
CANADA / JUDGMENT

R. v. Arnold

[1992] 2 SCR 208

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Supreme Court of Canada

DECIDED

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R. v. Arnold

Collection

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Date

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Report

[1992] 2 SCR 208

Case number

22467

Judges

L'Heureux-Dubé, Claire; Sopinka, John; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank

On appeal from

Nova Scotia

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 22467

Decision Content

R. v. Arnold, [1992] 2 S.C.R. 208

Peter Arnold and

Carl Boswick Appellants

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Arnold

File No.: 22467.

1991: November 8; 1992: June 11.

Present: L'Heureux-Dubé, Sopinka, Cory, McLachlin and Iacobucci JJ.

on appeal from the nova scotia supreme court, appeal division

Criminal law -- Secret commissions -- Elements of offence -- Accused acting as financial planners selling housing units to their clients -- Commissions paid to accused by promoters of projects for sale of units -- Whether accused guilty of corruptly accepting a benefit under s. 426(1) (a) of Criminal Code -- Whether accused made timely and adequate disclosure to their principals -- Whether Crown required to prove existence of corrupt bargain between giver and taker -- Meaning of word "corruptly" -- Criminal Code, R.S.C., 1985, c. C-46, s. 426(1) (a).

Constitutional law -- Charter of Rights -- Admissibility of evidence -- Accused acting as financial planners selling housing units to their clients -- Commissions paid to accused by promoters of projects for sale of units -- Statement made by one of the accused to plain-clothes RCMP officer investigating general partner involved in projects -- Accused later charged with receiving secret commissions -- Whether statement should be excluded -- Canadian Charter of Rights and Freedoms, s. 24(2) .

The accused, who were financial planners, recommended to a substantial number of their clients that they should invest in two development projects. For the sale of each unit in these projects, the accused received from the promoters a 10 percent commission together with a percentage of the profits derived from the sale. The majority of the clients who invested in these projects testified that the accused never mentioned the commissions that were to be paid to them. While the accused did disclose to their clients in the initial interview some general information as to commissions, there was no disclosure of commissions that would be payable to the accused from the projects unless a request for that information was specifically made by a client. In the Offering Memoranda shown to the clients, the commissions payable were included in the global figure for the "initial service cost" of the projects and there was no indication that it was the accused who, as agents for the projects, were to receive the commissions. In 1987, a statement was made by one of the accused to a plain-clothes RCMP officer investigating the general partner involved in the projects. Two years later, the accused were charged with accepting secret commissions contrary to s. 426(1) (a) of the Criminal Code . They were acquitted. The trial judge found that although there was no specific disclosure to the clients of amounts of commissions

payable to the accused, the clients knew that the initial fees they paid to the accused would not be their sole source of income. He concluded that proof of a corrupt bargain was an essential part of the offence and, since there was no corrupt bargain in this case, the accused could not be found guilty. The Court of Appeal set aside the acquittals and ordered a new trial. This appeal raised substantially the same issues as those before this Court in *R. v. Kelly*, [1992] 2 S.C.R. 000. The primary issue in this case is whether the accused as agents made timely and adequate disclosure to their principals of the commissions they received from a third party.

Held (Sopinka J. dissenting): The appeal should be dismissed.

Per L'Heureux-Dubé, Cory and Iacobucci JJ.: The Court of Appeal correctly concluded that the trial judge's finding that the Crown had failed to prove the requisite intent was based on a misapprehension as to the intent required under s. 426(1)(a) of the Code. For the reasons set out in *R. v. Kelly*, it was not necessary for the Crown to establish that there was a corrupt bargain between the giver and the taker. The trial judge also erred as to the standard of disclosure that was required. His finding that there was no secrecy on the part of the accused was made only in relation to their books which disclosed all the transactions. The testimony given by clients of the accused was overwhelmingly to the effect that there had been no disclosure to them of the commissions to be paid to the accused by the promoters of the projects. It will be for the judge presiding at the new trial to determine whether, in the circumstances of the case, the disclosure made by the accused to their clients was adequate and timely. Finally, the Court of Appeal correctly determined that the accused who made the statement was not in detention at the time of the statement, that his rights had not been violated by the police and that the statement was therefore admissible. The Court of Appeal's conclusion that an error had been made with regard to the statement did no more than supplement its decision to grant a new trial.

Per McLachlin J.: For the reasons given in *R. v. Kelly*, the trial judge's findings in this case were not adequate to resolve the disclosure issue. His reasons do not make clear whether the disclosure by the accused, which he found had been given, was limited to general statements that they would receive commissions with respect to transactions entered into by their clients, or whether there was also specific disclosure of the fact that they would receive commissions with respect to the transactions at issue. The fact that the accused did not make specific disclosure of the amounts to be received is purely secondary. The Court of Appeal's decision setting aside the acquittals and ordering a new trial must be affirmed.

Per Sopinka J. (dissenting): For the reasons given in *R. v. Kelly*, the acquittals of the accused should be restored. The offences charged are in relation to a transaction with certain management companies pursuant to which the accused accepted consideration for inducing their clients to invest in certain development projects. While in many instances the accused sold units to their clients, that was not because they were influenced to do so by the management companies nor because they believed that this was the intended purpose of either the agreement or the payments. The agreement was entered into at arm's length, the commissions were the same amount as was paid to any other salesmen and they were to be paid regardless of to whom the units were sold. The decision to sell to their clients was one made unilaterally by the accused.

Failure to make full disclosure to the clients may have amounted to a breach of duty but the accused are not guilty of the offence charged. The trial judge made a finding that they had not acted mala fide in the dealings giving rise to the charges. This finding was amply supported by the evidence.

Cases Cited

By Cory J.

Followed: R. v. Kelly, [1992] 2 S.C.R. 000, aff'g (1989), 52 C.C.C. (3d) 137.

By McLachlin J.

Followed: R. v. Kelly, [1992] 2 S.C.R. 000.

By Sopinka J. (dissenting)

R. v. Kelly, [1992] 2 S.C.R. 000.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 24(2) .

Criminal Code, R.S.C. 1970, c. C-34, s. 383(1)(a).

Criminal Code, R.S.C., 1985, c. C-46, ss. 426(1) (a), 691(2) .

APPEAL from a judgment of the Nova Scotia Supreme Court, Appeal Division (1991), 102 N.S.R. (2d) 207, 279 A.P.R. 207, 65 C.C.C. (3d) 171, setting aside the acquittals of the accused on charges of accepting secret commissions contrary to s. 426 of the Criminal Code , and ordering a new trial. Appeal dismissed, Sopinka J. dissenting.

David J. Bright, Q.C., and Sandra MacPherson Duncan, for the appellants.

Bruce P. Archibald and Bernadette Macdonald, for the respondent.

//Cory J.//

The judgment of L'Heureux-Dubé, Cory and Iacobucci JJ. was delivered by

Cory J. -- The issues raised in this appeal are substantially the same as those that were before the Court in R. v. Kelly, [1992] 2 S.C.R. 000. The primary issue is whether the accused as agents made timely and adequate disclosure to their principals of the commissions they received from a third party.

Factual Background

The appellants were financial planners who gave advice regarding tax planning, tax shelters, investments and RRSPs to doctors and dentists. Peter Arnold operated his business under the name of P.R. Arnold and Associates Ltd. while Carl Boswick carried on his business under the name Carl T. Boswick and Associates Ltd.

When clients first came to the appellants, they were informed in a general way about the sources of compensation that the appellants received. In this first interview, a reference was made to a "black binder" which contained a section entitled "How We're Compensated". In it the clients were advised that the appellants would be receiving commissions and fees. In discussions with their clients the accused seem to have used terms such as bonuses, overrides and bonus incentives when referring to their commissions.

There can be no doubt that the appellants recommended to a substantial number of their clients that they should invest in two limited partnerships: Lakewood Manor Ltd. and Oak Street Ltd. The Lakewood offering was composed of 100 units at \$ 10,000 per unit with a guaranteed return of \$ 15,000 to investors within two years. That guarantee was met. The Oak Street offering was 200 units at \$ 10,000 each with a guaranteed return of \$ 16,000 per unit within two years. This guarantee was not met, although the investors eventually did receive some tax write offs.

For the sale of the units, the appellants received 10 percent commission together with a percentage of the profits derived from the sale from J. & J. Management Limited, Woodrock Management Limited and Rockwood Real Estate Limited. On the two projects, the appellants received in excess of \$450,000 in commissions. In the Offering Memoranda shown to the clients, the commissions payable were included in the global figure for the "initial service cost" of the project. These Offering Memoranda had been reviewed by a law firm and approved by the Nova Scotia Securities Commission before they were distributed to the investors. However, it is significant that there was no reference in the Memoranda to the fact that it was the appellants who, as agents for the project, were to receive the commissions.

The majority of the clients who invested in the projects testified that the appellants never mentioned the commissions that were to be paid to Arnold and Boswick. The appellants did disclose to their clients in the initial interview some general information as to commissions. However, there was certainly no disclosure of commissions that would be payable to the appellants from the Lakewood or Oak Street projects unless a request for that information was specifically made by a client.

In 1987, the appellant Arnold made a statement to a plain-clothes RCMP officer investigating the general partner involved in Lakewood and Oak Street projects. Some two years later, the appellants were charged with two counts of contravening s. 426(1) (a) of the Criminal Code, R.S.C., 1985, c. C-46 (formerly s. 383). The trial judge acquitted the appellants on both counts. On the Crown appeal, the acquittals were set aside and a new trial was ordered: (1991), 102 N.S.R. (2d) 207, 279 A.P.R. 207, 65 C.C.C. (3d) 171. The appellants have brought this appeal as of right pursuant to s. 691(2) of the Criminal Code .

Judgments Below**County Court Judge's Criminal Court**

The trial judge observed that "the crooks in this case are probably Rockwood [the general partner of the project, who was later convicted for fraud] and Christopherson [the accountant for Rockwood]". He found that, although clients knew the initial fees which they paid would not be the sole source of income for the appellants, there was no specific disclosure to the clients of amounts of commissions payable to the appellants.

The trial judge, relying on the dissenting reasons of Hutcheon J.A. in *R. v. Kelly* (1989), 52 C.C.C. (3d) 137 (B.C.C.A.), concluded that proof of a corrupt bargain was an essential part of the offence. He determined that as there was no corrupt bargain in this case, the accused could not be found guilty.

Nova Scotia Court of Appeal (1991), 65 C.C.C. (3d) 171

Macdonald J.A., writing for the unanimous court, noted that there was no disclosure by Arnold or Boswick that they would receive commissions from the sale of units in the Lakewood or Oak Street projects unless that question was specifically asked of them. When the question was presented the replies they gave were vague and could not be categorized as full, frank and fair. In effect, they did not advise their clients as to the financial arrangements they had with the promoters of the two projects.

He then considered s. 426(1) (a)(ii) and determined that "[t]he element of corruption is simply doing the act enjoined by the section without having first made full disclosure to the principal" (p. 177). He found that it was the agent's non-disclosure to his principal of the reward or benefit in relation to the principal's business that made his conduct corrupt. He adopted the standard of disclosure put forward by the majority of the British Columbia Court of Appeal in the *Kelly* case and determined that the disclosure must be crystal clear. That is to say it must be full, frank and fair.

He found that the trial judge had erred in excluding the statement made by Arnold and determined that it should have been admitted. He found that the trial judge, in relying on Hutcheon J.A.'s dissent in *Kelly*, erroneously focused on the requirement of a corrupt bargain. He concluded that the trial judge had misapprehended the evidence as a result of misdirecting himself as to the mens rea required by the offence and by the trial judge's misconception of the word "corruptly". In the result, a new trial was ordered.

The Elements of Section 426

The elements of s. 426 have been considered in my reasons in *R. v. Kelly* and need not be repeated. It is sufficient to set out the summary of the conclusions in *Kelly* (at p. 000):

Summary

There are then three elements to the actus reus of the offence set out in s. 426(1) (a)(ii) as they apply to an accused agent/taker with regard to the acceptance of a commission:

- (1) the existence of an agency relationship;
- (2) the accepting by an agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal; and
- (3) the failure by the agent to make adequate and timely disclosure of the source, amount and nature of the benefit.

The requisite mens rea must be established for each element of the actus reus. Pursuant to s. 426(1) (a)(ii), an accused agent/taker:

- (1) must be aware of the agency relationship;
- (2) must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal; and
- (3) must be aware of the extent of the disclosure to the principal or lack thereof.

If the accused was aware that some disclosure was made then it will be for the court to determine whether, in all the circumstances of the particular case, it was in fact adequate and timely.

The word "corruptly" in the context of secret commissions means secretly or without the requisite disclosure. There is no "corrupt bargain" requirement. Thus, it is possible to convict a taker of a reward or benefit despite the innocence of the giver of the reward or benefit. Non-disclosure will be established for the purposes of the section if the Crown demonstrates that adequate and timely disclosure of the source, amount and nature of the benefit has not been made by the agent to the principal.

Application of Principles to the Facts of this Case

There is no doubt that the facts in this case arouse more sympathy for the appellants than did those in *Kelly*. Nevertheless, the question as to whether the disclosure was adequate in all the circumstances must still be determined. I cannot accept the contention that the findings made at the trial are adequate to resolve the issue. The Court of Appeal was correct in its conclusion that the trial judge's finding that the Crown had failed to prove the requisite intent was based on a misapprehension as to the intent required. For the reasons set out in *Kelly*, it was not necessary for the Crown to establish that there was a corrupt bargain.

Nor was the trial judge correct as to the standard of disclosure that was required. The argument that there was a finding made at trial that there was no secrecy on the part of the appellants cannot be accepted. That finding was made only in relation to the appellants' books which disclosed all the transactions. The testimony given by clients of the appellants was overwhelmingly to the effect that no disclosure was made to them that commissions would be

received by the appellants from the promoters of the developments for the sale of the units. It will be for the judge presiding at the new trial to determine whether, in the circumstances of the case, the disclosure made by the appellants to their clients was adequate and timely. The Court of Appeal correctly determined that there must be a new trial with regard to that issue.

The Admissibility of the Statement of Arnold

Arnold had made a statement to the police two years before the charges were laid. The trial judge had ruled on a voir dire that the statement was voluntary but inadmissible under s. 24(2) of the Canadian Charter of Rights and Freedoms because Arnold was a suspect at the time the statement was made. The Court of Appeal determined, correctly in my view, that Arnold was not in detention at the time the statement was made, that his rights had not been violated by the police and that the statement was therefore admissible.

In any event, the appellants have not put in issue the correctness of the Court of Appeal's ruling with regard to the admissibility of the statement. Rather the appellants contested the position of the Court of Appeal that the exclusion of the statement constituted a sufficient error to warrant a new trial. I agree that this error alone would not have been sufficient to warrant a new trial. However, it is quite clear that the Court of Appeal's order granting a new trial was based primarily on the trial judge's misconception of the mens rea required by s. 426 and of the meaning which he gave to the word "corruptly". The conclusion that an error had been made with regard to the statement did no more than supplement the decision to grant a new trial.

Disposition

In the result, the appeal must be dismissed. The order of the Court of Appeal setting aside the acquittals and ordering a new trial will be affirmed.

//Sopinka J.//

The following are the reasons delivered by

Sopinka J. (dissenting) -- I have had the advantage of reviewing the reasons of Cory J. herein but unfortunately I cannot agree with his disposition of this matter. As I have outlined in my reasons in *R. v. Kelly*, [1992] 2 S.C.R. 000, which are being released concurrently, in my view s. 426(1) (a) of the Criminal Code, R.S.C., 1985, c. C-46, requires that the Crown prove two essentials of the mental element of the offence before being able to secure a conviction. The first concerns the knowledge or belief of the accused as to the purpose of the transaction. When an agent is charged, it must be established that he or she demanded, accepted or offered or agreed to accept the benefit as a quid pro quo to influence him or her. A benefit cannot be demanded or received in consideration for doing an act if the taker did not believe that it was being demanded, offered or given for that purpose. Thus the Crown must prove that the benefit was so demanded, offered or accepted with the agent's knowledge or belief that it was given for that purpose. This requirement looks to the state of mind of the agent at the time of the transaction. The corruption

in this action is the belief that the valuable consideration is intended to influence the agent to show favour to some person in relation to the affairs of his or her principal. The taker is thus caught even if he or she was mistaken as to the true intention of the giver.

If the giver is charged, it must be shown that he or she gave, offered or agreed to give or offer a benefit intending that it would influence an agent to show favour to some person in relation to the affairs of the agent's principal. As with the taker, it is the state of mind of the giver at the time of the transaction that is crucial.

The second requirement of the mental element of this offence is that the accused entered into the transaction *mala fide*. This is most easily satisfied through proof of dishonesty. As I indicated in *Kelly*, non-disclosure is not synonymous with the terms "corruptly" or *mala fides*, although it may be a strong indicator that the accused has acted in bad faith. In some situations disclosure or the intent to disclose will be highly relevant. For example, if an agent is offered valuable consideration to influence his or her principal but at all times intended to disclose this fact to his or her principal, such an intention will foreclose a finding of bad faith against the agent. Conversely, if a giver offers valuable consideration to influence an agent with the belief that the agent will not disclose the consideration to the agent's principal, any actual disclosure or non-disclosure on the part of the agent is irrelevant vis-à-vis the giver. The offence is complete when the giver makes the offer with the belief that it will not be disclosed.

The words of the charges in this case make it clear that the offences charged are in relation to a transaction with certain management companies pursuant to which the appellants accepted consideration for inducing their clients to invest in certain development projects. As was the case in *Kelly*, the commissions were to be paid regardless of to whom the investments were sold. The payments were made to the appellants pursuant to an agreement that could not be said to be in consideration of the sale to clients of the appellants. The agreement was entered into at arm's length and the commissions were the same amount as was paid to any other salesmen. While in many instances the appellants sold to their clients that was not because they were influenced to do so by the management companies nor because they believed that this was the intended purpose of either the agreement or of the payments. The decision to sell to their clients was one made unilaterally by the appellants. Failure to make full disclosure to the clients may have amounted to a breach of duty but the appellants are not guilty of the offence charged.

It is clear from a review of the record before the Court that the trial judge made a finding that the appellants had not acted *mala fide* in the dealings giving rise to the charges before the Court. This finding was amply supported by the evidence. As noted by Cory J. in his reasons, the trial judge found "that unlike the *Kelly* case . . . the crooks in this case are probably Rockwood and Christopherson". The trial judge implicitly concluded that the appellants had acted in good faith and had not intentionally failed to adequately disclose the commissions they received. In view of this finding the accused cannot be convicted of the charges as framed.

Accordingly, I would allow the appeal and restore the acquittals.

//McLachlin J.//

The following are the reasons delivered by

McLachlin J. -- I have read the reasons of Sopinka J. and Cory J. and agree with Cory J. that the appeal must be dismissed. As I have outlined in my reasons in *R. v. Kelly*, [1992] 2 S.C.R. 000, which are being released concurrently, I agree with Cory J. that lack of disclosure is an element of the actus reus of the offence under s. 426(1) (a)(ii) of the Criminal Code, R.S.C., 1985, c. C-46 , and that an awareness of that lack of disclosure is an element of its mens rea. I depart from Cory J. on two points, however. First, with respect to the timing of disclosure, certainty requires that where the gravamen of the offence is the taking of a secret commission disclosure to the principal must be made by the time the commission is accepted. Second, with respect to the degree of disclosure required, the requirements of s. 426(1) (a)(ii) will, in my view, be satisfied if the agent discloses to the principal that he will receive a commission with respect to the transaction in question. Thus, an agent who advises his principal in advance that he will be receiving a commission with respect to a particular transaction will be innocent of any offence under s. 426(1) (a)(ii).

The trial judge in the present appeal found that "there was no specific disclosure of amounts to the clients. But there was disclosure that fees would be received". Given my interpretation of the requirements imposed by the section the fact that the appellants did not make specific disclosure of the amounts to be received need not concern us. But unfortunately the trial judge's reasons do not make clear whether the disclosure which he found the appellants to have given was limited to general statements that they would receive commissions with respect to transactions entered into by their clients, or whether there was also specific disclosure of the fact that they would receive commissions with respect to the transactions at issue in this appeal.

The Nova Scotia Court of Appeal (1991), 65 C.C.C. (3d) 171 (per Macdonald J.A.), held that the evidence was clear that the appellants did not tell their clients they would receive commissions with respect to these transactions unless specifically asked, and that the replies they gave in response were "vague to say the least" and "could not be categorized as full and frank and fair" (p. 174).

Unlike the Court of Appeal, I would not enter into a re-examination of the evidence in an attempt to determine what disclosure was made by the appellants and when. Although we come to different conclusions with respect to the standard of disclosure to which the appellants should be held, I agree with Cory J. that the findings of the trial judge are not adequate to resolve the disclosure issue. As a result the Court of Appeal's decision setting aside the acquittals and ordering a new trial must be affirmed and the appeal dismissed.

Appeal dismissed, Sopinka J. dissenting.

Solicitors for the appellants: Boyne Clarke, Dartmouth.

Solicitor for the respondent: The Department of the Attorney General, Halifax.

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