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Koury v. The Queen [1964] S.C.R. 212

Frank K. Roberts

Koury v. The Queen [1964] S.C.R. 212.

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CRIMINAL LAW — RES JUDICATA — POWER OF THE SUPREME COURT TO REVERSE A TRIAL COURT DECISION ON ONE CHARGE WHEN APPEAL IS TAKEN ONLY AS TO THE DECISION ON OTHER CHARGE.

This was an Appeal by the accused, Koury, from a Judgment of the Court of Appeal for Ontario upholding the conviction for fraud of the four co-accused, upholding the conviction for conspiracy of the three accused, other than Koury, and upholding the acquittal of the accused Koury on a conspiracy charge to commit the fraud for which he was in fact convicted.

The sole issue of the Appeal was whether the conviction of Koury of fraud was inconsistent with his acquittal on the charge of conspiracy to commit that very fraud. In acquitting the accused of conspiracy, the Jury must have found that he withdrew from the association before the conspiracy had been entered into. The case put against Koury on the fraud count was that he was an aider and abettor and therefore the Crown had to show a conscious participation in a common design and conscious and deliberate assistance between the aider and abettor and the other persons.

The majority of the Supreme Court of Canada held that aiding and abetting persuant to a common intent and design is not necessarily the same thing as conspiracy.

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26 *Mullins v. The Queen* (1952), 15 C.R. 99.
(Que. Q.B., Appeal Side)
Rex v. Malanik (1951), 13 C.R. 160, 1 W.W.R. (N.S.) 577.
101 C.C.C. 182 (Man. C.A.); affirmed, [1952] 2 S.C.R. 335, 14 C.R. 367, 103 C.C.C. 1.
Rex v. Gauthier (1943), 29 Cr. App. R. 189.
Rex v. Flett, (1943) 1 W.W.R. 672, 69 B.C.R. 25, 79 C.C.C. 183, [1943] 2 D.L.R. 656.
Rex v. Thorpe (1925), 18 Cr. App. R. 189.

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The argument on behalf of the accused in the *Kravenia* case[1] was that the trial Judge ought to have instructed the Jury that there is a difference in law between two people aiding and abetting one another in a specific crime, and in conspiring to commit that very crime and that the mere fact that one aided and abetted in a crime might not be conspiring to commit that crime. Fauteux J. for the majority (Cartwright J. dissenting) adopted this distinction and held that there was no obligation on the trial Judge to instruct the Jury as to the differences between the crime charged and another crime for which the accused was not indicted. The majority in the Koury case held that, on the particular facts before them, the verdict of guilty of the specific offence was not inconsistent with an acquittal on a charge of conspiracy to commit that offence.

The Court, however, decided to go farther. It stated, in *obiter dictum,* that an appeal court can review an acquittal by a trial court even though the acquittal is not before the court on appeal. At page 218 of the *Koury* report, Spence J. for the Majority states:

> On the evidence that we can now examine, the error, if any, is in the acquittal on the charge of conspiracy and not in the conviction on the substantive offence. . . . We are not compelled to defer to this acquittal for the purpose of quashing the conviction on fraud. We are not engaged in a process of logic chopping and we are entitled to look behind the record of the acquittal.

In my respectful submission the Court has gone too far in making this wide and dangerous statement. Cartwright J. in his dissent refers to the defence of *res judicata.* The principle upon which the general doctrine of *res judicata* is based is that once a matter has been judicially determined, the determination at least as between the same parties, should be accepted as final and conclusive: *interest reipublicae ut sit finis litum. res judicata* is a common law defence.

If the statement of the majority is accepted as good law, the whole general defence of *res judicata* is put in question together with the basic theory against double jeopardy. If the Court on Appeal is permitted to look behind the reasons for an acquittal not appealed from, that is to say to look behind a final verdict and say: "On the evidence that we can now examine, the error . . . is in the acquittal (not appealed from and not before the Court) . . . and not in the conviction (appealed from and before the Court)"; then the Common law defence of *res judicata,* specifically preserved by Section 7 of the Criminal Code, is, if not abolished, certainly thoroughly shaken.

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[1] *The Queen v. Kravenia,* [1955] S.C.R. 616.