* [1933] Ch. 745 at 769.

In my opinion the appellant has no status to maintain any objection based upon the rules of international law relating to diplomatic immunity. If another opinion as to the appellant's status to maintain that objection could be entertained, it would be necessary to consider whether even a foreign Ambassador is entitled to the privilege of diplomatic immunity in circumstances where the acts with which the prosecution is concerned are contrary to the safety and welfare of Canada: see Hall's International Law, 8th ed. 1924, pp. 223-4.

This same question of diplomatic immunity has been recently considered by the Court of King's Bench of the Province of Quebec on the appeal of one Fred Rose against his conviction upon a similar charge. I cannot find that the judgments in that case have, as yet, been reported, but I have had the privilege of reading a copy of the reasons for judgment of some of the judges of the Court of King's Bench. In my opinion we should follow the opinion of that Court.

As to the objection that Gouzenko's evidence is irrelevant, I am of the opinion that it also fails, if the evidence of the

appellant given before a Royal Commission, which I shall next deal with, was properly admitted.

Gouzenko gave evidence of a widely extended plan, of which certain members of the Russian Embassy had the general direction, whereby information and documents were secretly obtained by them through members of the Civil Service of Canada. I think there is no room for doubt, upon the evidence, that the purposes of this plan and the character of the information and documents obtained under it, come well within the description contained in the charge of conspiracy upon which appellant was tried. The appellant's own statements made to the Royal Commission clearly show that he was a party to the plan and actively engaged with others in carrying it out. Once it had been established that the appellant was a party to this plan or conspiracy, the special rules of evidence applicable where a conspiracy is charged, are wide enough to admit the evidence given by Gouzenko as evidence relevant to the charge upon which the appellant was tried.

I, therefore, deal next with the objection taken by the appellant that his statements or depositions made before the Royal Commission were improperly admitted in evidence against him upon this trial.

Counsel submitted that s. 5 of The Canada Evidence Act, R.S.C. 1927, c. 59, does not apply to the taking of evidence before a Royal Commission appointed by Order in Council under The Inquiries Act, R.S.C. 1927, c. 99, with authority "to inquire into and report upon which public officials and other persons in positions of trust or otherwise have communicated, directly or indirectly, secret and confidential information, the disclosure of which might be inimical to the safety and interests of Canada, to the agents of a Foreign Power and the facts relating to and circumstances surrounding such communication".

Section 2 of The Canada Evidence Act reads as follows:

"This Part shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf."

In my opinion the language of this section is broad enough to include an inquiry under The Inquiries Act as a matter respecting which the Parliament of Canada has jurisdiction. I see nothing in the section to confine the application of the Act strictly to judicial proceedings, and s. 5 of The Canada Evidence

Act applies to the evidence given by the appellant before the Royal Commission.

It probably makes very little difference, however, for the present purpose, whether s. 5 of The Canada Evidence Act, which relates to incriminating answers, is applied, or the rules of evidence prevailing without that statute are applied. If the statute applies then, although appellant as a witness before the Royal Commission, might have objected to answer upon the ground that his answer would tend to criminate him, or tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, still he must have answered the question. The only protection given by the statute is that if such an objection is taken, although the witness is not excused from answering, the answer is not to be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence. If, on the other hand, The Canada Evidence Act does not apply, then appellant, on objecting to answer and his objection being maintained, would not be compelled to answer. But in both cases the witness must make his objection to answering: Phipson on Evidence, 8th ed. 1942, p. 198. The appellant did not object to answer any question put to him in the course of his examination before the Commission. Having made no objection to answering, he can have no protection against the use of his evidence upon this trial, whether the statute applies or does not apply.

Further objection was taken that the learned trial judge improperly refused to direct an issue on the *voir dire* before admitting this evidence of the appellant. I can see no ground in law for this objection. The reason for directing an issue of that character, where there is a question of the admissibility of evidence and the case is tried with a jury, is that it is undesirable that the jury should learn of statements attributed to the accused before the judge—whose sole duty it is—has determined them to be admissible in evidence. Here there was no jury, and there was very little evidence to be heard to determine the question of admissibility.

In the judgment of this Court in the recent case of *Rex v. Mazerall,* [1946] O.R. 762, 86 C.C.C. 321, 2 C.R. 261, [1946] 4 D.L.R. 791, we pointed out that, by long-established rules of evidence which this Court is not at liberty to disregard, a clear

distinction in practice is made, in regard to their admissibility, between statements of an accused person made in the course of his examination on oath before one duly authorized to take such examination, and statements not made under oath in the nature of confessions, or that tend to incriminate, made by an accused person after a charge has been laid against him to or in the presence of a person in authority in whose custody he is. In the case of the latter it is necessary before the statement can be admitted in evidence, if its admission is objected to, that the prosecution shall first establish that the statement was voluntary in the sense that it was not induced by threat or fear or by any promise or inducement. There is no such preliminary requirement in the case of a statement made on oath, first above referred to. This does not mean that the accused person cannot adduce in evidence anything otherwise properly admissible that may show facts or circumstances that might tend to lessen the weight of the statement made by him on oath, or to explain it, but such evidence does not go to the question of admissibility. No evidence of that kind was tendered in this case for the appellant.

There existed, therefore, no ground upon which the sworn statements of the appellant put in evidence against him by the Crown could have been refused admission. There was also nothing in evidence that in any way lessened the weight of these admissions against the appellant. There was, on the whole case, ample evidence, properly admitted, to support the finding of the learned County Court Judge that the appellant was guilty of the offence of which he was convicted.

The appeal is, for these reasons, dismissed.

Appeal dismissed.

Solicitor for the accused, appellant: *G. A. Martin, Toronto.*