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14 號文件

(譯本)

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(經辦人：林培生先生)

林先生：

國家安全(立法條文)條例草案

正如四月一日在法案委員會所提及，現夾附我們曾在較早前向委員會提供的文件(1 號文件)中所提述，Re Schaefer 的案例，煩請安排分發，以供議員參考。

保安局局長
(羅憲璋代行)

二零零三年四月四日

was whether a railway car was a "building" within the meaning of that section. A careful perusal of the count, however, shews that the real question for determination is whether a buffet is not a building within the meaning of said section. I would therefore answer the first reserved question as follows: Count 1 of the indictment does not disclose an offence in law and should have been quashed.

In my opinion it was not necessary that the bill of indictment should have been so signed before presentment by the Grand Jury and would therefore answer the second reserved question in the negative.

It follows that in my opinion the conviction should be quashed.

Conviction quashed.

[COURT OF KING'S BENCH, QUEBEC.]

APPEAL SIDE.

Before SIR HORACE ARCHAMBEAULT, C.J., LAVERGNE, CROSS, CARROLL, AND DESY *ad hoc*, J.J.

Re SCHAEFER.

TREASON (§ I—19)—STATING THE OVERT ACTS IN THE INDICTMENT—SUFFICIENCY—CR. CODE, SECS. 74, 76, 75A, 567.

It is not essential that the overt acts charged in an indictment of treason should in themselves amount to treason apart from the criminal intent with which they are alleged to have been committed.

DECIDED: June 21, 1916.

MOTION for leave to appeal[1].

On June 20, 1916, Israel Shaefer was found guilty of treason by a jury, before the Court of King's Bench (Crown side).

The accused, on November 17, 1916, made a motion for leave to appeal, which was refused. (27 Que. K.B. 233). Sentence being meanwhile deferred.

On May 18, 1918, he presented a motion in arrest of judgment before Cross, J., presiding on the Crown side of the King's Bench, from the refusal of which leave to appeal is now applied for.

R. Stanley Weir, K.C., and *Percy C. Ryan*, K.C., for petitioner.

Walsh and *Lafortune*, for the Crown.

[1]Also reported 28 Que. K.B. 35.

LAVERGNE (dissenting):—Israel Schaefer is a Jew, who came to reside in Canada some twenty years ago or more. In the first years of his residence here, he became a British subject, being naturalized under the Canadian statutes. In October, 1914, he had a family of numerous children brought up here. His principal business since many years was to sell transportation tickets, both steamship and railway tickets. He was known as an industrious and very respectable citizen.

In October, 1914, he sold transportation tickets from Canada to a port in Bulgaria. Bulgaria, at that time, was not at war with any other part of the British Empire. The number of tickets sold is alleged to have been ten. In addition, he is alleged to have provided these ten people with documents to further transportation to the boundary line between Roumania and Austria-Hungary. The ten tickets were not all sold on the same date, but at different dates, in October, 1914. This was done by Schaefer in the course of his ordinary business.

Schaefer is now accused under an indictment for treason.

These people, or most of them, had come from Bukovina, which country formed part of Roumania and part of Austria. Most of these people, if not all of them, spoke the Roumanian language.

Schaefer was not only charged with assisting the public enemy, but was also charged with assisting the ten persons to leave Canada by selling them steamship tickets to a country not at war with Great Britain.

He is also charged with counselling these people to speak the Roumanian language. Another charge of furnishing these people monies was not pressed, and was virtually abandoned, no attempt whatever being made to establish that allegation. The persons to whom Schaefer sold tickets having been resident in Canada for a few years, were in the position of alien friends, and presumed to have paid local allegiance to our Sovereign. The fact that they were not arrested shews that the authorities did not regard them as offenders.

The charge of overt acts not having been related or connected with any hostile intention or action, the charge must fail.

It must not be forgotten that the indictment ascribed the purpose of helping the enemy to the ten persons named, but not

to Schaefer at all, and does not allege any conspiracy between those ten persons and Schaefer. To assist persons who are not proved to have assisted the enemy in any way cannot surely be regarded as an offence.

According to our Canadian statutes, assisting any public enemy by any means whatsoever must be made known by statement of overt acts. No act which can be described as an overt act is alleged in this indictment in respect of which a wrongful intention can be imputed. Alien enemies must not be confused with resident aliens of enemy origin known as alien friends. Subjects of the enemy are not necessarily enemies of the King, and to assist them is not to assist the enemy. An alien enemy and an alien friend are thus to be sharply distinguished from each other.

In the present case the assistance, if such there be, which is not admitted, was given to alien friends only. An analysis of the indictment shews that it discloses no offence, and is not framed according to the statute. It was no offence to proceed to a port in Bulgaria or to counsel the use of the Roumanian language in October, 1914.

The indictment and conviction cannot stand, and should be set aside, and the present motion should be allowed. I think it is useless to add any others reason in support of my opinion. The memorandum [of authorities] of the defendant is very complete, and the authorities cited are absolutely *ad rem*.

Cross, J.:—A motion in arrest of judgment was made before me on the Crown side, and was supported by a brief argument, in which the grounds taken and mainly relied upon before this court, on the motion for leave to appeal, were referred to, but only cursorily.

When a motion to have questions reserved is made in the Court of Appeal, there is an obvious utility in having the trial judge present, but when it is sought to appeal from his decision in the trial court, it is in general advisable that he should not take part in the judgment in appeal, though there is nothing contrary to law in his doing so.

Having regard to what I have above pointed out, and to the wide field of argument traversed at the hearing of the motion in this court, I consider it opportune to add to what has just been said in announcing the judgment of the majority, the considerations which follow.

The proposition which the accused must establish in order to have judgment arrested, is that the indictment, as it stands, or as it could have been amended, does not state any indictable offence. [Cr. Code sec. 1007].

Now, the indictment plainly charges the accused with having committed treason; having regard to s. 852 of the Criminal Code, it is to be said that, having made that charge, even if it had been made in popular language and without any technical averments, and having made it in "words sufficient to give the accused notice of the offence with which he is charged," the indictment is not demurrable as not setting forth the commission of an indictable offence.

But counsel for the accused say that an indictment for treason must state overt acts; that evidence is not to be admitted of any overt act not stated: s. 847; that the overt acts set out must be acts, the commission of which would amount to treason; but that the overt acts which are set out in the indictment here in question are acts the doing of which need not amount to treason at all.

Pursuing their argument, they point out that the persons named in the recital of overt acts, though persons of enemy nationality, are not to be taken as being alien enemies but as alien friends, seeing that they were in Canada at the outbreak of the war.

In the first place, I consider that the indictment cannot be so read, but, that, on the contrary, it charges the accused with having formed a treasonable design to assist the enemy in the war and, in furtherance of that design (I need not repeat the exact words) with having done certain acts.

Great stress was laid upon the argument that inasmuch as the aliens named in the indictment were, as appears from the indictment itself, persons then in Canada, they were to be regarded as alien friends. But it should be observed that a person of enemy nationality to be regarded as an alien friend must have had a fixed abode in the country at the outbreak of war. Instead of having a place of abode, the persons in question

are rather to be taken to have been in a group hurrying out of Canada at the outbreak of the war. The charge of treason and the recital of the overt acts therefore sufficiently state that the commission of an indictable offence, whether each recited overt act would or would not be an act of treason taken by itself.

But, in the second place, I consider that counsel for the accused are in error in their contention that overt acts must be acts, the commission of which by themselves would constitute treason. They have referred us to three notable cases as a sort of specimen in which the overt acts were so worded as to leave no doubt that they were charged as being treason in themselves, but they cited no authority in support of the general proposition.

To properly appreciate what is to be understood by the expression "overt acts," it would seem opportune to recall certain principles of the criminal law.

In general the law takes no account of mere intent. No one can be convicted of a crime for having intended to murder or to steal, unless he have done an act. It is not so in the case of treason. In contemplation of law, the intent is the treason.

At common law, and under the Act of 1351, there is no such thing as an attempt to commit treason. There are no accessories; all are principals. And it has been held that a bare conspiracy, the mere act of two or more in agreeing to effect a treasonable object, although nothing be done to carry it out, is a sufficient overt act: *Mulcahy* v. *R.*, (1868) L.R. 3 H.L. 306.

But the difficulty and danger of convicting persons of an offence consisting in mere intent led to the statutory requirement that the persons charged should "thereof be provably attainted by people of their condition" made in the Act of 1351 and repeated in later Acts.

An overt act was defined by Abbott, C.J., as "any act manifesting the intention and tending to the accomplishment of the criminal object."

It is said in the work of Foster: "Overt acts are to be considered not merely as evidence, but as the means made use of to effectuate the purpose of the heart, and that, in compassing the King's death, the compassing is considered as the treason, and the overt acts as the means made use of to effectuate the imagination of the heart."

Counsel for the accused are therefore in error in taking the ground that the recital of the overt acts must include a statement of the ingredients of the offence.

I may add that the relevancy of these observations to the matter in hand is not affected by the fact that s. 74 of the Code enumerates ten kinds of treason, in only two of which the gist of the offence is made to consist in the forming of an intention, whereas in each of the other eight the treason is an act.

What I am concerned with, for the moment, is the question whether if the overt acts set forth are not acts which in themselves amount to treason, the indictment is bad or not. In view of what is pointed out above, the answer is in the negative.

Quite apart from what is above set forth, it may be added that, inasmuch as the Code declares that treason is (amongst other things) "assisting any public enemy at war with His Majesty in such war by any means whatever," it cannot be successfully pretended that "any means whatsoever" must mean means, the recital of which would set forth all the ingredients of treason. It appears to me that the overt act might, as suggested at the hearing, consist in some quite colorless act such as sending food stuffs to Spain, provided, of course, that it be charged as having been done in furtherance of the treasonable project.

As the question raised is purely one of construction of the indictment, the matter can be appropriately decided on the motion now before us. That motion should be dismissed.

CARROLL, J.:—This case comes before us again in a new form. On December 4th, 1917, we refused an application for permission to appeal from the verdict against Schaefer for treason. This application urged that the verdict was obviously against the weight of evidence.

It was proved, in this case, that Schaefer had sold transportation tickets to certain Austro-Hungarian subjects in order to allow them to return to their own country during a time of war.

The judge who presided at the trial left to the jury the estimation of the facts, while saying to them that the evidence against the accused was not strong. In spite of this opinion the jury found that the imputed facts constituted an act of treason.

We are told that an intention of aiding the enemy must be proved against the accused, and that this intention is not clearly shewn from the established facts.

Intention is deduced from acts, and the whole question being submitted to the jury, it was within their competence to decide whether the facts proved constituted an act of treason.

When the matter came before us the first time, we decided that it was not one of those cases where the Crown had adduced no evidence in support of the charge. It was a question of facts uncontradicted by the accused, and creating a presumption against him. Schaefer had only to have the witnesses for the defence heard, or to be heard himself, to repel the presumption against him.

Under these circumstances we confirmed the verdict, and in the following term, the judge who presided at the trial was about to pronounce sentence when a motion was made, called, in criminal law, a motion in arrest of judgment.

Schaefer now claims that the indictment does not contain any of the elements of the offence of treason, and that he has the right, at any stage of the proceedings, up to the pronouncing of the sentence, to take objection to a conviction.

At the time of the argument I was led to believe that this motion being of the nature of an inscription in law, a demurrer, the defence should have made it before filing its plea, or, at any rate, during the trial, but, on consulting the authorities, I am convinced that, if it is true, as the accused claims it to be, the indictment contains no offence, objection can, at any stage of the proceedings, be taken against the verdict being carried out. I would cite, on this point, the case of *The King* v. *Lynch* [1900], 1 K.B. 144, 72 L.J.K.B. 167, see Archbold, Crim. Pleadings, 23rd ed., 122.

The point, therefore, is to ascertain if the indictment, as drawn, includes the crime of treason.

S. 74 of the Criminal Code defines what is understood by treason, and it is para. (i) of this section which applies to the present case, and reads as follows: "Assisting any public enemy at war with His Majesty in such war by any means whatsoever." This definition is, as one can see, very general. But the accused

tells us that it should be read in connection with s. 847 of the Criminal Code, which requires the indictment to state overt acts. I note that the French version of this section 847 differs from the English version. The French version says: "Every indictment for treason . . . shall state a commencement of the performance of the overt acts"; while the English version reads: "Every indictment for treason . . . shall state overt acts." Whatever this divergence in the texts may be, I would keep to the one most favorable to the accused, namely the English text.

The indictment reads as follows in the essential and pertinent parts on the point which we have to decide:—

"Israel Schaefer, at the City of Montreal, . . . on the 11th, 12th, 13th and 14th days of October, 1914, . . . being at all such times a subject of our Lord the King, not regarding the duty of his allegiance, as a false traitor against our said Lord the King, unlawfully and maliciously did commit treason, to wit: by assisting . . . subjects of the Austria-Hungarian Monarchy . . . to leave . . . the Dominion of Canada and proceed to Austria-Hungary, between which Monarchy and the Sovereign thereof and our said Lord the King war was then and is yet prosecuted and carried on, as he, the said Israel Schaefer, then and there well knew, for the purpose in such way of aiding, comforting and assisting the said public enemy so at war with His Majesty."

And the indictment continues, alleging that Schaefer sold transportation tickets to these Austrians for one of the ports of Bulgaria, and gave them documents which permitted them to reach the frontier between Roumania and Austro-Hungary; that he advised them to speak the Roumanian language, and favored an accomplishment of their purpose "by maliciously, unlawfully and traitorously providing and assisting . . . each and all of them with moneys of the said Austro-Hungarian Monarchy, to be used in furtherance of their said purpose."

As I have said, the question is, whether this indictment contains the elements of treason.

In short, the indictment says that Schaefer took means to send Austrian subjects into Austro-Hungary, in order to aid the enemy; that he sold them transportation tickets and procured money for them in order to obtain their transportation. . . .

It seems to me that the charge is sufficiently well-worded.

We are told that in 1915, by the Dominion Act, 5 George V., c. 12, s. 2, [Cr. Code s. 75 A] it was declared a special offence to incite to leave Canada the subject of a foreign State at war with His Majesty.

The Act of 1915 does not appear to me to bear upon this. An amendment has been inserted in the Criminal Code in order to alter the punishment formerly prescribed; for a sentence of death to punish an offence such as that of which Schaefer is accused would be excessive, and the punishment was reduced to two years in the penitentiary. This does not mean that the act committed by Schaefer does not constitute treason.

An elaborate argument has been made in order to shew us that the subjects of a foreign enemy State residing here can be alien friends. This argument, however interesting it may be, would have been still more so if the question had been presented before this court for the first time. We have had to consider it three or four times already, and we know the difference which exists between alien friends and alien enemies.

To sum up, we think that the indictment is sufficiently worded, the motion in arrest of judgment is refused with costs.

Judgment: "The Court having heard the said Israel Schaefer by his counsel upon his motion praying that he be granted leave to appeal against the dismissal by this court on its Crown side of his motion to have a question reserved, and that a case be stated upon such appeal, examined the proceedings and in particular the indictment upon which the said Israel Schaefer was convicted;

"Having also heard what was said by counsel representing the Attorney-General and deliberated;

"It is by this Court now here, considered that there is no error in the judgment of this court on the Crown side whereby the said motion was dismissed, and it is accordingly adjudged that the said motion for leave to appeal to this court on its appeal side, be and the same is dismissed." (The Honourable Mr. Justice Lavergne, dissenting).

Motion Refused.

[COURT OF KING'S BENCH, QUEBEC.]

APPEAL SIDE.

BEFORE LAMOTHE, C.J., CROSS, CARROLL, PELLETIER AND MARTIN, JJ.

REX v. ROLLINGS.

FRAUD (§ II—6)—MARKS ON MILITARY STORES—CR. CODE SEC. 436A.

The dishonest application of a government inspection mark to military stores being manufactured for the Government to indicate that they had passed the Government inspectors whereas they had not in fact been passed, is an indictable offence under Cr. Code sec. 436A, although the stores were in no respect defective.

DECIDED: November 21, 1918*

CROWN CASE reserved.

The respondent was acquitted by the Court of Sessions on a charge of having put a statutory mark upon certain shells to indicate that the munitions had been approved by competent officers for acceptance by His Majesty's Government, when as a matter of fact, they had not been so approved.

James Crankshaw, for appellant.

Tucker and Cameron, for respondent.

PELLETIER, J.:—The defendant Rollings was arrested upon the charge of having on different occasions between the 1st of January, 1918, and the 31st of May in the same year, committed acts of dishonesty, fraud and deception towards His Majesty, or towards some of the officers or servants of His Majesty in connection with the manufacture of military stores, namely, by applying to certain shells, both manufactured and in course of manufacture, the broad arrow mark indicating that the said shells had been accepted and approved by His Majesty's officers, when, in fact, the shells in question had not been accepted or approved or received. This charge was consequently based upon the last part of s. 436A., Criminal Code, which reads, in full, as follows:—

"Every person is guilty of an indictable offence and liable to imprisonment for two years, or to a fine not exceeding five thousand dollars, or to both imprisonment and fine, who knowingly sells or causes to be sold or delivered to His Majesty or to any officer or servant of His Majesty, any defective military, militia or naval stores of any kind or description, whether such stores are for His Majesty in the right of his Government of

*Also reported 28 Que. K.B. 75.