HIS MAJESTY THE KING..... APPELLANT;

AND

CAMILLE DEUR AND OTHERS..... RESPONDENTS.

1944

*May 15.
*June 22.
*Oct. 30.
*Nov. 20.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Accused charged on three counts of conspiracy—Speedy trial before Court of Sessions—Only one trial on the three charges—Only one complaint or information charging accused with the three charges, one preliminary inquiry and one option—Not the same as if several counts arise from separate informations and commitments, each charging distinct offences—This case distinguished from decision of this Court in The King v. Balciunas ([1943] S.C.R. 317).

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

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The accused, respondents, were charged on five counts, one for conspiracy to commit fraud, two for conspiracy to commit indictable offences and two for having committed the substantive offences themselves. The trial having been limited to the three conspiracy counts, the accused, having elected to be tried speedily under part 18 of the Criminal Code, were found guilty, but on appeal the conviction was set aside and a new trial was ordered. The decision of the appellate court was based on the ground that the trial judge upon speedy trial had no jurisdiction to try the three different counts in the indictment at the same time, that Court being of the opinion that it was contrary to the rule laid down by this Court in *The King v. Balciunas* ([1943] S.C.R. 317). The Crown appealed to this Court, leave having been granted under section 1025 of the Criminal Code.

Held that the appeal should be allowed. The judgment of this Court in the *Balciunas* case (*supra*) should not be considered as governing the present case, the true effect of that decision being that it is limited in its restriction of trial to cases where the several counts arise from separate informations and commitments.

The procedure was different in the two cases. In the present case, there was only one complaint which charged the respondents with the three conspiracy offences, there was only one preliminary inquiry referring to the three counts and there was only one charge sheet and one option. In the *Balciunas* case (*supra*), three separate informations were laid, each charging a distinct offence; there was a commitment for trial in each of the cases, although the three charges were set forth on a single charge sheet, there was one speedy trial on all three charges and the accused was convicted on each charge. Therefore, in the *Balciunas* decision, it was a case of a joinder for trial purposes of charges originating in different complaints, or in different and distinct commitments, or, in short, a joinder of different cases; and it was held that it was improper to try the three separate charges together.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, which allowed the respondents' appeal on questions of law and ordered a new trial, without giving any decision on questions of facts.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Gérald Fauteux K.C. and *Gustave Adam K.C.* for the appellant.

Philippe Monette K.C. and *M. Gameroff K.C.* for the respondents.

The judgment of the Chief Justice and of Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—The respondents were, by the Court of Sessions sitting in and for the district of Montreal, found guilty on three counts of conspiracy on which they had been tried. These counts of conspiracy formed part of a single charge sheet. The accused were charged with having conspired to commit a number of offences and also, on two other counts, with having committed the substantive offences themselves. Upon objection of the respondents, by way of motion to quash, against the joinder of the conspiracy charges and of the two other charges for having committed the substantive offences, the hearing of the two latter counts was adjourned and the case proceeded only upon the conspiracy charges, to the joinder of which, at that particular time, no objection was forthcoming from the respondents.

Against the conviction on the three counts of conspiracy, the respondents appealed on questions of law and on questions of facts.

By judgment rendered on the 30th of December, 1943, the Court of King's Bench (appeal side) unanimously allowed the appeal on the questions of law and ordered a new trial; but, although the Court had heard counsel for the parties both on the law and on the facts, no reference either in the formal judgment or in the reasons for judgment was made to the appeal on questions of facts.

The decision of the Court was that the presiding judge, upon speedy trial under part 18 of the Criminal Code, had no jurisdiction to try the three different counts in the indictment at the same time, as he had done; that this was contrary to the rule laid down by the Supreme Court of Canada in *The King* v. *Balciunas* (1). For that reason the conviction was quashed and the Court ordered a new trial.

Although the formal judgment of the Court of King's Bench states that the respondents took exception to the mode of trial, it now appears that this was a mistaken impression and that the trial proceeded and the accused were found guilty without raising the objection which they alleged in their notice of appeal.

The Crown moved for leave to appeal to this Court, under section 1025 of the Criminal Code, alleging conflict

(1) [1943] S.C.R. 317.

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in a like case between the judgment now appealed from and the judgment of the Court of Appeal of Nova Scotia in the case of *The King* v. *Cross* (1). Leave to appeal was granted.

There is no doubt about the jurisdiction of the learned judge who gave leave, because the conflict is evident. In the *Cross* case (1) the Court decided that a judge holding a speedy trial may deal with each charge as the counts in one indictment might be dealt with and is not bound to proceed with a speedy trial upon each formal charge. There was, as here, only one information. The Court of Appeal of Nova Scotia held that the magistrate had jurisdiction to try together the three charges there referred to and that the several charges were not to be treated as separate indictments and to be tried separately. The conviction was affirmed.

The judgment rendered by the Court of King's Bench in the present case is, therefore, clearly in conflict with the *Cross* case (1), and the case comes under section 1025 of the Criminal Code, unless it may be said that the judgment of this Court in the *Balciunas* case (2) overruled the judgment in the *Cross* case (1) and that the Court of King's Bench of Quebec only followed the decision rendered in this Court in the *Balciunas* case (2).

Leave having been granted, the Court first heard the appeal during the May sittings and judgment was then reserved; but, in the course of its deliberations, the Court felt there were points on which it would like to have a reargument. Accordingly counsel were advised that they were called upon to argue the following points:—

> Whether, under the judgment of this Court in the *Balciunas* case, (2) in no case can more than one count be the subject of trial under Part 18 of the Code at the same time, or whether the judgment is limited in its restriction of trial to cases where the several counts arise from separate informations and commitments.

Counsel on both sides had full opportunity to be heard on the points thus submitted.

The reargument took place at the present sittings of the Court. Counsel for the Attorney-General for the province of Quebec took the position that the second alternative in

(1) (1909) 14 Can. Cr. Cas. 171. (2) [1943] S.C.R. 317.

the question submitted by the Court was the correct one and that to which one should adhere. I have come to the conclusion that the latter view is the true effect of the *Balciunas* judgment (1). As appears in the judgment of the Court, the facts in that case were as follows:—

Three separate informations were laid against Balciunas. He was committed for trial on all three. A single charge sheet setting forth the three charges was prepared by the Crown Prosecutor and on this the accused was arraigned and elected to be tried speedily under part 18 of the Criminal Code. There was one trial on all three charges before the County Court judge and Balciunas was convicted on each charge. On appeal to the Court of Appeal this conviction was set aside and a new trial directed on the ground that it was improper to try the three separate charges together, the point being that, although there was authority in the Criminal Code to include in an indictment a number of separate charges, this was not the case as to a charge under the provisions of part 18. In this Court the judgment of the Court of Appeal was affirmed.

In the present case the procedure was different. There was only one complaint which charged the respondents with the three conspiracy offences. There was only one preliminary inquiry referring to the three counts, and there was only one charge sheet and one option.

A motion to quash was made, but it objected to the joinder of the conspiracy charges with the other charges of having committed the offences themselves; it did not object to the joinder of the three conspiracy charges.

As appears, there was a single complaint, a single inquiry, a single charge comprising the three counts, a single option in relation to that charge, and a single trial on the three counts. No objection was made to having the conspiracy counts tried simultaneously, and objection was made only to the joinder with the substantive offences counts.

The procedure, therefore, was different in the two cases and I do not think the *Balciunas* judgment (2) should be considered as governing the present case. What the Court had before it in the *Balciunas* case (2) was the fact of three separate informations, a commitment for trial on all three

(1) [1943] S.C.R. 317, at 319. (2) [1943] S.C.R. 317.

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and a single charge sheet on which the trial proceeded to conviction on all three charges. The Court did not pretend to decide anything else than what was then before it. The effect of the judgment is that, in the premises, it was improper to try the three charges together; and the decision should not be extended to a different case. Speaking broadly, however general the terms may be in which a judgment is expressed, unless a contrary intention clearly appears, they extend only to the facts and to the questions with which the Court is at the moment concerned.

In the *Balciunas* case (1) what was condemned was the joinder for trial purposes of charges originating in different complaints, or different informations, the joinder of separate records, or, in short, of different cases. It should not, therefore, be considered as concluding this particular case.

Now, as can be seen by the notice of appeal, there was substantially only one ground of appeal on the law before the Court of King's Bench in Quebec. The respondents contended that the trial judge had exceeded his jurisdiction in hearing simultaneously three counts in the indictment. Likewise, the Court of King's Bench decided that contention favourably to the respondents by resting its decision on the *Balciunas* judgment (1); but, in my opinion, the two cases are different and, as this was the real ground of the decision in the Court of King's Bench, it follows that the appeal ought to be allowed.

However, this does not dispose of the case. There was an appeal to the Court of King's Bench not only on the question of law just discussed, but also on questions of fact. The respondents were entitled to a pronouncement by the Court of King's Bench on their appeal on facts. In view of the result on the question of law, the Court of King's Bench gave no decision on the appeal on facts. The case ought, therefore, to be remitted to the Court of King's Bench (appeal side) of the province of Quebec in order that that Court may pass upon the grounds of appeal based on facts. In so ordering, I am adopting the course followed by this Court in *The King* v. *Boak* (2).

The appeal should be allowed to the extent indicated.

(1) [1943] S.C.R. 317.

(2) [1925] S.C.R. 525, at 532.

The judgment of Taschereau and Rand JJ. was delivered by

RAND J.—The respondents were charged before the Court of Sessions, district of Montreal, under the speedy trials provisions of the Criminal Code on five counts, one for conspiracy to commit fraud, two for conspiracy to commit indictable offences against sections 164 and 169 of the *Excise Act*, and two for those offences themselves. The charges had been laid in one information and the commitment was on all of them. On the objection of the respondents and with the consent of the Crown, the trial was limited to the conspiracy counts. The accused were found guilty but on appeal the conviction was set aside and new trials ordered. From that judgment the Attorney-General of Quebec appeals.

The ground on which the Court of King's Bench proceeded was that under part 18 of the Code, as interpreted by this court in the case of *The King* v. *Balciunas* (1), no more than one count or charge can be the subject of such a trial. But that was not, in my opinion, the effect of the *Balciunas* judgment (1) nor do I think it governs this case. An examination of its facts shows that three informations had been laid, each charging a distinct offence. There was a commitment in each case. The three charges, however, were set forth on one charge sheet; on them the accused elected for a speedy trial and they were tried together. It was, therefore, a case of joining charges contained in separate and distinct commitments. The Court of Appeal for Ontario had held that there was no power under part 18 to do that and that section 834 had no application because all three were contained in the commitments; and it had directed

> that the appellant be tried regularly upon the charges upon which he was committed for trial.

That judgment was affirmed in this court (1). In both, reference was made to section 856 of part 19 of the Criminal Code and assuming that section would have cured what was otherwise a misjoinder, it was held not to apply to proceedings under part 18.

(1) [1943] S.C.R. 317.

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These judgments imply that, if the three charges had been properly on the charge sheet, they could have been tried together, and this is clearly the assumption underlying section 856 in relation to an indictment. If the question had been simply whether there was jurisdiction under part 18 to try two charges together, it would have been quite unnecessary to emphasize the precise procedure followed or to make any reference to section 834.

Then does part 18 exclude all joinder of counts in a charge sheet? The commitment on the five charges was unobjectionable. Section 827 requires, for the purposes of election, that the prisoner be informed that he is charged with "the offence", which ordinarily means that upon which he has been committed, but the singular number is not to be taken as a limitation. By subsection 3,

> the prosecuting officer shall prefer the charge against the accused for which he has been committed for trial or any charge founded on the facts or evidence disclosed on the depositions.

Section 834 has already been considered. Section 839, giving all powers of amendment, authorizes the division of a count under section 891.

By the common law rule, an indictment could in general contain any number of counts. In felonies, when it appeared that they did not all arise out of the same body of facts, the court, not as a matter of jurisdiction but of judicial discretion, followed this practice: if the discreteness was detected before the prisoner pleaded, the court would quash the indictment; if it did not appear until after plea, the prosecutor was called upon to elect upon which count he would proceed; but after verdict the joinder was not available on a writ of error. So long, however, as the counts were statements of different offences arising out of what was in substance a single transaction, there was no misjoinder and all could be tried together: *The King* v. *Lockett et al.* (1), and in this background both the purpose of section 856 and the interpretation of part 18 are clarified. If a joinder of two or more counts, arising as in this case, were not allowed, then either speedy trials would be limited to commitments on a single charge or a separate trial would be necessary for each of any number of charges

(1) [1914] 2 K.B. 720.

although they all arose out of the same transaction, and the real object of part 18 would, in large measure, be defeated. Section 710 in part 15 shows with what specific language such a limitation of trial has been prescribed.

The ground, then, upon which the court below proceeded lay in a misconception of what the *Balciunas* judgment (1) decided and the appeal must be allowed but, as the accused had appealed as well on the facts and this ground has not been considered below, I would return the case to the Court of King's Bench to be dealt with accordingly.

Appeal allowed.