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17 June 2003

Clerk to Bills Committee
LegCo Secretariat
3/F, Citibank Tower
3 Garden Road
Hong Kong
(Attn: Mr Raymond Lam)

Dear Mr Lam,

National Security (Legislative Provisions) Bill
"Average man"

Further to the meeting of the Bills Committee held on 14 June, I enclose a judgment on the case *Rex v Cohen* 25 C.C.C. 302, in which the Court held that the jury were entitled to infer that an average man would be likely to be incited by the words spoken by the accused although the person actually addressed was not incited. We would be grateful if you could arrange for it to be distributed to Members.

With regards,

Yours sincerely,

(Johann Wong)
for Secretary for Security

c.c. D of J (Attn: Mr Gilbert Mo
Miss Adeline Wan)

REX v. COHEN

25 C.C.C. 302; 1916 C.C.C. LEXIS 469

SUPREME COURT OF ALBERTA -- APPELLATE DIVISION

JUDGES: SCOTT, STUART AND BECK, JJ.

March 31, 1916

KEYWORDS-1: [**1] 1. SEDITION (I -- 5) -- SPEAKING SEDITIOUS WORDS -- CR. CODE SEC. 134.

SUMMARY-1:

A charge of speaking seditious words with intent in contravention of Cr. Code sec. 134 may be supported by evidence of seditious words openly expressed in a public place to a mere acquaintance, although others were not in a position to overhear what, was said; the jury is entitled to draw inferences both as to the probability of the conversation being repeated by the person addressed and as to the possible effect on such person's loyalty.

[R. v. Felton, 25 Can. Cr. Cas. 207, considered.]

APPEAL following the refusal of Mr. Justice Simmons to reserve a case for the opinion of the Court on the application of the [*303]

accused. The case was argued by consent as if a case had been reserved.

B. Ginsberg, for appellant.

J. Short, K.C., for the Crown.

JUDGMENT-BY: STUART, J.

JUDGMENT:

STUART, J.:--The accused was tried before Mr. Justice Simmons and a jury on the charge "that he, the said George Cohen, at Calgary ... on or about 28th day of April, 1915, did speak seditious words with intent to raise disaffection amongst His Majesty's subjects or to promote feelings of ill-will and hostility between different classes of His [**2] Majesty's subjects."

The accused had been living in Riverside, a suburb of Calgary, for some three or four years and had been in the second-hand furniture business. It was not clear from the evidence whether he had ever been naturalised as a British subject or not, but this is immaterial (Rex v. Felton, 25 Can. Cr. Cas. 207, 9 W.W.R. 819). He was, so he had stated to witnesses, a German and had been an officer in the German army.

The principal witness for the Crown was one Wiggins who had kept a grocery store across the street from the shop of the accused although at the time of the occurrence in question he was not thus engaged. Wiggins stated that on the 28th April, 1915, shortly after the battle of Langemark, he had gone into a pool room at Riverside to get some tobacco and had met the accused at the tobacco stand near the door. There were at the time only two other men in the pool room and these were engaged in playing pool. There does not seem to have been any salesman at the tobacco counter. The accused had been reading a newspaper and, so Wiggins stated, started to laugh and said, "There is good news" and in answer to a question from Wiggins he began to talk about the Canadians [**3] getting badly beaten and said, "You are slaves, you have to do what King George and Kitchener say" and that it was good enough for us to get cut up; we had no business in it at all. Wiggins asked him if he thought they (meaning the Germans) were fighting an honourable fight with gas and the accused answered, "Anything at all, no matter how you get there." Wiggins questioned him as to why he did not leave this country and the accused said he wanted to but had been stopped. He also said that "there would be lots of fertilisers after that

battle, that the Canadians would make good fertilisers." [*304]

There was no evidence that either of the two persons playing pool heard these remarks. Wiggins said, in answer to a question whether he thought they would hear, "No, not if they were interested in the game of pool they certainly could not, they might have heard him talk but would not pay attention."

One of the two men was called but stated that he had not heard anything, in fact that he had only come in after the conversation was over but had heard about it. The other was not called.

This is all the evidence that is really material to the case.

The question which counsel for the [**4] accused asked to have reserved is:

"Was there any evidence in law to support the said verdict?"

There is of course no doubt that there was evidence to go to the jury upon the fact whether certain words were used or not. The only question is whether there was any evidence to leave to the jury upon the matter of seditious intention.

The law in regard to the matter was pretty fully discussed in Rex v. Felton, ubi supra, and it was very properly explained to the jury in the learned Judge's charge to which no objection has been taken.

There is just this slight distinction between the facts of this case and those in Rex v. Felton, that in the latter case the words were spoken in the presence of and were heard by at least two persons in a public bar-room in a hotel, while in the present case the words were, so far as there was any evidence to shew, spoken only in the hearing of the one witness Wiggins, though the locus in quo was of practically the same character.

It appears to me as I said upon the argument that this case lies at least upon the extreme limit of the law. Indeed one is inclined to wonder why the authorities saw fit to put the Country to the expense of a criminal trial [**5] when it was apparently possible to intern the accused as an enemy alien during the war. It may be that he is naturalised because the evidence is not clear on that point, but one would have thought that if he had been the fact would have been brought out in evidence.

While, however, the case is near or indeed just on the line I think we must take into account, as stated in Rex v. Felton, and in the trial Judge's charge, the circumstances not only of the particular occasion but also of the times. These latter have a [*305]

real bearing on the case and were entitled to be considered by the jury. In more peaceful times this element of the evidence would not be present. Therefore on the whole I think there was evidence presented to the jury from which they could, if they saw fit, infer that the words used were likely to cause disaffection among His Majesty's subjects and to stir up ill-will and hostility between different classes of His Majesty's subjects. The fact that such words were being used by him would undoubtedly be reported, as the jury could infer. They would possibly, or at least so the jury might infer, stir up feelings of ill-will against His Majesty's peaceable subjects [**6] of German origin and have a tendency to create dissension and even riots in such times as these. And though the one person addressed may have been extremely loyal that is a matter which the jury might consider not to have been so clear. In any case I do not think the accused ought to be given the benefit of the steadfast loyalty of the person addressed. The words, spoken to an <u>average man</u> were, so the jury were entitled to infer, likely to weaken the firmness of the person addressed in his adherence to his country's cause. This was not a case of a quiet conversation between close and intimate personal friends but an open declaration of opinion to a person, only an acquaintance, casually met in a public place.

I think therefore there was evidence to go to the jury, though no doubt very weak, and that the appeal should be dismissed.

SCOTT, J., concurred.

BECK, J., concurred, but with hesitation.

Appeal dismissed. [*306]