

CANADA / JUDGMENT

R. v. Cooper

[1978] 1 SCR 860

COURT

Supreme Court of Canada

DECIDED

8 March 1977

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R. v. Cooper

Collection

Supreme Court Judgments

Date

1977-03-08

Report

[1978] 1 SCR 860

Judges

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

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

R. v. Cooper, [1978] 1 S.C.R. 860

Date: 1977-03-08

Her Majesty The Queen (Plaintiff) Appellant;

and

Norton Cooper (Defendant) Respondent.

1976: November 17; 1977: March 8.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Evidence—Circumstantial evidence—Corruption—Trial—Charge to jury—Whether s. 110(1)(b) of Criminal Code requires proof of intent—Correct application of “rule in Hodge’s case”—Whether jury misled as to need for proof beyond reasonable doubt—Whether judge erred in using words not found in s. 110(1)(b) to describe the offence—Criminal Code, s. 110(1)(b).

Respondent was charged with conferring a benefit on a Government employee with respect to dealings which respondent had with the Government contrary to s. 110(1)(b) of the Criminal Code. The procedure adopted at the trial was unusual in that the case for the Crown was composed entirely of a statement of facts agreed to by both Crown and defence counsel. Respondent at the material times controlled and managed a number of companies and applied to the Department of Regional Economic Expansion for grants in respect of two of these companies of which he was president. These grants were approved and contracts entered into by the companies and the federal government, the latter being represented in one contract by the Director of the Special Analysis Group of the Department and in the other by his immediate superior. The Director, McK had met the respondent around the time when the applications were made and had spent two week-ends in Florida as his guest before the contracts were signed and two more week-ends shortly thereafter. Taken together the agreed facts disclosed that benefits had accrued to McK and constituted an admission that certain benefits were conferred by respondent on a government employee. Respondent then adduced evidence in an attempt to show that the benefits were not conferred “with respect” to the dealings that respondent had with the government employee’s department, an essential element of the offence. In his charge to the jury the trial judge directed them in accordance with the rule in Hodge’s Case, (1838) 2 Lewin in 227, 168 E.R. 1136. After objection by Crown counsel on the basis of R. v. Mitchell, [1964] S.C.R. 471, that Hodge’s Case had no application to a case turning upon the intention of the accused, the jury were recalled and re-instructed in effect to disregard the rule in Hodge’s Case and to decide the issue on the basis of reasonable doubt. The Court of Appeal ordered a new trial on the basis that the trial judge had erred in withdrawing the rule in Hodge’s Case from the jury.

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

Per Martland, Ritchie, Beetz and de Grandpré JJ.: The present case is almost the exact converse of Hodge’s Case. In the latter there was no doubt that a crime had been committed and the only question for the jury was whether the accused was the person who had committed it; whereas in this case there is no doubt that the respondent was the person who conferred the benefits and the only question is whether he intended them to be benefits conferred with respect to his dealings with the Government, such intent being a necessary element of the offence charged under s. 110(1)(b). The trial judge was right in correcting himself to the effect that Hodge’s Case did not

apply and in recharging the jury accordingly. There was nothing exceptionable in the recharge which adequately covered the principle of reasonable doubt and contained nothing to indicate that the rule in Hodge's Case, where it applies, does not contain a formula to assist in applying the accepted standard of proof nor to suggest that the formula does not afford a graphic illustration of the principle in such cases.

Although respondent submitted alternatively that the trial judge had erred in charging the jury that they should find respondent guilty if they were satisfied that the benefits were conferred directly or indirectly in relation to the dealings with the Government when the words "directly" or "indirectly" did not occur in s. 110(1)(b), this error did not justify quashing the conviction.

Per Laskin C.J. and Judson and Dickson JJ. dissenting: This case turns entirely on the inference to be drawn from undisputed facts as to the accused's intention. Under s. 110(1)(b) the words are "with respect to those dealings"; that is, there can be no conviction unless it is shown beyond reasonable doubt that benefits were conferred "with respect to" the dealings with the government as alleged. The trial judge's charge and recharge were confusing and a lay jury was unlikely to have had the clear view that it should have on the applicable law. Recent doubts have been cast, in England and in Canada, as to the inexorability of the formula in Hodge's Case and although a judge might refer to that case, the traditional formula requiring proof beyond reasonable doubt is the safest and simplest way to bring a lay jury to the appreciation of the burden of proof resting on the Crown in criminal cases.

The use of the words "directly or indirectly" could not but have the effect of qualifying the element of intent adversely to the accused so as to direct the jury to a wider scope of the offence than that which is defined in s. 110(1)(b). It was a clear error in law justifying a new trial.

[R. v. Mitchell, [1964] S.C.R. 471; McGreevy v. Director of Public Prosecutions, [1973] 1 All E.R. 503; R. v. Comba, [1938] S.C.R. 396; R. v. John, [1971] S.C.R. 781; Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136; R. v. Paul (1975), 27 C.C.C. (2d) 1; Sherras v. De Rutzen, [1895] 1 Q.B. 918; R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5; R. v. Bagshaw, [1972] S.C.R. 2, 18 C.R.N.S. 195, rehd. to.]

APPEAL from a decision of the Court of Appeal for Ontario[1], quashing a conviction, by Graburn Co. Ct. J. with a jury, of unlawfully conferring a benefit on a Government employee contrary to s. 110(1) of the Criminal Code. Appeal allowed, Laskin C.J. and Judson and Dickson JJ. dissenting.

D.H. Doherty, for the appellant.

J.J. Robinette, Q.C., for the respondent.

The judgment of Laskin C.J. and Judson and Dickson JJ. was delivered by

THE CHIEF JUSTICE (dissenting)—I have had the advantage of reading the reasons of my brother Ritchie, and they lead me to take two points, both of which bring me to a conclusion different from his. This is a case which turns entirely on the inference to be drawn as to the accused's intent from the undisputed facts of the relationship between the accused and McKendry, arising out of the former's applications for government grants. There was, admittedly, no taint, no

impropriety in the grants themselves; approval for them was given on the merits of the applications. On the other hand, there was no doubt too that the accused had conferred benefits upon McKendry, who was the government official with whom negotiations for the grants took place.

Under s. 110(1)(b) of the Criminal Code the key question of intent is raised by the words “with respect to those dealings”. In short, before there can be a conviction under s. 110(1)(b) of a person who, having dealings with the government, confers a benefit upon a government employee with whom he deals, it must be shown, by way of proof beyond a reasonable doubt, that the benefit was conferred “with respect to those dealings”.

As my brother Ritchie noted, the trial was unusual in that the Crown made its case by putting in an agreed statement of facts. Many witnesses were called for the accused, including McKendry and the accused himself. In charging the jury on the issues in the case, it was of course necessary for the trial judge to ask them to consider all the circumstances touching the dealings with McKendry, which included the four Florida trips for which the accused paid, and the explanations given by the witnesses, and especially by the accused and by McKendry, about how those trips came about, whether their timing alone was sinister, and whether they were a spontaneous result of an association which revealed a common interest in horses or were offered and accepted with respect to the dealings then on foot between the accused and McKendry. Since the evidence on the question of intent could only come from the defence witnesses in this case and was circumstantial only, the trial judge charged the jury in terms of the so-called rule in Hodge’s case. After the charge, when counsel were invited, as is usual, to state any objections that they had to it, Crown counsel adverted to the judgment of this Court in *The Queen v. Mitchell*[2], and contended that the trial judge should not have charged in terms of Hodge’s case on the question of intent. Thereupon the trial judge recalled the jury and said this on the question of circumstantial evidence:

It has been brought to my attention, ladies and gentlemen, that I was clearly wrong in my charge to you, as a matter of law, because that particular rule which I gave to you this morning about having to find the circumstances consistent with guilt and inconsistent with any other rational conclusion does not apply when we are talking about things like intent, or we are talking about things like the purpose. It does apply as to an act.

In other words, if we are trying to determine whether such-and-such an act was done, such-and-such a physical act was done, then the rule I indicated to you is applicable, but when we are talking about intent, purpose, things in a man’s mind, that rule does not apply. That is clear, and that matter has been pointed out to you, so I was wrong giving you the example about circumstantial evidence, and I was wrong to charge you about circumstantial evidence at all. And I ask you, and you must disregard in your deliberations the charge I gave you in relation to circumstantial evidence.

In all other respects, what I indicated to you is correct so far as counsel are concerned, and hopefully so far as I am concerned.

The reference back to the charge as originally given, coupled with the portion of the recharge just quoted leads me to conclude, as the Ontario Court of Appeal concluded, albeit for different reasons, that an order for a new trial was the proper order in this case, and particularly so in the light of the second point that I take in relation to the charge, as discussed later in these reasons. Sitting as we are in calm contemplation of the issues and of the judge's charge and recharge, I still find his entire exercise confusing, and I cannot believe that a lay jury would have the clear view it should have on the law by which it should be guided when confronted with the passages I have quoted after having been so categorically charged otherwise earlier in the proceedings.

There are a few observations I would make on Hodge's case specifically. Intent is no less a question of fact than is identity or the *actus reus* of an offence. I would not condone a situation where a trial judge may properly charge a jury under Hodge's case in respect of identity, and all other issues except intent, and then in the same case tell them to approach the Crown's burden of proof on a different basis on the question of intent. There must be consistency in a charge where burden of proof is concerned; and to have two different formulae in one case is as unjust to the Crown as it is to an accused.

The judgment of the House of Lords in *McGreevy v. Director of Public Prosecutions*[3] rejects the notion that there ever was any rule arising from Hodge's case which judges in England were required to follow where all or most of the evidence in a jury trial was circumstantial. In *Comba v. The King*[4], this Court referred to the formula in Hodge's case as "the long settled rule of the common law which is the rule of law in Canada" (at p. 397). Notwithstanding this pronouncement, this Court attenuated the rule in its judgment in *The Queen v. Mitchell*, *supra*, and manifested its discomfort with Hodge's case in *Alec John v. The Queen*[5]. The time has come to reject the formula in Hodge's case as an inexorable rule of law in Canada. Without being dogmatic against any use of the formula of the charge in Hodge's case I would leave the matter to the good sense of the trial judge (as was said in *McGreevy*), with the reminder that a charge in terms of the traditional formula of required proof beyond a reasonable doubt is the safest as well as the simplest way to bring a lay jury to the appreciation of the burden of proof resting on the Crown in a criminal case.

The second point I take arises from the error of the trial judge, a clear error in my opinion, in telling the jury that if they found that the benefit conferred on any one occasion "was related in whole or in part, directly or indirectly, to Cooper's dealings with the government" they must find the accused guilty. The offence under which the accused was charged does not use the words "directly or indirectly" in defining it; those words are used in the definition of two other offences, described respectively in s. 110(1)(a) and in s. 110(1)(c). Not only did the trial judge originally charge the jury in that erroneous way several times, but in his recharge he repeated the error, again telling the jury that they could convict if they found beyond a reasonable doubt that benefits "were conferred by the accused in *McKendry* in relation to the dealings with the government, in whole or in part, directly or indirectly so far as Cooper was concerned".

In my opinion, the use of the words “directly or indirectly” could not but have the effect of qualifying the element of intent adversely to the accused so as to direct the jury to a wider scope of the offence than that which is defined in s. 110(1)(b). It is patent to me that if the accused had been tried under s. 110(1)(a), and the jury had been charged in words which omitted the reference in that provision to “directly or indirectly” and had acquitted, there would be every reason to order a new trial on the ground of an error of law. Equally, there should be a new trial here where added words were used to describe the offence in terms wider than its definition, especially when the charge was also unsatisfactory on the other ground discussed herein.

I would, accordingly, dismiss the appeal.

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

RITCHIE J.—This is an appeal brought by the Attorney General of Ontario with leave of this Court, from a judgment of the Court of Appeal of that Province quashing the conviction entered against the respondent at a trial held before His Honour Judge Graburn sitting with a jury, for the offence of unlawfully conferring a benefit on a Government employee with respect to dealings with the Government contrary to s. 110(1)(b) of the Criminal Code which provides that:

110. (1) Every one commits an offence who

(b) having dealings of any kind with the government, pays a commission or reward to or confers an advantage or benefit of any kind upon an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies upon him;...

The procedure adopted at the trial before His Honour Judge Graburn was unusual in that the case for the Crown was composed entirely of a statement of facts agreed to by both counsel for the Crown and counsel for the accused (the respondent). By order of the presiding judge this statement of facts was not marked as an exhibit in the case and was not available to the jury with the result that it was not before us in this appeal and the facts must accordingly be garnered from the opening address of the Crown Prosecutor which purports to incorporate all that was agreed upon.

The facts so stated with which counsel for the respondent expressed his total agreement are partially summarized in the reasons for judgment of the Court of Appeal where Mr. Justice Arnup stated:

These facts are briefly as follows. At all material times the appellant (i.e. Cooper) directly or indirectly controlled and managed a number of companies; two of these companies of which the appellant was president were Jacques Cartier Mint Inc. (Jacques Cartier) and Silver Shields Mines Inc. (Silver Shields). The former company was incorporated in January, 1972, for the purpose of operating a private mint. The latter was incorporated in June, 1971 and was a mining company

with interests in various properties in the area of Cobalt, Ontario. Both companies were based at Toronto. In late February and the first week of March, 1972, both Jacques Cartier and Silver Shields, under the guidance of the appellant, applied to the federal Department of Regional and Economic Expansion (DREE) for economic grants under The Regional Development Incentives Act, R.S.C. 1970, c. R-3 . Generally speaking, this Act, which is administered by DREE, provides for grants to applicants proposing to establish new production facilities in what are referred to as 'designated regions'.

Jacques Cartier sought a grant to assist it in establishing a mint for the purpose of manufacturing silver medallions and commemorative items. Silver Shields sought a grant for the purpose of rehabilitating and modernizing a silver refinery. Both applications related to the Cobalt area of Ontario, which was a designated region.

Both applications were duly received and processed by DREE and were eventually approved. Jacques Cartier was awarded a grant of \$617,000 and Silver Shields was awarded a grant of \$119,970. On April 5, 1972, formal contracts with respect to the grants were entered by the Federal Government (DREE) and the respective companies. It is agreed that the viability of the projects is not relevant to these proceedings.

At all material times, Gerald William McKendry was employed by the federal government, in DREE, as a director of the Special Analysis Group. McKendry was thus an 'employee of the government' within the meaning of section 110(1)(b) of The Criminal Code.

On March 3, 1972, McKendry travelled to Ocala, Florida, with the appellant and spent the weekend on the appellant's ranch, returning to Toronto on March 5, 1972.

On March 17, 1972, McKendry and the appellant, this time accompanied by their wives, again travelled by plane to Ocala, Florida. Mr. and Mrs. McKendry spent the evening of March 17 and part of March 18 at the appellant's ranch and returned to Toronto on March 19, 1972.

Again, on April 7, 1972, Mr. McKendry accompanied the appellant to Florida and spent the weekend on the appellant's ranch.

Finally, Mr. and Mrs. McKendry and another couple accompanied the appellant and his wife to their ranch in Florida for the weekend of May 5, 1972, to May 7, 1972.

With respect to each of the above mentioned four trips from Toronto to Florida, travel arrangements were made by or on behalf of the appellant, and the cost of the various return flights from Toronto to Tampa were in each case eventually paid for by cheques drawn on the account of Newtor Holdings Ltd., a private investment and management company owned and controlled by the appellant. No amount was received by the appellant from McKendry with respect to the repayment of the travel costs, but an account receivable was opened on the books of Newtor Holdings Ltd., relating to the costs of the trip of March 17, 1972.

The agreed statement of facts also discloses that the contract for the Jacques Cartier grant of \$617,000 was signed on behalf of the Government by Mr. James Smart who was the Executive Director of the Industrial Incentive Branch in DREE and was McKendry's direct superior while the \$119,970 contract with Silver Shields Mines was signed for the Government by McKendry himself.

I think it important also to note that Cooper and McKendry first met on February 29, 1972 and that, according to McKendry, their meeting had been arranged for the purpose of discussing whether Cooper's proposals would be eligible for a DREE grant. Mr. McKendry put it this way:

Mr. Cooper was interested in one matter primarily, and that is this: would his project for Cobalt be eligible under the R.D.I. Act to be eligible for incentive assistance through DREE.

I will consider hereafter at greater length the evidence given by McKendry and Cooper as to their relationship, but there is no dispute about the date or purpose of their first meeting and I think that the jury was entitled to view it in the context of McKendry's first trip to the Cooper ranch in Florida three days later and the signing of the substantial DREE grant contracts exactly one month after his return (April 5th), having regard also to the fact that Mr. and Mrs. McKendry had spent at least two days there (March 17th, 18th) at Cooper's expense during the same month.

Referring to the various trips taken by McKendry at Cooper's expense, counsel for the respondent, in my opinion, put the whole issue very clearly to the jury when he said in closing: Well, the issue remains at the end what it was at the beginning, and that is, whether or not the benefits that were conferred were benefits with respect to the transactions that were taking place with DREE; that is the issue in this case.

In considering the direct evidence contained in the agreed statement of facts bearing on this important issue, the following passages from that statement which relate to the air tickets for the trip of March 17th appear to me to be relevant:

The cost of these McKendry tickets was charged to the account of The Jacques Cartier Mint, which was in the books of Newtor Holdings Ltd. And you heard me say that The Jacques Cartier Mint was incorporated in January of 1972, and the accounts were being handled in Newtor Holdings and there was an account there headed 'Jacques Cartier Mint,' and the McKendry tickets were charged to that account.

The statement also contains the following passage relating to the same trip:

These tickets were paid for, as indicated, by cheque of Newtor Holdings; Mr. Fred Munger issued the cheque. And in the case of the McKendry tickets, the \$378 charged to The Jacques Cartier Mint account, and in the books of Newtor Holdings and subsequently Mr. Munger opened an account with the heading of 'Receivable from G. McKendry,' and debited the account in the amount of \$378. So that on the second trip it was originally set up in the books of Newtor Holdings as being attributable to Mr. and Mrs. McKendry, but then subsequently an account was opened indicating it was receivable from Mr. McKendry in that amount. But that account, I believe there is agreement, was never paid.

It will be seen that the \$378 benefit which accrued to McKendry was initially charged to the Jacques Cartier Mint account on the books of Cooper's "private investment and management company" and although the amount at some subsequent date was debited to an account entitled "Receivable from G. McKendry", no money was ever received from this source and the fact remains that the Jacques Cartier Mint Inc., was one of the companies in respect of which Cooper was then seeking and ultimately received a DREE grant, and I think that the admission contained in the last-quoted paragraph is at least open to the construction that at the time when the benefit was conferred, it was treated as being a disbursement in respect of that company's dealings with the government through McKendry.

There was no suggestion here, as there was in the case of *R. v. Paul*[6], that a prima facie case had not been made out by the prosecution and the agreed statement of facts, in my opinion, clearly discloses evidence from which a properly instructed jury, acting reasonably, could have drawn the inference that the respondent was guilty of conferring a benefit on a government employee with respect to dealings with the government without having the consent in writing of the head of the branch of government with which he was dealing. This position was clearly recognized by counsel for the defence as is evidenced by the following passage from his address to the jury:

Now, if there was no defence evidence called, if there wasn't a jot of evidence called by the defence at the conclusion of the case for the Crown, the agreed-upon set of facts, you would have to ask, "Why were the trips made?" And you might have come to the conclusion they were only made for one purpose; and that is somehow for the trips to tie in in some way with respect to the grant. And it is for this reason, because that's the inference that you might draw, that an attempt was made by the defence to outline to you in every detail that it could what took place, why it took place, and who was there.

The defence called fifteen witnesses, the most important of whom were McKendry and the respondent himself. The obvious purpose of this evidence was to explain that although the benefits were conferred, they were not conferred in respect of dealings with the government, but rather were the product of a new-found and rapidly maturing friendship between McKendry and Cooper which started on the day when they met to discuss new business and grew through a mutual interest in horses.

McKendry's evidence disclosed that after his first meeting with Cooper in his office, the two men walked over to lunch at the Chateau Laurier and it was during this walk that the subject of horses was first discussed between them. The conversation, as McKendry recounts it, developed into a discussion of Cooper's ranch in Florida and some matched horses which he had for sale. The following sequence of events is then described by McKendry:

He said, "I commute back and forth every weekend to my home," and he said, "If you want to come down some weekend, that would be great". I said, "When are you going next?" He said, "Pretty well every weekend; I'll give you a call in the next day or two and see if you are free for this weekend". I said, "Fine; I would want my wife to come. One horse would be for me and one horse would be for my wife, and you can't buy a horse for your wife; she has to see it". He said "Fine, she can come."

So he phoned me in a day or two and he said, "I'm going down this weekend; can you come?" I said, I can, but Tia can't; she's working this weekend and can't get off, and she said for me to go ahead and if I like them she'll come later."

The immediate result of this conversation was McKendry's first free trip to the Cooper ranch.

Cooper tells much the same story except that he does not think that he invited McKendry to his ranch on the first occasion because as he says, "I don't believe I would have done it that spontaneously".

The explanation given of the second trip is that it was arranged so that McKendry and his wife could both see the horses which he was contemplating purchasing. These two trips, which were made while the grants to Mr. Cooper's companies were still being negotiated, appear to me to be of more significance than the last two visits to Florida which took place after the contracts has been signed. The first of these later trips (April 7th) is explained by Cooper and McKendry as having to do with McKendry obtaining a manager for Cooper's ranch in Florida, while the second (May 3rd) is said to have been made because Cooper wanted to discuss with McKendry an offer to become the President of Jacques Cartier Mint Inc. I agree with the Court of Appeal that the evidence relating to these last two trips is admissible, but as I have indicated, I think that the benefits received during the course of the negotiations for the grants is the more significant.

Counsel for the prosecution appears to me to have accurately reviewed the statement of agreed facts in the following paragraphs of his opening address:

So those are the facts as they are agreed upon, and you will note that there are four trips to Florida that are involved; the two involving Mr. McKendry alone, as far as the charge is concerned, and two involving Mr. and Mrs. McKendry. And I think the benefits would total up to nearly twelve hundred dollars for those four trips.

Also, there is no reference to the fact that Mr. and Mrs. McKendry ever paid anything for these tickets to Mr. Cooper or to any of the companies involved. So then it would appear that the situation is that there was, I think it would go without saying, and in any circumstances the trip to Florida on these four occasions would be a benefit; I don't think there's any dispute about that. It was a benefit provided through Mr. Cooper, or through one of Mr. Cooper's companies, it was conferred on Mr. McKendry, who was an official of DREE, and it was conferred at the time that Mr. Cooper was having dealings with the Canadian Government, in particular with that branch of the Canadian Government.

After having weighed this evidence in light of the explanation given by Cooper and McKendry, the jury found the respondent to be guilty as charged, but the Court of Appeal for Ontario quashed this conviction and directed a new trial on the ground that there were serious misdirections in the trial judge's charge to the jury. Judge Graburn's charge initially contained the following direction with respect to circumstantial evidence:

If you find those to be the facts of these circumstances, you might say a rational inference is, or the circumstances are consistent with the conclusion, that Cooper invited McKendry to Florida in relation to the DREE grant, in whole or in part, directly or indirectly.

In this case circumstantial evidence is very important, and I direct you as a matter of law that where the evidence on which you rely is mainly circumstantial, before you may find an accused guilty on such evidence standing alone, you must be satisfied that such evidence is consistent only with the guilt of the accused and inconsistent with any other rational conclusion. By that, ladies and gentlemen, I mean a reasonable conclusion on the evidence that you have heard.

Therefore, in the example that I have given you, and of course it is only an example in the total body of evidence which is before you, but I deal with this one example for a moment. In the example that I gave you, you must be satisfied that the evidence is consistent only with the conclusion that Cooper invited McKendry to Florida in relation to the DREE grant, in whole or in part, directly or indirectly, and inconsistent with any other rational conclusion, such as the evidence that the invitation was extended so that McKendry could look at, and perhaps purchase, horses down in Florida.

As I said to you, ladies and gentlemen, I gave you that as an example only of circumstantial evidence. The way in which you approach that circumstantial evidence is important in this case, and you must consider the evidence as a whole.

This direction was in accordance with what is sometimes referred to as the rule in Hodge's case[7]. The report of that case, is a reproduction of a charge delivered by Baron Alderson to a jury at the Liverpool Assizes at a time when the accused, as a person interested in the result, was prohibited from testifying on his own behalf. The pertinent part of the charge reads as follows:

Alderson, B., told the jury, that the case was made up of circumstances entirely; and that, before they could find the prisoner guilty, they must be satisfied, 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.' [The italics are my own.]

At the conclusion of Judge Graburn's charge to the jury in the present case, counsel for the Crown pointed out, correctly in my view, that it had been decided in this Court in *The Queen v. Mitchell*[8], that Hodge's case was concerned only with the identification of the accused as being the person who had committed the crime and that it had no application to a case turning upon the intention of the accused. I think it should be stated here also that in my view the present case is almost the exact converse of Hodge's case. In the latter case there was no doubt that a crime

had been committed and the only question for the jury was whether the accused was the person who had committed it; whereas in the present case there is no doubt that the respondent was the person who conferred the benefits and the only question is whether he intended them to be benefits conferred with respect to his dealings with the government.

It was contended on behalf of the respondent that criminal intent was not an element of the offence created by s. 110(1)(b) of the Code, but this involves the proposition that the acts thereby prohibited “are not criminal in any real sense but rather acts which in the public interest are prohibited under a penalty”. See *Sherras v. DeRutzen*[9], which was recently affirmed in this Court in *R. v. Pierce Fisheries*[10], at p. 14. In my opinion the provisions of s. 110(1)(b) are directed toward the preservation of integrity amongst employees of the government and those who deal with them, and it is the importance of preserving this aspect of national life that persuades me that the offence created by that section is in a real sense a criminal offence of which “intention” to confer the benefits “with respect to” dealings with the government is a necessary ingredient.

As I have indicated, the issue in the present case is, as stated by counsel for the defence, whether Cooper conferred the benefits in this case “with respect to” the DREE grants and contracts. It is admitted that the benefits were conferred on a government employee at a time when Cooper was involved in dealing with the Government through that employee. There is no suggestion that consent was obtained from the head of the branch of government concerned. Whether or not the benefits were conferred “with respect to” his dealings with the government must depend on his intention in conferring them and the evidence for the defence was directed towards showing that they were conferred because of his friendship with McKendry and their identity of interest in horses. In the course of the reasons for judgment which he delivered on behalf of this Court in the *Mitchell* case, Mr. Justice Spence departed from the approach which had been almost slavishly followed in the courts of this country for more than fifty years wherever the evidence was solely or mainly circumstantial, and instead of parroting the language used by Baron Alderson, he engaged in a realistic analysis of the actual circumstances of Hodge’s case concluding that the direction there given “was concerned only with the identification of the accused as being the person who had committed the crime”. Mr. Justice Spence then went on to say, at p. 479:

This does not, in the slightest degree, reduce the onus of proof which rests upon the Crown in criminal cases and does not substitute any other rule. The direction in Hodge’s case did not add to or subtract from the requirement that proof of guilt in a criminal case must be beyond a reasonable doubt. It provided a formula to assist in applying the accepted standard of proof in relation to the first only of the two essential elements in a crime; i.e., the commission of the act as distinct from the intent which accompanied that act. The first element, assuming every circumstance could be established by evidence, would be capable of proof to a demonstration. The latter element, save perhaps out of the mouth of the accused himself, could never be so proved. The circumstances which establish the former not only can be, but must be consistent with each other, as otherwise a reasonable doubt on the issue arises. The circumstances which

establish the latter, being evidence personal to one individual, will seldom, if ever, be wholly consistent with only one conclusion as to his mental state and yet the weight of evidence on the issue may be such as to satisfy the jury, beyond a reasonable doubt, as to the guilty intent of the accused. The instruction of Baron Alderson in Hodge's case does not apply and was never intended to apply to an issue of this kind.

When this case was cited to Judge Graburn by Crown counsel, he recalled the jury and instructed them that he had been wrong in leaving the issue of the appellant's intention in conferring the benefits to be decided in accordance with the Hodge's rule. In so doing, Judge Graburn gave the following amended instruction to the jury: It has been brought to my attention, ladies and gentlemen, that I was clearly wrong in my charge to you, as a matter of law, because that particular rule which I gave to you this morning about having to find the circumstances consistent with guilt and inconsistent with any other rational conclusion does not apply when we are talking about things like intent, or we are talking about things like the purpose. It does apply as to an act.

In other words, if we are trying to determine whether such-and-such an act was done, such-and-such a physical act was done, then the rule I indicated to you is applicable, but when we are talking about intent, purpose, things in a man's mind, that rule does not apply. That is clear, and that matter has been pointed out to you, so I was wrong giving you the example about circumstantial evidence, and I was wrong to charge you about circumstantial evidence at all. And I ask you, and you must disregard in your deliberations the charge I gave you in relation to circumstantial evidence.

In all other respects, what I indicated to you is correct so far as counsel are concerned, and hopefully so far as I am concerned.

In the reasons for judgment which he delivered on behalf of the Court of Appeal, Mr. Justice Arnup placed his own construction on the Mitchell case saying:

The Queen v. Mitchell, supra does not detract from the general rule where what is sought to be proved by circumstantial evidence is a fact essential to the proof of the offence charged. It holds that insofar as the intent of the accused is concerned, the rule in Hodge's case does not apply to circumstantial evidence led to prove intent, although of course the rule as to reasonable doubt continues to apply. In my view it is impossible to read the several judgments of the Supreme Court in John v. The Queen, [1971] S.C.R. 781 without coming to the conclusion that the rule in Hodge's case remains as an established principle of criminal law in Canada. If it is to be declared that the rule is no longer to be applicable in Canada to proof of facts by inference from circumstantial evidence, then such a declaration can come only from the Supreme Court itself.

With the greatest respect, it appears to me that the learned judge is saying in effect that the rule in Hodge's case applies "where what is sought to be proved by circumstantial evidence is a fact essential to the proof of the offence charged." As I view the present case, however, the only fact "essential to the proof of the offence charged" which has not been admitted is the "intention" of Cooper in conferring the benefits and Mr. Justice Arnup appears to recognize the Mitchell case as

having held that the “rule in Hodge’s case does not apply to circumstantial evidence led to prove intent”.

There is, of course, no doubt that the charge must be proved beyond a reasonable doubt in order to support a conviction and where, as here, the accused has called evidence directed towards providing an explanation of incriminating circumstances, the question is whether, when the whole evidence is considered together in light of that explanation, the jury is nonetheless satisfied beyond a reasonable doubt as to the guilty intention of the accused in conferring the benefits which he did on McKendry.

The Court of Appeal summarized the submission of the present respondent’s counsel in the following paragraphs of the reasons for judgment delivered by Mr. Justice Arnup:

In this case Mr. Robinette submitted that in order to prove the commission of the offence set out in s. 10(1)(b) of The Code, the Crown must prove, as matters of fact:

- i—that the accused conferred a benefit on an employee of the government, and
- ii—the accused conferred it with respect to the dealings of the accused with the government.

He submitted that unless the Crown proved both aspects of this factual proposition, the Crown had not proved the commission of the offence, and that the rule in Hodge’s case applied to both branches of the factual proposition, where the essential facts were sought to be proved by circumstantial evidence. I accept this proposition.

It follows, in my view, that the trial judge correctly charged the jury in the first instance, and was wrong when he withdrew that charge and told the jury to disregard it. I am further of the opinion that the consequent misdirection is fatal to the conviction, which cannot stand. Mr. Powell candidly conceded in argument that if the trial judge was wrong in changing his mind, there must be a new trial.

As to the first branch of the factual proposition referred to in this passage, I can only say that the statement of facts, and indeed the evidence of Cooper himself, appear to me to constitute a clear admission by the respondent that he had conferred benefits on McKendry. It is not disputed that the trips were paid for by Cooper through his companies and that McKendry and sometimes his wife enjoyed the Cooper hospitality on more than one occasion.

As to the second branch of Mr. Justice Arnup’s proposition, it will be apparent that I consider it to turn on a pure question of “intention” to which the Hodge’s rule does not apply, and that there was ample evidence to justify the jury in drawing an inference of guilt beyond a reasonable doubt. It will be seen that in my opinion the learned trial judge was correct in recharging the jury in the language which he employed.

In the alternative, it was submitted on behalf of the respondent that by withdrawing his initial instructions as to circumstantial evidence in proof of intent, the trial judge “seriously diluted” his charge as to reasonable doubt in which he had said in part:

There is a very important rule of law which applies in this case, and applies in every criminal case, and that is known as the presumption of innocence. It means that an accused person is presumed to be innocent until the Crown has proven his guilt beyond a reasonable doubt. The presumption of innocence and the burden of proof in a criminal case are inseparable. The onus, or burden of proving the guilt of an accused person beyond a reasonable doubt rests with the Crown, and that burden never shifts. There is no burden on an accused person to prove his innocence. The Crown must prove each and every ingredient of the offence charged beyond a reasonable doubt.

In support of this alternative submission which was not made to the Court of Appeal, counsel for the respondent contended that the judge's recharge on the circumstantial evidence "...would convey to the jury that his instruction previously given in the language of Hodge's case was neither a formula to assist in applying the accepted standard of proof nor a graphic illustration of the principle of reasonable doubt." (This quotation is taken verbatim from the factum filed on behalf of the respondent).

The phrase "a formula to assist in applying the accepted standard of proof is obviously taken from the reasons for judgment of Spence J. in *The Queen v. Mitchell*, supra, at p. 479, and the phrase "graphic illustration of the principle of reasonable doubt" from what was said in this Court in *John v. The Queen*, supra, at p. 791, where the *Mitchell* case was expressly approved. In both these cases, when the language referred to is read in context, it is found to apply only to "the commission of the act as distinct from the intent which accompanied that Act". I can find nothing in the recharge to indicate that the Hodge test, where it applies, does not contain a formula to assist in applying the accepted standard of proof, nor is there anything to suggest that the formula does not afford a graphic illustration of that principle in such cases.

In the course of his recharge to the jury and after he corrected himself in relation to the rule as to circumstantial evidence in regard to proof of intention, Judge Graburn once again stressed the necessity of the jury being satisfied beyond a reasonable doubt before convicting. He there said:

Therefore, the issue is left as follows, ladies and gentlemen. The Crown must satisfy you beyond a reasonable doubt that the benefits, if you find them to be benefits, were conferred by the accused on McKendry in relation to the dealings with the government, in whole or in part, directly or indirectly, so far as Cooper was concerned. And the Crown must do that on the basis of the evidence they have presented to you, and on the basis of the case as a whole. If that has been done, then you will find the accused guilty.

On the other hand, if you believe, or have a reasonable doubt about it, that the benefits were wholly unrelated to the dealings but dealt rather with horses to be purchased, the introduction of a manager and the job offer, as far as the accused is concerned, then the accused is not guilty.

These were the last words spoken to the members of the jury before they retired to consider their verdict, and when the charge, as corrected, is read as a whole and in light of this final admonition, I am of opinion that no reasonable juror could have been confused as to the obligation to be satisfied beyond a reasonable doubt before entering a conviction. Nothing was

said to suggest any other standard of proof and in my opinion the instructions as to reasonable doubt are in no way diluted by charging the jury in accordance with the law established in this Court that the Hodge's formula does not apply in determining the "intention" of the accused. The language employed by Mr. Justice Spence in the passage from his reasons in *The Queen v. Mitchell*, supra, has been reaffirmed in this Court in *John v. The Queen*[11], at p. 791, *The Queen v. Bagshaw*[12], at p. 6 and *R. v. Paul*[13], at p. 4, and must, I think, be taken to have been accepted as confining the application of the Hodge's case formula in the manner there stated. This is not to say that, even where the issue is one of identification, the exact words used by Baron Alderson must necessarily be incorporated in a judge's charge. It is enough if it is made plain to the members of the jury that before basing a verdict of guilty on circumstantial evidence they must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. In this regard it will be seen that I agree with the Chief Justice in his rejection of the Hodge formula as an inexorable rule of law in Canada.

Finally, and in the further alternative, it was submitted on behalf of the respondent that by telling the members of the jury that they should find him guilty if they were satisfied that the benefits were conferred "directly or indirectly" "in relation to the dealings with the government", the trial judge misdirected them in that the words "directly or indirectly" do not occur in s. 110(1)(b) although they are to be found elsewhere in the description of offences created by s. 110.

Notwithstanding the persuasive argument addressed to us on this point, I do not regard this as an error justifying the quashing of the conviction. It must be plain that if the jury was satisfied that the benefits were conferred "directly" in relation to dealings with the government, they should convict the accused; and notwithstanding the fact that the word "indirectly" is not included in s. 110(1)(b), I take the view that if the jury was satisfied that Cooper's conferring of the benefits was indirectly connected with the dealings which he had with the government through McKendry, a verdict of guilty could not be set aside.

The submission as to the trial judge's use of the word 'directly or indirectly' was made before the Court of Appeal where Mr. Justice Arnup considered it in the following passage of his reasons for judgment:

While the words "directly or indirectly" appear in s. 110(1)(a) of The Code, which contains within itself a separate offence, the words do not appear at all in s. 110(1)(b). I therefore agree that the trial judge erred in using the words "directly or indirectly" as he did. Neither word is used in s. 110(1)(b) and he ought not to have used either of them in his charge. If this error had stood alone, we would have had to give serious consideration to the question of whether s. 613(1)(b)(iii) should be invoked on the facts of this particular case. However, since in my view the appeal should be allowed on the ground already stated, it is unnecessary to consider the weight to be given to this error of the trial judge. I draw attention to it so that it will not be repeated on the new trial. [*The italics are my own.*]

As I have indicated, I differ, with respect, from the conclusion of the Court of Appeal that the use of the words in question constitute an error, but it will be apparent that if I shared that view I would have regarded it as an error which stood alone, and while we are without the benefit of the

concluded view of the Court of Appeal as to whether in this event it would have been an error in respect of which s. 613(1)(b)(iii) should be applied, I have given the question the best consideration which I can and I am satisfied that under these circumstances that section would have applied.

I do not think that any importance is to be attached to the fact that the judge used the words “in relation to the dealings with the government” instead of the words “with respect to” those dealings as they are found in the statute.

For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and restore the conviction entered at trial. Appeal allowed, conviction at trial restored, LASKIN C.J. and JUDSON and DICKSON JJ. dissenting.

Solicitor for the appellant: The Attorney General for Ontario, Toronto.

Solicitors for the respondent: McCarthy & McCarthy, Toronto.

[1] (1975), 7 O.R. (2d) 429.

[2] [1964] S.C.R. 471.

[3] [1973] 1 All E.R. 503.

[4] [1938] S.C.R. 396.

[5] [1971] S.C.R. 781.

[6] (1975), 27 C.C.C. (2d) 1.

[7] (1838) 2, Lewin 227, 168 E.R. 1136.

[8] [1964] S.C.R. 471.

[9] [1895] 1 Q.B. 918.

[10] [1971] S.C.R. 5.

[11] [1971] S.C.R. 781.

[12] [1972] S.C.R. 2.

[13] (1975), 27 C.C.C. (2d) 1.

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Prepared on 26 October 2026 · Esheria