

CANADA / JUDGMENT

Elliott v. The Queen

[1978] 2 SCR 393

COURT

Supreme Court of Canada

DECIDED

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Elliott v. The Queen

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1977-12-20

Report

[1978] 2 SCR 393

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

British Columbia

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Elliott v. The Queen, [1978] 2 S.C.R. 393

Date: 1977-12-20

Dale Stuart Elliott Appellant;

and

Her Majesty The Queen Respondent.

1977: May 3; 1977: December 20.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Accused charged with conspiring to traffic in MDA, trafficking in MDA and having MDA in possession for purpose of trafficking—Appeal by Crown against acquittals on first and third counts and appeal by accused against conviction on second count—Conspiracy appeal dismissed—Conviction of accused set aside and acquittal entered because evidence disclosed accused trafficked in salt of MDA but not in MDA itself—Application to amend third count to charge possession of a salt of MDA for purpose of trafficking—Amendment allowed and new trial ordered on third count as amended—Whether Court of Appeal erred in amending third count—Criminal Code, R.S.C. 1970, c. C-34, ss. 529, 610, 613(8).

The appellant and another were tried on an indictment containing three counts, namely, (1) conspiring to traffic in a restricted drug, methylenedioxyamphetamine (MDA); (2) trafficking in MDA, and (3) having MDA in possession for the purpose of trafficking. They were both acquitted of the conspiracy charge, the appellant alone was convicted on the second charge of trafficking but he was subsequently acquitted on the third charge of possession for the purpose of trafficking, the acquittal being based on the application by the trial judge of *res judicata* and of the principle in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729. Proceedings against his co-accused on the third count were stayed.

The Crown appealed the acquittals on counts 1 and 3, and the accused appealed his conviction on count 2. The conspiracy appeal was dismissed. On the appellant's appeal from his conviction of trafficking in MDA, the conviction was set aside and an acquittal entered because the evidence disclosed that the accused trafficked in a salt of MDA but not in MDA itself. The Court concluded that since the Crown had charged the appellant with trafficking in a specific drug, MDA, proof of MDA was an essential element of the offence. The Court rejected the contention that the relevant provisions of the statute, the Food and Drugs Act, R.S.C. 1970, c. F-27, listing among the restricted drugs "MDA or any salt thereof" embraced any salt of MDA in a charge that specified MDA only. McIntyre J.A., speaking for the majority of the Court, considered that an amendment to the indictment, even after the hearing of the appeal, would have been appropriate. However, an amendment was not sought and the Court decided that an acquittal had to be entered.

When the Crown's appeal from the acquittal of the appellant on the third count of possession for the purpose of trafficking came on for hearing the Court was differently constituted. The Crown, on the appeal, applied to amend the third count to charge possession of a salt of MDA for the purpose of trafficking. The Court allowed the amendment, allowed the Crown's appeal, set aside the acquittal and directed a new trial on the third count as amended. From that judgment the appellant appealed to this Court.

Held (Laskin C.J. and Spence and Dickson JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson, Ritchie, Pigeon, Beetz and de Grandpré JJ.: The only issue before this Court on the present appeal was whether the Court of Appeal exceeded its powers when it amended the third count of the indictment in such fashion as to conform to the evidence by adding a particular which had not been included in that count as originally drawn, upon which the appellant had been acquitted. Having regard to the extensive activities which the appellant was found to have been conducting in the manufacture of MDA hydrochloride, it could not be suggested that the appellant was in any way misled by the fact that that salt was not mentioned in the particulars. He knew in any event that he was being charged with possession of a restricted drug for the purpose of trafficking.

In directing a new trial, MacLean J.A. incorporated the amendment to the information in his order as he felt that the ends of justice required him to do. In granting this order the Court of Appeal was acting pursuant to the provisions of s. 613(4)(b) and (8) of the Criminal Code. The appellant's contention that the order for a new trial could not have been made unless the amendment had been granted and that the amendment was therefore not an order "in addition" to the exercise of the court's power under subs. (4)(b)(i), but rather that it was a prerequisite to the granting of a new trial, was not accepted. When Parliament authorized the Court of Appeal, in the exercise of its power, to order a new trial, to "make any order, in addition, which justice requires" it must be taken as having authorized that Court under those circumstances to make any additional order which the ends of justice require whether the order for a new trial is dependent upon the additional order or not.

Since, in view of the evidence, the ends of justice required the amendment which was here granted, it followed that it was unnecessary to express any view as to the submission that the authority of the Court of Appeal to grant an amendment stems from the provisions of s. 610(3) of the Code which authorize the court to exercise powers "that may be exercised by the court on appeals in civil matters..."

As to s. 529 of the Code, which bears the heading "Amending defective indictment or count", the only mandatory language in that section is contained in subs. (1) which provides for "an objection to an indictment or to a count in an indictment for a defect apparent on the face thereof" and requires such objection to be taken before plea or thereafter by leave of the court or a judge. In the present case there was no defect apparent on the face of the indictment and this subsection accordingly had no application to the present circumstances. There was no other language in the section which could be read as curtailing the power of the Court of Appeal to

make an order under s. 613(8) which has the effect of amending the indictment so as to conform to the evidence where the ends of justice require it.

Per Laskin C.J. and Spence and Dickson JJ., dissenting: Three issues were raised by the order of the Court of Appeal in this case: (i) whether a Court of Appeal has power to amend an indictment; (ii) if so, whether that power can be exercised so as to provide a basis for ordering a new trial; and (iii) whether a Court of Appeal has power to substitute a charge different from the one laid and upon which the appeal has proceeded. There was nothing in the case law, and certainly nothing in the applicable legislation to authorize a court of appeal to do what the British Columbia Court of Appeal did in this case, namely, substitute a charge of a different offence, something which the trial judge himself could not do under the wide amending powers given to him under s. 529 of the Criminal Code.

The view that s. 610(3) of the Code confers power upon a court of appeal to amend an indictment could not be accepted. That section takes its context from the preceding provisions of s. 610 which concern evidentiary questions. The opening words of s. 610(3) show its limited range; they provide that “a court of appeal may exercise... any powers not mentioned in subsection (1) that may be exercised... on appeals in civil matters”. The subsection cannot, therefore, be read as if it was a detached and separate provision. Still less can s. 610(3) be relied upon to authorize a court of appeal to substitute a different charge from the one on which the case came before it.

As to s. 613(8), the provision for “any order, in addition, that justice requires” is sequential to the exercise of the power to order a new trial under s. 613(4). It does not enable a court of appeal to make an order upon which to found a direction for a new trial; and certainly not when that order does not relate to the charge on which the accused has been acquitted and to an error of law in respect of that charge. This is obvious when reference is had, as it must be, to s. 605(1)(a) upon which the Crown must base its right to appeal an acquittal. Assuming, however, that s. 613(8) gives a court of appeal a wider power than that which its terms appear to confer when considered alongside s. 613(4) and s. 605(1)(a), the relevant question here was whether the words “make any order, in addition, that justice requires” empower the Court of Appeal to direct a new trial on a different offence from that on which the appeal was taken.

There was here a usurpation of the function of the Attorney-General and of the Crown. It is for them to decide, the existing charge not being proved, whether to lay the different charge which the Court felt should have been brought against the accused. It is not for a Court to take an ad hominem view in a case like the present one and to do violence to the separate functions of Court and Crown lest a person guilty of an offence, but not the one charged, escape punishment.

APPEAL from a judgment of the Court of Appeal for British Columbia granting leave to amend the indictment and allowing the Crown's appeal against the appellant's acquittal, and ordering a new trial on the indictment as amended, on a charge of unlawfully having in his possession a restricted drug for the purpose of trafficking. Appeal dismissed, the Chief Justice, Spence, and Dickson JJ. dissenting.

P.C.P. Thompson and J.A.D. Bohun, for the appellant. S.M. Froomkin, Q.C., and R. Leclaire, for the respondent.

The judgment of Laskin C.J. and Spence J. was delivered by

THE CHIEF JUSTICE (dissenting)—This case raises an important issue in the administration of the criminal law. The issue, briefly stated, is whether a court, in particular an appellate court, has the power to raise a charge against an accused and to direct that he be tried on that charge, not being the one laid or sought to be laid by the Crown and not being an included offence in that respect. I should have thought that the answer must be emphatically “no”, but the British Columbia Court of Appeal resolved the issue in the affirmative under what, in my view, was a misconception of the problem that it faced. A recital of the facts makes this clear.

The appellant and another were tried on an indictment containing three counts, namely, (1) conspiring to traffic in a restricted drug, methylenedioxyamphetamine, more conveniently called MDA; (2) trafficking in MDA, and (3) having MDA in possession for the purpose of trafficking. They were both acquitted of the conspiracy charge, the appellant alone was convicted on the second charge of trafficking but he was subsequently acquitted on the third charge of possession for the purpose of trafficking, the acquittal being based on an application by the trial judge of *res judicata* and of the principle in *Kienapple v. The Queen*[1]. Proceedings against his co-accused on the third count were stayed.

The Crown appealed the acquittals on counts 1 and 3, and the accused appealed his conviction on count 2. The conspiracy appeal was dismissed by the British Columbia Court of Appeal on November 26, 1975, and is of no concern here. The appellant’s appeal from his conviction of trafficking in MDA was heard on February 4 to 6, 1976, by a Bench composed of Maclean, Seaton and McIntyre J.J.A. The latter delivered the principal judgment of the Court[2] on March 26, 1976, whereby the conviction was set aside and an acquittal entered because the evidence disclosed that the accused trafficked in a salt of MDA but not in MDA itself. The Court concluded that since the Crown had charged the appellant with trafficking in a specific drug, MDA, proof of MDA was an essential element of the offence. The Court rejected the contention that the relevant provisions of the statute, the Food and Drugs Act, R.S.C. 1970, c. F-27, listing among the restricted drugs “MDA or any salt thereof”, embraced any salt of MDA in a charge that specified MDA only. In its opinion, the trial judge had erred in making interchangeable references to MDA and salt of MDA.

McIntyre J.A. concluded his reasons for judgment as follows:

This is a case where in my view an amendment to the indictment, even after the hearing of the appeal, would have been appropriate. Had the Crown sought an amendment I would have been disposed to allow it. However, no application having been made I feel obliged for the reasons given above to consider that this appeal should be allowed and an acquittal entered.

Seaton J.A., who wrote brief concurring reasons, noted that although the expert evidence was to the effect that MDA and salt of MDA were the same drug, a view accepted by the trial judge, the question was one of law turning on the interpretation of the relevant provisions of the Food and Drugs Act, and particularly Schedule H. Under the Act they were not the same drug, and since the Crown did not seek an amendment, an acquittal had to be entered.

The issue now before this Court arises from the disposition by the British Columbia Court of Appeal of the Crown's appeal against the acquittal of the appellant on the third count, namely, possession for the purpose of trafficking. In approaching the issue, I take no position on the correctness of the decision of the Court of Appeal that the Narcotic Control Act created two distinct offences, one relating to MDA and the other to a salt of MDA. That differentiation must stand for present purposes. The appeal by the Crown from the acquittal of the appellant on the third count of possession for the purpose of trafficking came on for hearing on May 12, 1976, some six weeks after the provincial Court of Appeal had disposed of the appellant's appeal on the second count favourably to him. The Court was differently constituted, consisting of Maclean, McFarlane and Branca JJ.A. The Crown, on the appeal, applied to "amend" the third count to charge possession of a salt of MDA for the purpose of trafficking. In short reasons with which the other members of the Court agreed, Maclean J.A. allowed the "amendment", allowed the Crown's appeal, set aside the acquittal and directed a new trial on the third count as amended. He said only this:

In my view the ends of justice require that the amendment in this case be granted and in my view no substantial wrong would be suffered thereby by the accused person.

It is thus clear that judges of the British Columbia Court of Appeal who made up the different Benches that heard the appeals on the second and third counts were in no doubt of the Court's power to "amend" an indictment so as to charge a different offence from the one on which the accused was tried. This is not the view of my brother Ritchie, whose reasons in this appeal I have had the advantage of reading, because he speaks not of an "amendment" to charge a different offence but of an amendment "to conform to the evidence by adding a particular which had not been included in [the third] count as originally drawn". Since for the purposes of this case, as I have already noted, it must be taken that the specification of a particular drug in the charge made proof thereof an essential element of the offence, the substitution in the wording of the charge of another drug amounts to a charge of a different offence, even though the other essential elements, namely, possession for the purpose of trafficking, are the same in either situation. Indeed, counsel for the Crown conceded that in this case he must accept as a fact that different offences were involved in the indictment as laid and as altered by the Court of Appeal.

Does then a court of appeal have the power to order an accused to be retried on a different charge from that originally laid and different from that on which he was originally tried? It is one thing to amend, so as to rectify an imperfect charge or indictment of an offence where the charge or indictment is not itself a nullity; it is another thing to substitute a charge of a different offence. Supplying an omitted essential averment of a charge which is clearly indicated is one thing; changing a charge to allege a different offence is something else.

II

Three issues are raised by the order of the court of appeal in the present case. They are, first, whether a court of appeal has power to amend an indictment; second, if so, whether that power can be exercised so as to provide a basis for ordering a new trial; and third, whether a court of appeal has power to substitute a charge different from the one laid and upon which the appeal has proceeded. I think it relevant to these issues to begin with a consideration of the powers of a trial judge to amend an indictment.

Those powers are now set out in s. 529 of the Criminal Code. It is unnecessary in this case to trace its history, other than to note that it goes back not only to the original Criminal Code of 1892 (see s. 723) but beyond that Code to the Criminal Procedure Act, 1869 (Can.), c. 29, s. 70. Although there was originally some doubt whether the power to amend extended beyond the amendment of formal defects, statutory clarification and ensuing judicial decisions settled that question in favour of an extended power, including a power to supply an essential averment of the offence charged as well as power to make changes in the assertions of the charge to conform with the evidence as to any such details: see *R. v. Lacelle*[3]; *R. v. Kerr*[4]; *Yanovitch v. The Queen*[5]. Wide as was the power to amend reposed in the trial judge, it did not extend to authorize him to substitute an offence different from the one charged. This was asserted more than fifty years ago in the *Kerr* case, *supra*, at p. 231, where Meredith C.J.O. said, referring to the provision for amendment of an indictment that “[it] does not, of course, authorize an amendment which substitutes a different offence for that intended to be charged or the addition of other offences”. The same view was taken more recently by the Quebec Court of Appeal in *Dupont v. The Queen*[6], at p. 390, and re-affirmed by the Ontario Court of Appeal in *R. v. Elliott*[7], at p. 237. An earlier authority to the same effect is *R. v. Cohen*[8].

I am not unmindful of s. 496 of the Criminal Code which relates to the preferring of an indictment by the Crown and to the inclusion of counts of offences disclosed by the evidence taken on the preliminary inquiry, even if the accused was not committed for trial thereon. Although this provision does not touch the powers of the trial judge, it indicates that it is left to the prosecution to determine, in the defined circumstances, whether to add or substitute a charge other than that set out in the information. The farthest that the courts have gone in respect of the substitution of offences is to permit the Crown to ask for an amendment to that effect of an information upon which an accused has elected trial before a magistrate but in such case the accused must be allowed to re-elect: see *R. v. Hollman*[9]. I do not pass on the correctness of this view of a court’s power. The substance of the matter appears to be a

withdrawal of one information by the Crown and the laying of another, and this is open to the Crown in respect of indictments.

Coming then to the powers of a court of appeal in respect of amendments or substitutions, I find no provision of the Criminal Code which gives a court of appeal greater powers in these respects than are given to a trial judge; and, indeed, there is no provision which expressly gives any power relating to indictments to a court of appeal. Neither Bench of the British Columbia Court of Appeal discussed or even referred to any provision of the Criminal Code which supported the power it asserted, but during the argument before this Court ss. 610 and 613(8) as well as s. 529 were brought to the fore.

I shall deal first with s. 610 which reads as follows:

610. (1) For the purposes of an appeal under this Part the court of appeal may, where it considers it in the interests of justice,
- (a) order the production of any writing, exhibit, or other thing connected with the proceedings;
 - (b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,
 - (i) to attend and be examined before the court of appeal, or
 - (ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;
 - (c) admit, as evidence, an examination that is taken Under subparagraph (b)(ii);
 - (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;
 - (e) order that any question arising on the appeal that
 - (i) involves prolonged examination of writings or accounts, or scientific or local investigation, and
 - (ii) cannot in the opinion of the court of appeal conveniently be inquired into before the court of appeal,be referred for inquiry and report, in the manner provided by rules of court, to a special commissioner appointed by the court of appeal; and f) act upon the report of a commissioner who is appointed under paragraph (e) in so far as/the court of appeal thinks fit to do so.
- (2) In proceedings under this section the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under paragraph (1)(e), are entitled to be present during the inquiry and to adduce evidence and to be heard.

- (3) A court of appeal may exercise in relation to proceedings in the court any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.
- (4) Any process that is issued by the court of appeal under this section may be executed anywhere in Canada.

Although I have reproduced the entire section for context, the only terms thereof relevant here are the opening words of subs. (3), namely “A court of appeal may exercise in relation to proceedings in the court any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters...”. Section 610 first appeared as s. 1021(1) of the Criminal Code, enacted by 1923 (Can.), c. 41, s. 9, and was taken from s. 9 of the English Criminal Appeal Act, 1907 (U.K.), c. 23. The concern of the English Courts with this provision does not appear to have gone beyond reliance on it to permit fresh evidence to be admitted on appeal: see *R. v. Robinson*[10]. A similar provision was at issue in the New South Wales case of *R. v. Burns*[11] to support the power of an appellate court to amend an indictment. In that case an indictment charged the accused with obtaining a travel document by a false pretence to one N with intent to defraud, but the evidence did not show a false pretence to N but rather to another, and it was held that the provision was not ample enough to empower an appellate court to make the amendment. Although dissenting on the ground that there was no substantial wrong or miscarriage of justice in the conviction of the accused, Chief Justice Cullen was nonetheless of the same opinion as his colleagues in declaring that the provision comparable to our now s. 610(3) did not enable an appellate court to make an amendment to an indictment which had been finally dealt with by the trial judge; and he added (at p. 356): “so drastic a power, if it had been the intention of the Legislature to confer it, one would expect to have seen expressed in plain words”.

Section 610(3) was considered in a series of British Columbia cases, which I wish to examine. *R. v. Danyleyko*[12] may be put to one side because there the British Columbia Court of Appeal sitting as the Yukon Territory Court of Appeal relied on s. 610(3) and on the provincial Court of Appeal Act to support its right to send a stated case back to a magistrate for amendment; it does not, therefore, touch the issue in question here. In *R. v. McNutt*[13], an issue arose as to proof of the territorial jurisdiction of a magistrate under an indictment charging an assault in place H whereas it occurred in place W, both being within the territorial jurisdiction. No amendment was made or sought before the magistrate. A new trial was ordered by the majority in view of the course of the proceedings below (the dissenting judge concluded that territorial jurisdiction had not been proved) but Davey J.A. in obiter also adverted to what is now s. 610(3) as being broad enough to empower the Court of Appeal to make an amendment to prevent a miscarriage of justice. This statement was induced, however, by doubt whether the British Columbia Court of Appeal was right in an earlier case, *R. v. More and Melville*[14] (Davey J.A. being a member of the Court), which held that an allegation of the commission of an offence at a defined place was an essential averment, and where the evidence showed its commission at a different place and no

amendment was made at trial, the Court of Appeal could not itself amend but must quash the conviction. However, it was held that it was open to the Court to order a new trial in the interests of justice, and it would be for the trial judge to decide whether an amendment was necessary and, if so, whether it should be made. In the McNutt case, Wilson J.A. was content to apply the More and Melville case in this respect while also agreeing with Davey J.A. that a new trial was warranted in McNutt because of the course of proceedings there.

Among the authorities relied on in the More and Melville case was *R. v. Austin*[15] where the Ontario Court of Appeal held that on a charge of robbing a named person, proof that the person robbed was the one named was essential, and in the absence of an amendment at trial to make the indictment conform to the evidence the Court of Appeal could not remedy the defect because it had no power to amend, and consequently an acquittal must be entered. There was no such additional ground in the Austin case as there was in the More and Melville case to warrant a new trial; there was simply failure of proof at trial of an essential averment, and the Court of Appeal did not think it should enter the lists and do for the Crown what it was open to it to do and what it failed to do for itself, namely, seek an amendment at trial.

This brings me to the later judgment of the British Columbia Court of Appeal in *R. v. Wixalbrown and Schmidt*[16], in which the force of *R. v. More and Melville* was eroded and in which the majority of the five-man Bench concluded that (to use the words of Davey J.A. at p. 39) “this Court may in appropriate cases exercise the powers of amendment conferred by the Code upon trial Judges” but it was a power to be exercised with greatest care. Davey J.A. did not himself indicate the provisions of the Criminal Code giving this asserted power to a court of appeal. It is clear from his words that he was purporting to exercise the powers of a trial court under what is now s. 529. At the same time, he based his conclusion on adoption of the reasons of Wilson J.A. who invoked what is now s. 610(3), pointing out that there was no reference to that provision in the More and Melville case, and holding that s. 529 did not extend to a court of appeal. I should say at this point that the decision in *Wixalbrown and Schmidt* cannot be justified by reliance on s. 529 which, by its own words, is restricted to matters at trial. It is included in Part XVII of the Criminal Code—Procedure by Indictment—while the powers of the Court of Appeal are set out in Part XVIII—Appeals—Indictable Offences—and there is no incorporating reference.

What Davey J.A. said on the question of a court of appeal’s power to amend, speaking also for Bird and Tysoe J.J.A., with Sheppard J.A. dissenting on this point, was an alternative ground of decision, having regard to the facts of the case. The two accused were charged with breaking and entering certain premises at a specified time and committing an indictable offence, to wit, theft. The charge was laid under what is now s. 306(1)(b) (then s. 292(1)(b)) which concluded with the word “therein” in defining the offence but that word was not included in the indictment nor was objection taken to the omission at the trial which proceeded on the basis that the alleged theft was committed in the specified premises. The word “therein” had been included in the information upon which the preliminary inquiry was conducted which resulted in the committal for trial. On appeal from conviction, counsel for the accused took for the first time two objections; first, that there were no or no sufficient particulars of the alleged offence of theft, as

was a requisite under s. 492, (now s. 510) and, second, that the omission of the word “therein” was an omission of an essential averment and hence the accused was convicted of an offence not known to the law.

Davey J.A. disposed of the first objection by agreeing that if theft alone had been charged the indictment would have been fatally defective (relying on *Brodie v. The King*[17], at p. 199), but theft being alleged as part of a compound offence and there being sufficient particularity to enable the accused to meet the charge, the objection failed. As to the second objection, the omission of the word “therein” from the indictment, Davey J.A. took alternative positions. He held, first, that as a matter of context (purporting to distinguish this Court’s judgment in *McNeil v. The King*[18], with, in my opinion, questionable success) there was not an omission of an essential averment but rather an imperfect allegation of such an averment which caused no substantial wrong or miscarriage of justice. His alternative position, agreeing for this purpose that there was omission of an essential averment, was that in principle (to quote him, at p. 39),

...no person ought to stand convicted or be imprisoned on a charge that totally omits an essential averment required to constitute an offence known to the law. That in itself is a substantial wrong. I can see no difference in principle between a conviction for a charge that lacks one averment necessary to constitute a crime, and a conviction for one that is totally unknown to the law. To allow the former to stand would open the door to grave abuses, the end of which cannot be foreseen.

He went on to say, however, that “that objection can be met by amendment if we have the power”. He concluded, as I have already noted, that a court of appeal “may in appropriate cases exercise the powers of amendment conferred by the Code upon trial Judges”. He did not say whence comes this power—it could only be given by statute—and I can only infer from Davey J.A.’s reliance on Wilson J.A.’s reasons that in Davey J.A.’s view it derived from what is now s. 610(3) of the Criminal Code. However, s. 610(3) speaks of the power of a court of appeal in civil matters and it is impossible to find authorization in it for the exercise of powers conferred by the Criminal Code upon trial judges. Sheppard J.A. met the issue of the omission of an essential averment, to which no objection was taken at trial, by invoking the principle laid down in *R. v. Leclair*[19], namely, that when an accused has failed to move to quash before pleading to an indictment and has failed as well to object during the trial, the Court of Appeal may refuse to allow him to raise the matter there unless it is of opinion that the accused has been in some way prejudiced or misled. In *Leclair*, although an essential averment was omitted, the section of the Code under which the offence was charged was referred to, and this, it seems to me, must have some bearing on the statement of principle which, otherwise, would appear to contradict Davey J.A.’s opinion, quoted above, that omission of an essential averment itself is a substantial wrong. I do not need, however, to dwell on this point here but pass to Sheppard J.A.’s observation on whether there is a power in a court of appeal to amend an indictment. He said this on the point (at p. 44):

The Court of Appeal has not power to make the amendment of the indictment and conviction by adding the word “therein” as requested by the Crown. By reason that Parliament has expressly conferred on the trial Court the power to amend indictments subject to certain restrictions (s. 510) [now s. 529] there is difficulty in construing other sections of the Code as impliedly conferring upon another Court, such as the Court of Appeal, the power to amend the indictment and conviction, either subject to the same restrictions on the trial Court or without any restriction. Moreover, the primary question for the Court of Appeal is whether or not substantial wrong or miscarriage of justice has occurred (s. 592(1)(b)(iii)) [now s. 613(1)(b)(iii)]; if not the appeal would be dismissed and the matter thereby ended. If substantial wrong or miscarriage of justice has occurred the appeal would be allowed and the conviction quashed, with the direction of an acquittal, or of a new trial (s. 592(2)) [now s. 613(2)]. Only in the event of a new trial would any amendment be required and the power to make such amendment has been given to the trial Court where the accused would have an opportunity to plead thereto and to meet the issue raised thereby. It would follow that the Court of Appeal has not the power to amend the indictment and conviction as requested for the Crown. I have reviewed the Wixalbrown and Schmidt case at some length because it has spawned other decisions to the same effect on the power to amend. Certain observations must be made about it. In the first place, and central to the present case, it does not deal with the substitution of a charge of a different offence from that sought to be alleged. Second, Wilson J.A. did not say what Davey J.A. said he did. Wilson J.A. noted that a court of appeal could not find a power to amend an indictment on the now s. 529, that provision being limited to trial judges, but it could be founded on the now s. 610(3) as giving the same power to amend as the Court of Appeal had in civil cases.

I am unable to accept the view that s. 610(3) confers any power upon a court of appeal to amend an indictment. That subsection takes its context from the preceding provisions of s. 610 which concern evidentiary questions. The opening words of s. 610(3) show its limited range; they provide that “A court of appeal may exercise... any powers not mentioned in subsection (1) that may be exercised... on appeals in civil matters”. The subsection cannot, therefore, be read as if it was a detached and separate provision. Although Wilson J.A. purported to find support for his view in this Court’s judgment in *Kissick v. The King*[20], that case was concerned with an issue as to admissibility of evidence and thus related to the very subject-matter of s. 610. Still less can s. 610(3) be relied upon to authorize a court of appeal to substitute a different charge from the one on which the case came before it.

Wixalbrown and Schmidt was invoked by the British Columbia Court of Appeal in *R. v. Breland and George*[21], where essential averments were omitted from a charge but no objection was taken at trial. The majority judgment proceeded on alternative bases, relying, first, on the principle of *R. v. Leclair*, *supra*, that where no objection is taken at trial the accused will not be allowed to take it on appeal unless he has been misled or prejudiced; and, second, on the principle allegedly derived from the judgment of Davey J.A. in *Wixalbrown and Schmidt* that even if the accused has been misled or prejudiced, the Court of Appeal may amend and affirm the conviction under s. 529 of the Criminal Code if there has been no substantial wrong or miscarriage of justice. I have doubts whether *Wixalbrown and Schmidt* goes this far (and the

dissenting judgment of Whittaker J.A. supports my doubt), since Davey J.A. was mistaken as to what Wilson J.A. said in that case but, in any event, I need not pursue this because we are not dealing in the Breland and George case with the substitution of a different charge but only with the perfection of an imperfect one.

There is another line of cases represented by *Morin and Morin v. The Queen*[22] and by *R. v. Pearson*[23] which take a strict approach against the Crown where an essential particular of a charge is not proved and no application to amend is made by the Crown to the trial judge. In the *Morin* case, there was a charge of illegal possession of goods on a stated date but the evidence showed possession at a later date. The Crown did not move to amend but a conviction was entered at trial. The Quebec Court of Appeal held that the offence charged was not proved and that it had no power to rectify the matter, citing *R. v. Volaine*[24]. This class of case differs from those where an essential averment or some particular is omitted; the charge is good in all respects but, as in the *Volaine* case, it alleges an offence committed on a specific date and the evidence does not show any of the prohibited acts to have been committed on that date. No rectification having been effected at the trial, it was held in *Volaine* that the Court of Appeal had no power to rectify the mistake, with the result that a conviction on the charge could not stand and an acquittal had to be ordered. In the *Pearson* case, *supra*, there was a variance as to the place of commission of an offence between the statement in the charge and the evidence that was adduced but no application was made to amend. On appeal, a majority of the Quebec Court of Appeal held that the conviction must be quashed and an acquittal entered because the Court of Appeal had no power to amend the charge to conform to the evidence. Owen J.A. dissented in an extensive review of the authorities, preferring to follow and to apply, in respect of a variance as to the place of commission of an offence, a line of cases, having their source in English case law, holding that a variance as to date was not fatal to a conviction because the place, like the date, was not an essential averment, and since the accused was not misled or prejudiced the conviction should stand. He added this (at p. 26):

In view of this conclusion, I do not deem it necessary to discuss whether this Court, in the present case, had the power to amend the indictment so as to conform with the proof.

One further point may be noted, arising from the judgment of the New Brunswick Court of Appeal in *R. v. Christiansen*[25]. That Court was unanimous in holding that a charge of trafficking in narcotics by distributing was not supported by the evidence and further that an attempt to commit the offence was not established. However, it divided on the consequences of its holding. Since it appeared that the evidence supported a finding of trafficking by giving, the question was whether the trial judge should have amended the indictment *suo motu* and whether, not having done so, this was a reversible error. Hughes C.J.N.B. held on the authorities that there was no duty on the trial judge to amend the indictment to conform to the evidence when the Crown did not seek an amendment and hence would dismiss the Crown's appeal against an acquittal. Ryan J.A. was content to dismiss the appeal on the ground that the offence charged was not proved. Only Limerick J.A., who dissented, viewed s. 610(3) as giving the Court of Appeal power to amend the indictment but, apparently, only by reason of the trial judge's error in law in failing to make

the amendment. It followed in his view that a new trial should be directed on an amended indictment, invoking in this respect s. 613(8) of the Criminal Code.

I cannot subscribe to Limerick J.A.'s proposition that a trial judge has a duty to amend an indictment to conform to the evidence when the Crown has not sought an amendment and hence the basis on which he asserted an amending power in the Court of Appeal under s. 610(3) disappears. Indeed, if he is correct in imposing such a duty on a trial judge there is no need to invoke s. 610(3) since the issue then becomes merely one of correcting an error of law below. I do not find the Christiansen case of any assistance on the issues in the present case.

It is, of course, the fact that, with the power given to a trial judge to amend to add an omitted essential averment, the line between a charge which is a nullity and one which is merely imperfect has become more difficult to draw. *R. v. Hunt, Nadeau and Paquette*[26] is an illustration, the British Columbia Court of Appeal holding there that there was no offence disclosed in the charge, which was thus not amendable. In *R. v. Major*[27], which came to this Court (see 27 C.C.C. (2d) 239) MacKeigan C.J.N.S. considered both *R. v. Leclair* and *R. v. Wixalbrown and Schmidt* and, speaking for the majority, laid it down (at p. 65) that "the omission of what used to be considered an essential averment is not now sufficient to prevent a charge being cured by amendment, even at the Court of Appeal level, so long as the accused is reasonably informed and not misled, and especially where the offence is correctly identified by section number". The source of this power must have been s. 529 because MacKeigan C.J.N.S. said that he respectfully agreed with Davey J.A. in *Wixalbrown and Schmidt*.

The issue for MacKeigan C.J.N.S. in the *Major* case was whether the charge was an unamendable nullity or was amendable despite its imperfection, and he concluded that it was amendable by supplying an omitted essential averment but that it was necessary to see if the matters covered by the missing averment were in fact proved in order to decide whether the amendment should be made and whether the accused should have been convicted. It was on the point of whether there was such evidence that Cooper J.A. dissented from the majority and would, unlike them, have allowed the amendment and affirmed the conviction which the majority quashed. In so far as the Nova Scotia Court's decision in the *Major* case stands for the proposition that a court of appeal may exercise the powers of a trial judge under s. 529 to amend a charge of an indictable offence to supply an essential averment it is, in my opinion, wrong in law and this is very clear from a mere reading of s. 529. The appeal to this Court was disposed of in short oral reasons at the conclusion of the hearing whereby Cooper J.A.'s assessment was preferred and the conviction was accordingly restored: see (1976), 27 C.C.C. (2d) 239.

The *Major* case was considered by this Court in its recent decision in *R. v. Côté*[28], which was a Crown appeal from acquittal on an information charging an offence under s. 235(2) of the Criminal Code, the information referring to the section but omitting from the particulars of the charge the words "without reasonable excuse". No objection was taken by the accused to the omission either at first instance or on the trial *de novo*, nor did he object in his notice of appeal that the charge did not disclose an offence. However, leave to amend the notice of appeal to raise this objection was given by the Saskatchewan Court of Appeal which, in the result, quashed the

summary conviction on that ground. The case was brought here on the question of the applicability of ss. 732(1), (3) and 755(4) (as it stood at that time) of the Criminal Code. Whether s. 732, which refers to the powers and position of a summary conviction court, has any relevance to an issue arising in an appellate court is, at best, doubtful, and I have grave doubt as well whether s. 755(4) has any application to a court of appeal since it is a provision referring to an “appeal court” defined in s. 747 as being the court for trials *de novo* whereas the further appeal to a court of appeal is dealt with in s. 771. However, neither s. 732(1), (3) nor s. 755(4) was necessary to the determination of the Crown’s appeal (which was allowed in this Court) since both de Grandpré J. who wrote for the majority and Spence J. who wrote in concurrence were agreed that the information was sufficient and did not need amendment.

However, in deference to the arguments advanced by counsel on the question on which leave was given to bring the case to this Court, de Grandpré J. went on to discuss the Major case, pointing out (and in this Spence J. agreed) that we were concerned, on the appeal here, only with the question whether there was sufficient evidence to prove an element of the offence charged, and we supported the dissenting view of Cooper J.A. in the Nova Scotia Court of Appeal that there was such evidence. The further observation and conclusion of de Grandpré J. on the effect of ss. 732(1), (3) and 755(4) (and I have already indicated my doubt of their applicability to a court of appeal) that “it was an error on the part of the [Saskatchewan] Court of Appeal to fail to consider the application of the relevant provisions of s. 732 and s. 755... in the circumstances of the case and to hold that the information did not disclose an offence known to the law” (at p. 358 of 33 C.C.C. (2d)) have no relevance for the issue under consideration in the present case.

This observation and conclusion was prefaced by the words (referring to the Major case) that “this recent decision of our Court settles the matter with the result that the question of law defined in the order granting leave [in the Côté case] must be answered in the affirmative”. Whatever be the view taken of our decision in the Major case, nothing in it touches the power of a court of appeal to substitute a charge of a different offence, and it must be assumed that Chief Justice MacKeigan’s reference to the Court of Appeal’s power to amend can only have been a reference to s. 529 although no Criminal Code provision was identified by him.

Since it is established—and a recent illustration is seen in *R. v. Vallée*[29]—that a charge or an indictment which fails to disclose an offence, one which is a nullity, is not amendable by the trial judge even given the wide powers of amendment reposed in him by s. 529, and that no power to breathe life into a nullity rests in a court of appeal, it would be astonishing if on appeal a court of appeal could exercise power to substitute a different charge when a trial judge cannot do so. There is no express power to do so, indeed there is not even any express power in a court of appeal to amend, as there is in New Zealand under s. 392(1) of the Crimes Act, 1908 (N.Z.), No. 32, and it would seem that the proper course for the Court of Appeal to adopt, if it decides to order a new trial and not apply the Leclair doctrine to foreclose the accused on any objection to the indictment, is to leave it to the trial judge to decide whether an amendment should be made.

III

I turn now to s. 613(8) of the Criminal Code and, in order to provide a context for its consideration I reproduce as well s. 613(4) as that provision stood at the time of the proceedings in this case in the British Columbia Court of Appeal (it was amended and re-arranged by the Criminal Law Amendment Act, 1975, 1974-75-76 (Can.), c. 93, s. 75, effective July 26, 1976, but without any change in substance). The two subsections read as follows:

613. (4) Where an appeal is from an acquittal the court of appeal may

- (a) dismiss the appeal; or
- (b) allow the appeal, set aside the verdict and (i) enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or
- (ii) order a new trial.

...

- (8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

I supplement these provisions to make the short point here that this Court's power to entertain the accused's appeal from the setting aside of his acquittal is found in s. 618(2)(a) which gives him a right of appeal in such circumstances on a question of law, here the question of the proper construction and application of s. 613(4), (8).

Grammatically and as a matter of common sense construction, a court of appeal, seized of a Crown appeal against an acquittal, looks to s. 613(4) for the powers it may exercise on such an appeal, and it is only where (in the words of s. 613(8)) "a court of appeal exercises any of the powers conferred by subsection... (4) [that] it may make any order, in addition [to that exercise (the italicized words are my own)] that justice requires". The provision in s. 613(8) for "any order, in addition, that justice requires" is sequential to the exercise of the power to order a new trial under s. 613(4). It does not, in my view, enable a court of appeal to make an order upon which to found a direction for a new trial; and certainly not when that order does not relate to the charge on which the accused has been acquitted and to an error of law in respect of that charge. This is, I think, rather obvious when reference is had, as it must be, to s. 605(1)(a) upon which the Crown must base its right to appeal an acquittal. There is a statutory framework, and only a statutory framework, for appeals, and the limitations which have been placed by Parliament on Crown appeals are clear. A court of appeal, limited to questions of law arising out of the indictment on which an accused has been tried and acquitted, cannot, so to speak, pull itself up by its own bootstraps to exercise its power to order a new trial but must find a basis for doing so in respect of the charge as laid and considered at trial. It is only that charge which an accused must be prepared to defend (saving included offences) and fairness to him, which the Criminal Code purports to express in accordance with the fundamental conceptions residing in the presumption

of innocence, dictates that he not be taken beyond the bounds of what the Crown has chosen to lay against him.

What is now s. 613(8) was considered by Fauteux J., as he then was, in *Welch v. The King*[30], where he spoke for the majority of the Court on an issue arising from a conviction on a charge of manslaughter upon a second trial of the accused who had first been charged with murder and convicted of manslaughter. The first verdict was set aside for misdirection and the Ontario Court of Appeal either failed or refused to order a new trial or to direct an acquittal, contenting itself with saying that although the conviction would be set aside the accused was not acquitted. The second trial followed. In the result, the majority of this Court allowed the accused's appeal, quashed the conviction on the second trial and ordered his discharge. What this Court was concerned with in the *Welch* case was the incomplete judgment of the Ontario Court of Appeal in the first proceeding and, hence, with the statutory powers of courts of appeal on appeals in criminal cases. The explanation of the Court of Appeal's unusual decision neither to convict nor acquit nor to order a new trial was the assumed impossibility under the Criminal Code of the Crown laying a second indictment for manslaughter where the accused had been acquitted on an indictment charging murder: see *R. v. Pascal*[31].

In the course of his reasons, and adverting obviously to what is now s. 613(8), Fauteux J. said this (at p. 426):

...I fail, I must say with deference, to appreciate the alleged obstacles standing in the way of the Court of Appeal to exercise its authority if, as suggested, the majority judges wanted to direct a new trial only on this sole undisposed of part of the indictment, that is, the lesser charge of manslaughter. Legal and sufficient it would have been to direct a new trial on the offence of manslaughter exclusively and to further order that the original indictment of murder be, to that end, amended. Thus, on this new trial, the accused could only be found guilty or not guilty of manslaughter. The language of the statute is broad enough to embrace the authority to make such "other order", if the justice of the case suggests no other. And I know of no principles of law which could have then been violated by such order. I must, therefore, conclude that the exercise of the statutory authority given to the Court of Appeal, under section 1014(3), to direct an acquittal to be entered or to direct a new trial and in either case, to make such other order as justice requires, is not permissive but mandatory.

This application of s. 613(8) does not touch the present case but it clearly gives sensible subject-matter to the provision in respect of the substitution of convictions for included offences or orders for a new trial in respect of such offences.

A reference to what is now s. 613(8) is also made in the dissenting reasons of Taschereau J., as he then was, Chief Justice Rinfret concurring. The dissent was on another point but as to s. 613(8), the learned justice said this (at p. 416):

I had the advantage of reading the reasons for judgment of my brother Fauteux, and I agree with him, that when the Court of Appeal allows an appeal against a conviction, in a case like the one at bar, it has only two alternatives. It may quash the conviction and direct a verdict of acquittal, or direct a new trial, and it is only when one of these two courses has been followed that it may make such other order as justice requires. It is however imperative and not only permissive, that there should be an acquittal or that a new trial should be directed.

I entertain no doubt that the Court of Appeal had power by virtue of section 1014(3) of the Cr. C., after having quashed the conviction, to direct a new trial limited exclusively to the charge of manslaughter. This would have clearly been an order authorized by the concluding part of section 1014(3) Cr. C. I subscribe fully to this view and would underline Taschereau J.'s words that "it is only when one of these two courses [direction of an acquittal or of a new trial] has been followed that [the Court of Appeal] may make such other order as justice requires". (The italics are those of Taschereau J.)

The Welch case appears to have been applied in *R. v. Kelso*[32], where the accused on an indictment for rape was convicted of attempted rape, and in ordering a new trial because of misdirection the Court felt it could properly order the new trial to proceed on the charge of attempted rape, not a very surprising conclusion and, indeed, it may be doubted whether in the circumstances of the Kelso case there was any need to rely on s. 613(8): see also *R. v. Robertson*[33]. However, such reliance in case of an included offence (as to which see *R. v. Popoff*[34]) is a long way from the issue confronting this Court here.

Assuming, however, that s. 613(8) gives a court of appeal a wider power than that which I think its terms confer when considered alongside s. 613(4) and s. 605(1)(a), the relevant question here is whether the words "make any order, in addition, that justice requires" empower the court of appeal to direct a new trial on a different offence from that on which the appeal was taken. It would be incongruous to me if the Court of Appeal, under the relevant words of s. 613(8), could do what the trial judge could not do under the wide amending powers given him under s. 529. That aside, a consideration of the history of the words in question in their original setting and in their present one does not lead to the conclusion reached by the British Columbia Court of Appeal in this case.

I begin the historical canvass with a statute of pre-Confederation Canada, An Act for the Further Amendment of the Administration of the Criminal Law, (1851) (Can.), c. 13, providing for the reservation of questions of law arising in a criminal trial for the opinion of a superior court. The question or questions of law were to be submitted by a stated case and

...the Justices of either of the said Superior Courts shall thereupon have full power and authority to hear and finally determine the said questions, and thereupon to reverse, affirm or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said Justices the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other Session

of Oyer and Terminer or Gaol Delivery, or other Sessions of the Peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require;...

This statute by its terms was in force only in Upper Canada.

Similar provision for stating a case on a reserved question of law is found in the Statutes of Lower Canada: see C.S.L.C. 1860, c. 77, s. 58. The Court of Queen's Bench was authorized to reverse, amend or affirm any judgment on the indictment in question, to avoid or arrest judgment or "to make such other order as justice requires". Section 3 of the Consolidated Statutes of Upper Canada 1859, c. 112, was in similar terms, and so was s. 101 of the Revised Statutes of Nova Scotia, 1864 (3rd series), c. 171, and to the same effect was s. 23 of the Revised Statutes of New Brunswick, 1854, c. 159. These provisions were virtually a reproduction of English legislation, 1848 (U.K.), c. 78, and were similarly entitled. When the statutes of Canada were first revised after Confederation, the foregoing common provisions were superseded by s. 261 of the Criminal Procedure Act, R.S.C. 1886, c. 174, which was as follows:

261. The justices of the court for Crown cases reserved, to which the case is transmitted, shall hear and finally determine such question, and reverse, affirm or amend any judgment given on the trial wherein such question arose, or shall avoid such judgment or order an entry to be made on the record, that in the judgment of such justices the person convicted ought not to have been convicted, or shall arrest the judgment, or if no judgment has been given, shall order judgment to be given thereon at some future session of the court before which the person was convicted, or shall make such other order as justice requires.

The new Criminal Code of 1892 retained provision for the reserving of questions of law arising during a trial but to be considered by courts of appeal upon a case stated: see s. 743. The Code improved upon the previous law governing appeals in criminal cases by the enactment of a composite provision, s. 746, reading as follows:

746. ...

- (a) confirm the ruling appealed from; or
- (b) if of opinion that the ruling was erroneous, and that there has been a mis-trial in consequence, direct a new trial; or
- (c) if it considers the sentence erroneous, or the arrest of judgment erroneous, pass such a sentence as ought to have been passed or set aside any sentence passed by the court below, and remit the case to the court below with a direction to pass the proper sentence; or
- (d) if of opinion in a case in which the accused has been convicted that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused shall be discharged, which order shall have all the effects of an acquittal; or
- (e) direct a new trial; or

- (f) make such other order as justice requires: Provided that no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed a new trial shall be granted.
2. If it appears to the Court of Appeal that such wrong or miscarriage affected some count only of the indictment the court may give separate directions as to each count and may pass sentence on any count unaffected by such wrong or miscarriage which stands good, or may remit the case to the court below with directions to pass such sentence as justice may require. Section 746 of the original Code came down in subsequently revised form to the present s. 613, and s. 613(8) may be looked upon as a transformed version of s. 746(f).

The case law on the pre-Confederation and post-Confederation legislation cited above, at least until it was subsumed under the new Criminal Code, established that although the sufficiency of an indictment was a question that could be reserved in arrest of judgment (see *R. v. Gibson*[35], holding, however, that the sufficiency of an indictment could not be challenged on a motion to quash), there was no power on the consideration of a reserved question to amend the indictment: see *R. v. Garland*[36]. The Court said in the *Garland* case, at p. 227, that “our powers do not extend to amending the indictment. We can only deal with the judgment; and if we amend the judgment here the record will be wrong”. A fortiori, there was no power to direct the substitution of a different charge.

I referred earlier in these reasons to the judgment of the British Columbia Court of Appeal in *R. v. More and Melville*[37], and, risking repetition, I wish to mention again what was there decided. The Court took a cautious approach to the question of its power to direct a new trial on an amended indictment involving an essential averment, namely, the place of commission of the offence of unlawful possession of stolen property. After considering the *Welch* case and some others the majority concluded that it had no power to amend the indictment in that respect but, in the special circumstances, it could order a new trial, leaving it to the trial judge to determine whether an amendment to the charge was necessary and whether it should be made. The dissenting Chief Justice Desbrisay agreed that the Court of Appeal had no power to amend and would have entered an acquittal. The Nova Scotia Supreme Court en banc applied *More and Melville* in *R. v. Rooney*[38] to deny to an appellate court the power to amend an indictment. In the result in that case, which involved a conviction on a charge of obtaining money by false pretences but the proof did not go higher than showing that the accused had obtained a cheque by false representations, the majority of the Court ordered a new trial because, in the words of McDonald J. for the majority at p. 196, “it appears that evidence does exist by which a case may be proved properly, with or without amendment of the charge by the magistrate”. The opposing view was put by Ilesley C.J. in dissent (Currie J. concurring), namely, that this was not a case where because of some mistake in the conduct of the trial the conviction could not stand although there was evidence to convict on a proper trial, but rather it was a case where the Crown had failed to

prove guilt of the offence charged and “for this Court to order a new trial would be to place again the appellant in jeopardy... in order to give the Crown another opportunity to secure his conviction on an amended charge” (at p. 192).

I refer to one more decision, that of the New Brunswick Court of Appeal in *Budovitch v. The Queen*[39]. It involved a conviction for fraudulently failing to pay over or account for money, the charge alleging the offence to have been committed in Fredericton. The evidence showed that, if committed, it was in Saint John. On appeal, a new trial was ordered on a charge which alleged an offence in Saint John, the majority purporting to invoke what is now s. 613(8) in directing the amendment to be made at the new trial. Hughes J.A., as he then was, would, following the *Rooney* case (as holding there was no power to amend the indictment on appeal), have ordered a new trial, leaving it to the trial judge to make the appropriate amendment under what is now s. 529, pointing out there was uncontradicted evidence of a theft in New Brunswick.

Although *Budovitch* goes beyond *More* and *Melville* and beyond *Rooney* in directing a new trial on an amended charge, it is nonetheless simply a case where the amendment was within the trial judge’s power, relating as it did to an essential particular in the charge, but not to a different charge, and, moreover, a particular on which evidence had been adduced, that is as to the place of commission of the offence.

I do not find anything in the case law, and certainly nothing in applicable legislation to authorize a court of appeal to do what the British Columbia Court of Appeal did here, something which the trial judge himself could not do. There is here a usurpation of the function of the Attorney-General and of the Crown. It is for them to decide, the existing charge not being proved, whether to lay the different charge which the Court felt should have been brought against the accused. It is not for a Court to take an *ad hominem* view in a case like the present one and to do violence to the separate functions of Court and Crown lest a person guilty of an offence, but not the one charged, escape punishment.

I would allow the appeal, set aside the order of the British Columbia Court of Appeal and restore the acquittal.

The judgment of Martland, Judson, Ritchie, Pigeon, Beetz and de Grandpré JJ. was delivered by

RITCHIE J.—The appellant and one Arthur James Williams were charged together on an indictment dated October 22, 1974, with the following offences:

1. THAT in or about various places in the County of Nanaimo, and elsewhere, in the Province of British Columbia, between on or about the 23rd day of August, A.D. 1972 and on or about the 21st day of December, A.D. 1973, they and Stuart Hunter Elliott, Lois Phoebe Elliott, Jerry Dean Elliott, Myron Zarry, Shirley Ferguson, Ingrid Elliott, unlawfully did conspire together the one with the other or others of them, and persons unknown to commit the indictable offence of trafficking in a restricted drug, to wit, 3, 4, Methylenedioxyamphetamine (MDA) contrary to the form of statute in such case made and

provided and against the peace of our Lady the Queen, her Crown and Dignity.

2. THAT in or about various places in the County of Nanaimo, and elsewhere, in the Province of British Columbia, between on or about the 23rd day of August, A.D. 1972 and on or about the 21st day of December, A.D. 1973 they did unlawfully traffic in a restricted drug, to wit; 3, 4, Methylenedioxyamphetamine (MDA) contrary to the form of statute in such case made and provided and against the peace of our Lady the Queen, and her Crown and Dignity.
3. THAT in the County of Nanaimo, Province of British Columbia on or about the 17th day of December A.D. 1973 they did unlawfully have in their possession a restricted drug, to wit; 3, 4, Methylenedioxyamphetamine (MDA) for the purpose of trafficking contrary to the form of statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.

At the trial before Cashman C.C.J., both accused were acquitted on the first count of this indictment, the appellant alone was convicted on the second count but acquitted on the third. The learned trial judge entered the latter acquittal on the ground that he had already convicted the appellant of “trafficking” on the second count and that the offences charged in these two counts were so intermingled that he could not distinguish the one from the other; he therefore invoked the judgment of this Court in *Kienapple v. The Queen*[40], and thus concluded that the matter was *res judicata*.

When the appellant appealed his conviction on the second count, the Court of Appeal directed an acquittal on the ground that although it had been proved that the appellant had substantial quantities of a salt designated MDA hydrochloride in his possession for the purpose of sale and distribution, it was not shown that he was in possession of MDA itself for the purpose of trafficking or otherwise. All the counts in the indictment were laid under the provisions of the Food and Drugs Act, R.S.C. 1970, c. F-27, s. 40 of which defines a “restricted drug” as including “methylenedioxyamphetamine (MDA) or any salt thereof”. The Court of Appeal being satisfied that trafficking in the salt constituted a separate offence which was not charged in the indictment, allowed the appellant’s appeal.

In appealing the verdict of acquittal on the third count, the Crown applied to amend the charge by adding the words “a salt of” prior to the words “3, 4,MDA” so that the allegation would comply with the facts as disclosed by the evidence and found by the Court of Appeal in the appeal against conviction on count 2. This application was granted and the Court ordered “that the appeal against acquittal be allowed, the acquittal set aside and a new trial ordered on the indictment as amended”. Judgment on this application was rendered on behalf of the Court by Mr. Justice MacLean who had presided at the appeal from the conviction on the second count and, as I have said, it is clear that the Court of Appeal in disposing of that count treated the charge of being in possession of MDA and being in possession of a salt thereof as two separate charges, although McIntyre J.A., speaking for the majority of the Court, clearly indicated that he regarded the designation of “MDA” in the charge as a “particular” and would have considered an amendment appropriate after hearing the appeal had one been sought.

In considering the third count, however, the Court of Appeal, differently constituted, appears to have recognized that the charge was that the accused “did unlawfully have in their possession a restricted drug... for the purpose of trafficking” and that the failure to allege possession of “a salt of MDA” constituted a failure to allege “a particular” of the offence which was capable of being added by way of amendment, in order to conform to the evidence which the Court had accepted in disposing of count 2.

The latter amendment did not in my opinion have the effect of charging a new offence as it did no more than specify a particular of the offence which had already been charged. If I thought the amendment to be tantamount to the charge of a different offence from that contained in the original count, other considerations might apply, but what we have here is a particularization of an ingredient of the main charge which was made necessary by the evidence which the Court had already accepted and which had in fact been in great measure conceded by the appellant.

Mr. Justice MacLean’s judgment on this application is very brief and I reproduce it in full:

In this case the Crown applies for an amendment of the indictment, some considerable time after conclusion of the trial, applying to this Court rather than to the court below.

In my view the ends of justice require that the amendment in this case be granted and in my view no substantial wrong would be suffered thereby by the accused person.

I would accordingly allow the amendment of the third count in the indictment, allow the appeal of the Crown, set aside the acquittal and direct a new trial on the third count as amended.

It is from this decision and the order granted pursuant thereto that the appellant now appeals alleging:

- (i) that as the trial judge had found count three to be indistinguishable from count two, it followed that by acquitting the appellant with respect to count two the Court of Appeal had necessarily disposed of the Crown’s appeal on count three and that the Court of Appeal lacked jurisdiction to entertain the Crown’s appeal on this count; (Kienapple v. The Queen was cited in support of this contention.)
- (ii) that proceedings by way of appeal relating to several counts in an indictment which had been tried together cannot be severed by the Crown in the Court of Appeal;
- (iii) that there is no power in the Court of Appeal to amend an indictment so as to conform with the evidence, this power being limited to the trial court by reason of ss. 529, 610 and 613 of the Criminal Code. In acquitting the appellant on count 2 the Court of Appeal did not, in my view, dispose of the third count; it did on the other hand dispose of the reason given by the trial judge for his acquittal on that count. It will be observed that the gravamen of the offence under these counts is in the one case that the accused did “unlawfully traffic in a restricted drug...” and in the other that they did “unlawfully have in their possession a restricted drug for the purpose of trafficking”. The whole gist of the decision in the Court of Appeal on count 2 was that although the appellant was guilty of having possession of a restricted drug (a salt of MDA) for the purpose

of trafficking, the salt was not a drug specified in the particulars of the indictment. It remained for the Crown to seek an order amending count 3 of the indictment so as to conform to the evidence. Far from having been disposed of by the appellant's acquittal by the Court of Appeal on count 2, the Crown's appeal from the acquittal on count 3 had not then been heard by the Court and it was open to the Crown to pursue it.

Having found that the appellant was in fact in possession of a restricted drug (a salt of MDA) for the purpose of trafficking, Mr. Justice MacLean indicated that he would have been disposed to allow an amendment to the second count of the indictment even after the hearing of the appeal. The fact that the Crown did not seek such an amendment in no way precluded it from applying to amend count 3 so as to conform to the evidence described in Mr. Justice McIntyre's reasons for judgment. The case of *Kienapple* does not appear to me to have any application in this situation as that case was concerned essentially with the proposition that an accused cannot be convicted twice for the same offence.

The second ground of appeal advanced on behalf of the appellant to the effect that counts in an indictment cannot be severed in the Court of Appeal appears to me to overlook the course of proceedings at trial in the present case. Here the learned trial judge disposed of the first and second counts by a judgment rendered on January 31, 1975, and only then proceeded to consider the third count against Elliott alone (a stay of proceedings having been entered with respect to Williams). The third count was thus effectively severed from counts 1 and 2 by the trial judge who proceeded to consider that count separately and to dispose of it by a judgment dated February 24, 1975.

In so doing, the learned trial judge purported to act in accordance with s. 43 of the Food and Drugs Act and it therefore appears to me to be desirable to consider the following provisions of that statute:

42. (1) No person shall traffic in a restricted drug or any substance represented or held out by him to be a restricted drug.
- (2) No person shall have in his possession any restricted drug for the purpose of trafficking.
43. (1) In any prosecution for a violation of subsection 42(2), if the accused does not plead guilty, the trial shall proceed as if the issue to be tried is whether the accused was in possession of a restricted drug contrary to subsection 41(1).
- (2) If, pursuant to subsection (1), the court finds that the accused was not in possession of a restricted drug contrary to subsection 41(1), he shall be acquitted, but, if the court finds that the accused was in possession of a restricted drug contrary to subsection 41(1), he shall be given an opportunity of establishing that he was not in possession of the restricted drug for the purpose of trafficking and thereafter the prosecutor shall be given an opportunity of adducing evidence to the contrary.

In purported compliance with these provisions, Judge Cashman made the following statement in his judgment on the third count:

As required by Section 43 of the Food and Drugs Act... I made a finding that the accused Elliott was in possession of MDA on December 17th, 1973.

It was then agreed by Counsel that I should make findings on Counts 1 and 2 with respect to each accused on these counts before the accused Elliott be given an opportunity to establish that he was not in possession of MDA for the purpose of trafficking.

Later in his judgment the learned trial judge reasoned as follows: If the accused was before me on a charge of possession for the purpose of trafficking in MDA and that was the only charge before me then in the circumstances in which the MDA was found I would have no difficulty in concluding it to be a fair inference from the evidence that the accused had that quantity of MDA for the purpose of physically making MDA available to other persons.

And he went on to say:

The question is not whether the accused can be convicted of possession for the purpose of trafficking in MDA in the circumstances of this case but whether he should as a matter of law be convicted of that offence, he having been convicted on the same evidence of trafficking in MDA.

He then concluded:

In my opinion the two offences charged here in Counts 2 and 3 are so intermingled that I cannot say that one is distinct from the other.

It is my view that in the circumstances here were I to convict the accused of both offences I would in reality be convicting the accused twice of the same offence.

In *Kienapple v. The Queen* (supra) in the C.R.N.S. volume at page 7, Laskin, J. said this:

In my view, the term *res judicata* best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences.

Accordingly I find that I cannot convict the accused Elliott on Count 3 and I make that finding notwithstanding that during the course of the Trial pursuant to Section 43 I found the accused to be in possession of MDA. My inability to convict the accused Elliott is not due to a matter of fact but rather to a matter of law for the reasons stated above.

As I have pointed out, the Court of Appeal has found that the appellant was in possession of a restricted drug (a salt of MDA) within the meaning of s. 41(1) of the Food and Drugs Act and the effect of the amendment granted by Mr. Justice MacLean is to give the appellant "an opportunity of establishing that he was not in possession of the restricted drug for the purpose of trafficking" as provided by s. 43(2) of the Food and Drugs Act. In my opinion the only issue before this Court on the present appeal is whether the Court of Appeal exceeded its powers when it amended the third count of the indictment in such fashion as to conform to the evidence by adding a particular which had not been included in that count as originally drawn, upon which the

appellant had been acquitted. Having regard to the extensive activities which the appellant was found to have been conducting in the manufacture of MDA hydrochloride, I do not think that it can be suggested that the appellant was in any way misled by the fact that that salt was not mentioned in the particulars. He knew in any event that he was being charged with possession of a restricted drug for the purpose of trafficking.

In directing a new trial, Mr. Justice MacLean incorporated the amendment to the information in his order as he felt that the ends of justice required him to do.

In granting this order it seems to me to be plain that the Court of Appeal was acting pursuant to the provisions of s. 613(4)(b) and (8) which provide as follows:

613. (4) Where an appeal is from an acquittal the court of appeal may...

(b) allow the appeal, set aside the verdict and

(i) order a new trial,...

(8) Where a court of appeal exercises any of the powers conferred by subsection... (4),... it may make any order, in addition, that justice requires.

It was contended on behalf of the appellant that the order for a new trial could not have been made unless the amendment had been granted and that the amendment was therefore not an order “in addition” to the exercise of the court’s power under subs. (4)(b)(i), but rather that it was a prerequisite to the granting of a new trial.

In my view when Parliament authorized the Court of Appeal, in the exercise of its power, to order a new trial, to “make any order, in addition, which justice requires” it must be taken as having authorized that Court under those circumstances to make any additional order which the ends of justice require whether the order for a new trial is dependent upon the additional order or not. I do not think that the wide powers conferred on the Court of Appeal by s. 613(8) are to be narrowly construed but rather that they are designed to ensure that the requirements of the ends of justice are met, and are to be liberally construed in light of that overriding consideration.

In ordering a new trial it would normally be undesirable to comment on the evidence, but I think that in this case the concessions made by the appellant on his appeal are relevant as indicating the material of which the Court must have been aware in determining that the ends of justice required a new trial on the third count.

In the course of his reasons for judgment in the appeal on the second count, Mr. Justice McIntyre, with whom all members of the Court agreed, had this to say:

The appellant conceded that the police had found M.D.A. hydrochloride a salt of MDA upon the premises and conceded that it was manufactured by the appellant. Indeed, in the absence of such a concession there was positive proof that MDA hydrochloride had been manufactured in substantial quantity and that it was intended for sale and distribution.

Seized with knowledge of this evidence, it is small wonder that Mr. Justice MacLean considered the ends of justice to require the amendment which he granted and that no substantial wrong was done to the appellant by granting it. I fully agree with this conclusion and would affirm the order that implemented it.

In the course of the argument in this Court reference was made to other cases in which provincial courts of appeal have granted amendments to an indictment as to which there was no complaint made at trial, but the circumstances disclosed in each of these cases differs materially from the situation disclosed in this appeal and I prefer to base my conclusion on the broad ground that the ends of justice required the amendment which was here granted. It follows that I find it unnecessary to express any view as to the submission that the authority of the Court of Appeal to grant an amendment stems from the provisions of s. 610(3) of the Criminal Code which authorize the court to exercise powers “that may be exercised by the court on appeals in civil matters...”. In my view a final determination of this question can be appropriately considered when it is an essential element in the disposition of the appeal.

In the course of the argument reference was made to the provisions of s. 529 of the Criminal Code which bears the heading “Amending defective indictment or count” but in my view the only mandatory language in that section is contained in subs. (1) which provides for

an objection to an indictment or to a count in an indictment or a defect apparent on the face thereof...

and requires such objection to be taken before plea or thereafter by leave of the court or a judge. In the present case we are not concerned with a defect apparent on the face of the indictment and this subsection accordingly has no application to the present circumstances. In my view there is no other language in the section which can be read as curtailing the power of the Court of Appeal to make an order under s. 613(8) which has the effect of amending the indictment so as to conform to the evidence where the ends of justice require it.

For all these reasons I would dismiss this appeal.

DICKSON J. (dissenting)—I agree with the conclusion reached by the Chief Justice in this appeal and the reasons therefor, with one reservation. I would like to leave open the issue as to whether s. 529(1) or s. 732(1) of the Criminal Code prevents initial objection being taken in the Court of Appeal to a defect on the face of the indictment or information and the effect of the judgment in *R. v. Leclair*[41].

Appeal dismissed, LASKIN C.J. and SPENCE and DICKSON JJ. dissenting.

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Solicitor for the respondent: C.O.D. Branson, Victoria.

[1] [1975] 1 S.C.R. 729.

[2] [1976] 4 W.W.R. 285.

- [3] (1905), 10 C.C.C. 229.
- [4] (1922), 53 O.L.R. 228.
- [5] (1958), 28 C.R. 220.
- [6] (1958), 123 C.C.C. 386.
- [7] [1970] 3 C.C.C. 233.
- [8] (1912), 19 C.C.C. 428.
- [9] (1962), 132 C.C.C. 257.
- [10] [1917] 2 K.B. 108.
- [11] (1920), 20 S.R. (N.S.W.) 351.
- [12] (1962), 38 C.R. 175.
- [13] [1963] 3 C.C.C. 150.
- [14] (1959), 124 C.C.C. 140.
- [15] (1955), 113 C.C.C. 95.
- [16] [1964] 1 C.C.C. 29.
- [17] [1936] S.C.R. 188.
- [18] [1931] S.C.R. 505.
- [19] (1956), 115 C.C.C. 297.
- [20] [1952] 1 S.C.R. 343.
- [21] [1964] 3 C.C.C. 370.
- [22] (1966), 48 C.R. 303.
- [23] (1972), 6 C.C.C. (2d) 17.
- [24] [1951] O.W.N. 582.
- [25] (1973), 23 C.R.N.S. 229.
- [26] (1974), 16 C.C.C. (2d) 382.
- [27] (1975), 25 C.C.C. (2d) 62.
- [28] (1977), 33 C.C.C. (2d) 353.
- [29] [1969] 3 C.C.C. 293.
- [30] [1950] S.C.R. 412.

[31] (1949), 95 C.C.C. 288.

[32] [1953] O.R. 413.

[33] (1954), 107 C.C.C. 400.

[34] (1960), 129 C.C.C. 250.

[35] (1889), 16 O.R. 704.

[36] (1869), 11 Cox C.C. 224.

[37] (1959), 124 C.C.C. 140.

[38] (1962), 132 C.C.C. 190.

[39] (1969), 8 C.R.N.S. 280.

[40] [1975] 1 S.C.R. 729.

[41] (1956), 115 C.C.C. 297.

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