1924

*Oct. 20, 21
*Oct. 23.

LEO DAVIS ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENTT.

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

Appeal—Jurisdiction—Criminal matter—Dissenting opinion—Question of law—Section 1013, as enacted by 13-14 Geo. V, c. 41, section 1024 Cr. C.

The Supreme Court of Canada has no jurisdiction to hear an appeal against a conviction where only questions of fact are involved, since the announcement of any dissent in the court of appeal is in such a case prohibited (s. 1013 (5) Cr. C. as enacted by 13-14 Geo. V. c. 41). An appeal lies to this court under 1024 Cr. C. read with s. 1013 Cr. C. only where a dissenting opinion has been expressed by a member of the court of appeal, upon a question which that court deems a question of law and pursuant to its direction. Mignault J. *dubitante.*

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] A.C. 185.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Court of King's Bench, criminal side, whereby the conviction of the appellant upon an indictment for murder was sustained.

The material facts of the case and the questions at issue are fully stated in the judgments now reported.

F. J. Laverty K.C. and *O. Gagnon* for the appellant.

C. Lanctot K.C. and *R. L. Calder K.C.* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Idington, Duff, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The appellant was convicted of murder on his trial before the Court of King's Bench (Criminal side) at Montreal. He appealed to the court of appeal (which by the definition clause of the criminal code is, in the province of Quebec, the Court of King's Bench, appeal side), under s. 1013 of the criminal code as enacted by c. 41 of 1923, upon grounds which include the submission

that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence.

Before the hearing the court of appeal, upon the appellant's application, ordered that the evidence of the appellant, and of one Morel, should be received for the purposes of the appeal, and the testimony of these two witnesses was accordingly taken under the direction of the court and incorporated in the record upon which the appeal was heard. The court, having heard the case thus submitted, affirmed the conviction, but the Chief Justice and Guerin J. pronounced dissenting judgments, holding in effect that in view of the new evidence the proof was unsatisfactory, and that it could not be affirmed that the jury would have convicted the prisoner if the new evidence had been before them at the trial.

Thereupon the court, by its formal judgment, upon the narrative that the appeal had been heard

on grounds involving questions of fact alone,

ordered that the appeal should be dismissed, and that the conviction should be in all respects confirmed.

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From this judgment of the Court of King's Bench, appeal side, the prisoner appealed to this court, relying upon s. 1024 of the criminal code. The objection was suggested by the court that neither this section nor any other provision of the criminal code authorizes an appeal to the Supreme Court of Canada in cases like the one under consideration where the appeal is concerned only with weight of evidence, and counsel were heard upon the point both for the prisoner and for the Crown.

When the new provisions regulating appeals from convictions upon indictment were introduced by c. 41 of 1923, the sections of the criminal code from 1012 to 1023, inclusive, were repealed and new provisions were substituted for these, leaving unrepealed, however, s. 1024 which provides for appeal to the Supreme Court of Canada, and the question which now arises requires the interpretation of that section, having regard to the changes introduced by the substituted clauses. The appeal under s. 1024 extends only to convictions which have been affirmed under s. 1013. The text of subsection 1 of section 1024, in so far as material, is as follows:

1024. Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the court of appeal is unanimous in affirming the conviction.

Section 1013 as enacted by the criminal code (1906) provided that:

1013. An appeal from the verdict or judgment of any court or judge having jurisdiction in criminal cases, or of a magistrate proceeding under section seven hundred and seventy-seven, on the trial of any person for an indictable offence, shall lie upon the application of such person if convicted, to the court of appeal in the cases hereinafter provided for, and in no others.

2. Whenever the judges of the court of appeal are unanimous in deciding an appeal brought before the said court their decision shall be final.

3. If any of the judges dissent from the opinion of the majority, an appeal shall lie from such decision to the Supreme Court of Canada as hereinafter provided.

Followed ss. 1014, 1015 and 1016 providing for the statement and reservation of questions of law to be reviewed upon the appeal.

The section substituted for s. 1013 in 1923 is substantially different; it reads as follows:

1013. (1) A person convicted on indictment may appeal to the court of appeal against his conviction,—

(a) on any ground of appeal which involves a question of law alone; and

(b) with leave of the court of appeal, or upon the certificate of the trial court that it is a fit case for appeal, on any ground of appeal which involves a question of fact alone or a question of mixed law and fact; and

(c) with leave of the court of appeal, on any other ground which appears to the court of appeal to be a sufficient ground of appeal.

(2) A person convicted on indictment, or the Attorney General, or the counsel for the Crown at the trial, may with leave of a judge of the court of appeal, appeal to that court against the sentence passed by the trial court, unless that sentence is one fixed by law.

(3) No proceeding in error shall be taken in any criminal case, and the powers and practice now existing in the court of criminal appeal for any province, in respect of motions for or the granting of new trials of persons convicted on indictment are hereby abolished.

(4) The determination of any question before the court of appeal shall be according to the opinion of the majority of the members of that court hearing the case.

(5) Unless the court of appeal directs to the contrary in cases where, in the opinion of that court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court, the judgment of the court shall be pronounced by the president of the court or such other member of the court hearing the case as the president of the court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court.

It will be observed that subsections 2 and 3 of the original section 1013 providing for appeal to the Supreme Court of Canada, in cases in which any of the judges of the court of appeal dissent, have been omitted, and that provision is made by subsection 5 of the substituted section that the judgment of the court shall be pronounced by the president or such judge as the president directs, and that no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court, unless the court of appeal direct to the contrary in cases where in the opinion of the court the question is a question of law on which it would be convenient that separate judgments should be pronounced by members of the court. Consequently, upon any appeal upon a question of fact there can be no dissent expressed nor separate judgment pronounced by any member of the court, and, if the appeal be upon a question of law, it is only when the court of appeal so directs that dissenting members of the court may pronounce their dissent. Considering the re-

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quirements of this subsection it seems plain that the learned Chief Justice and Guerin J. should not have pronounced their dissenting judgments upon the question of fact, which is the only question involved in the case; and, if these dissenting judgments be excluded from the record, as in my view they must be, having regard to the peremptory provision of the statute, there is apparent in the case neither dissent nor lack of unanimity to form the basis of the jurisdiction conferred upon the Supreme Court of Canada by section 1024. The interpretation of the latter section has frequently been considered by this court and it is established by a long and practically uniform course of decision, which has become firmly embedded in the practice of the court, that the only questions open to consideration upon appeals under that provision are the points of difference between the dissenting judge or judges and the majority of the court of appeal. Among other cases in which this interpretation has been expressed or applied may be mentioned: *McIntosh* v. *The Queen* (1); *Gilbert* v. *The King* (2); *Mulvihill* v. *The King* (3); *Kelly* v. *The King* (4); *Rémillard* v. *The King* (5). Therefore, in the absence of expressed dissent, there is no ground of appeal to be argued and, consequently, no appeal.

Obviously this court cannot acquire jurisdiction by a learned judge of the court of appeal pronouncing a dissent which the statute forbids to be pronounced.

When section 1024 was enacted and until the criminal code amendments of 1923, there was no appeal to this court except upon questions of law. It is true that it was provided by section 1021 that:

> 1021. After the conviction of any person for any indictable offence the court before which the trial takes place may, either during the sitting or afterwards, give leave to the person convicted to apply to the court of appeal for a new trial on the ground that the verdict is against the weight of evidence.
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> 2. The court of appeal may, upon hearing such motion, direct a new trial if it thinks fit.

But this section was self-contained and by its own force enabled any person convicted of an indictable offence by

(1) [1894] 23 S.C.R. 180.
(2) [1907] 38 S.C.R. 284.
(3) [1914] 49 S.C.R. 587.
(4) [1916] 54 S.C.R. 220
(5) [1921] 62 S.C.R. 21.

leave of the trial court to move the court of appeal for a new trial on the ground that the verdict was against the weight of evidence; no authority for such a motion was derived from section 1013; the motion was not an appeal taken under section 1013, and therefore a judgment refusing the application was not appealable to this court under section 1024.

One would not expect to find the jurisdiction of this court, which in relation to criminal appeals was wisely limited to questions of law, enlarged to admit of appeals upon questions of fact, involving moreover the consideration of evidence taken in the court of appeal, unless by an apt change of the language which conferred the jurisdiction to entertain appeals upon questions of law. The judicial interpretation of section 1024 had been reported and was established and well known when chapter 41 of 1923 was enacted, and if it had been the intention of Parliament to extend the right of appeal to questions of fact, it is to be supposed that that intention, effecting an addition to the jurisdiction of the court in such an important particular, would have been clearly expressed. On the contrary while section 1024, the only section remaining which confers jurisdiction, stands unchanged, subsections 2 and 3 of section 1013 do not survive, but in the place of them is found subsection 5 which forbids the expression of dissent except upon questions of law and when considered convenient by the court of appeal.

I entertain no doubt that the plain operation and effect of subsection 5 is, not only to maintain the restriction of the right of appeal conferred by section 1024 to questions of law, but also to regulate the cases in which upon questions of law lack of unanimity may be expressed so as to embrace only those cases in which the court of appeal considers it in the interest of justice that separate judgments should be pronounced by the members of the court.

When it is considered that the questions which may be heard upon the appeal are only those upon which there was a difference of opinion in the court below, and that there is no means by which this court may consistently with the statute be informed of the dissent or the grounds of the dissent upon which its limited jurisdiction depends,

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except with relation to questions of law, it follows logically enough that there can be no appeal except upon questions of law. Indeed, section 1024 will articulate with section 1013 of 1923 only upon the assumption that the dissent upon which the right of appeal is conditioned is that for the publication of which provision is made and which is not prohibited by subsection 5 of section 1013. In effect, therefore, an appeal lies to the Supreme Court of Canada only by leave of the court of appeal, and that leave is given only with relation to questions of law, and in the statutory manner by the decision of the court, when it is not unanimous, to authorize the pronouncing of separate judgments.

The present appeal does not raise any question of law, and this is not a case in which the absence of unanimity on the part of the members of the court of appeal in affirming the conviction could, except by breach of the statutory injunction be disclosed by the judgment of the court of appeal; neither is it a case in which any judgment could be pronounced by a member of that court, other than the president or such other member of the court hearing the case as was directed by the president to pronounce the judgment of the court.

The appeal should, therefore, be quashed.

Mr. JUSTICE IDINGTON (concurring).—I agree entirely with the conclusion herein reached by my brother Newcombe and in the main with the reasoning by which he arrives at such conclusion.

MIGNAULT J. (*dubitante*).—While not entering a formal dissent from the judgment quashing this appeal for want of jurisdiction, I have been unable to free my mind from serious doubts as to its correctness, if I may say so with every possible deference.

I quite agree that subparagraphs 4 and 5 of section 1013 of the criminal code, as enacted by 13-14 Geo. V (1923), ch. 41, contemplate but one judgment on behalf of the court of appeal when the appeal from a conviction is, in the opinion of that court, on a question of fact. Even when the question is one of law, there must also be but one judgment, unless the court of appeal directs to the contrary. Does this prevent the minority judges—for subsec-

tion 4 provides that the majority shall determine any question before the court—from having their dissent entered upon the formal judgment, as was done here and is always done in Quebec, without any pronouncement by them of a separate judgment? Parliament has not so declared, unless perhaps it may be said to have done so inferentially, and without a plain expression of its will I would hesitate to conclude that so radical a change has been made.

Our jurisdiction to entertain an appeal from a judgment of the court of appeal in criminal matters is governed by sections 1024 and 1024*a* of the criminal code, which were not modified by the legislation of 1923, but Parliament no doubt considered that these sections would fit in, if I may use the expression, with the new provisions allowing appeals from conviction on indictments. Subject to the provisions of section 1024*a*, our jurisdiction is taken away when the court of appeal is unanimous in affirming the conviction. How can the unanimity of the court of appeal be ascertained unless it be by its judgment, or by a statement made in the reasons for judgment handed down by the member of the court who is instructed to pronounce its judgment? And when, as here, the judgment on its face states that two of the learned judges dissented therefrom, can it be said that the court of appeal was unanimous in affirming the conviction? It does not appear to be an insuperable objection that our jurisdiction is limited to the points of difference between the judges of the appellate court, for an unrestricted dissent is a dissent on the whole case.

On the true meaning of these provisions depends the question whether Parliament really intended to allow appeals to this court when the appeal involves only a question of fact. But the new section 1013, when construed with the section 1024, raises such an important question of construction that I have thought it my duty to state my doubt as to the decision denying to the appellant the right to appeal to this court. It is, of course, clear that I express no opinion on the merits of his appeal.

Appeal quashed.