Osgoode Hall Law Journal

Volume 3, Number 2 (April 1965)

Article 21

Wright, McDermott and Feeley v. The Queen, [1963] S.C.R. 539; Regina v. Feeley, Wright, McDermott

P. G. J.

F. EVIDENCE

Wright, McDermott and Feeley v. The Queen, [1963] S.C.R. 539.
Regina v. Feeley, Wright, McDermott

Notwithstanding the sometimes sinister and always newsworthy circumstances surrounding this case, the points of law involved merit consideration and discussion.

The accused were charged on two counts of conspiracy involving alleged bribes to a police officer for the purpose of receiving advance warnings of anti-gambling raids. W was also charged in three additional counts with having committed substantive offences under s. 101(b) of the Criminal Code,[1] these arising from the payments alleged to have been made by W to the police officer.

At the first trial Spence J., presiding, the Crown elected to proceed on only the first conspiracy count. The necessary three elements of the offence the Crown sought to prove were: (1) conspiring together to commit an indictable offence under s. 101(b) of the Criminal Code; (2) corruptly giving money to the police officer; and (3) intending that the officer should interfere with the administration of justice contrary to s. 408(1)(d) of the Criminal Code. The result of jury deliberation was the acquittal of the accused.

Count two upon which the Crown next proceeded before Donnelly J., differed from *count one* since it involved neither the corrupt payment of money to the police officer, nor the intent that he should interfere with the administration of justice as elements. The Crown had now to prove only a conspiracy to obtain from the officer information which it was his duty not to divulge. The latter element did not necessarily involve on the part of the conspirators an intent to interfere with the administration of justice.[2]

At trial the accused put forward the special plea of *autrefois acquit* as well as the alternative of *res judicata* but both were rejected by Donnelly J. However, insofar as the three substantive charges against W were concerned, the trial judge accepted the defence of *res judicata* and directed an acquittal.

The decisions of Donnelly J. regarding *autrefois acquit* and *res judicata* were appealed by the accused as was the acquittal of W on the three counts by the Crown. All these questions were decided unfavourably to the accused by the Court of Appeal.

In the Supreme Court of Canada, Judson J. delivered the majority decision affirming the decisions of the Court of Appeal.

All members of the Court concur with Judson J. in rejecting the plea of *autrefois acquit.* All adopt the reasons of Schroeder J.A., to the effect that the two charges are essentially different, since their

[1] 1953-54 (Can.), c. 51.
[2] Police Act, R.S.O. 1960, c. 298; R.R.O. 1960, Reg. 486.

elements are not identical. The test applied by the court in judging the merit of the special plea is that of comparing the elements of the two charges rather than examining the similarity of evidence and fact in the two trials.

In attempting to meet the difficult onus of establishing the validity of a plea of *res judicata,* the defence arguments at trial centred on admissions made by the accused during the first trial. The accused had admitted all elements of *count one,* except the intent to interfere with the administration of justice. Thus, ran the defence argument, the jury in acquitting the accused must have decided the matter of intention in the favour of the accused. Because of the previous settlement of this vital issue of fact common to both offences, the defence reasoned that the trial judge should direct a verdict of not guilty.

Judson J., in denying the defence of *res judicata* in this case and the validity of the above defence logic, says at page 568 of his judgment:

> An acquittal on a charge of conspiracy does not pronounce against every part of it.

The Court follows the reasoning of Schroeder J.A., who could see no certainty as to the basis of the jury's decision despite the reduction of its area of decision by the admissions of the accused. His Lordship reasoned that lack of proof of a common objective among the alleged conspirators or intent on the part of W alone are two of several possible reasons for the jury's verdict.

Hall J., in his dissenting judgment makes clear his feeling that his colleagues have erred in focusing their attention on the wording of the two charges. While he accepts this as the proper method in deciding upon the plea of *autrefois acquit,* he considers that in applying a very similar mode of analysis to the problem of *res judicata,* the majority recognized easily apparent elemental differences between the two crimes. To Hall J., and Cartwright J., who concurs in the dissent, the differences between the two proceedings are largely illusory.

The only important question, in the opinion of Hall J., is were there two conspiracies or only one? Using the transcripts of the two trials as his reference text, he compares the various components of the trials and finds many strong arguments for the validity of the "one-conspiracy" position.

For instance, the only sizeable difference between the evidence given at the first and second trials is that some has been excluded in the second. He questions the logic of the proposition that a separate offence can be created by a process of severing the first.

The police officer who was W's contact gave evidence at each trial which painted an unmistakeably clear picture of one indivisible

conspiracy with only one intent. The only agreement the officer and W ever had was to pass information regarding future raids.

A comparison of opening statements by the Crown in each case displays no appreciable difference in the elements of the crime dealt with. The charges to the juries of the respective judges again do not conflict enough to warrant a conclusion that either saw the case as a particularly different or separate one.

Hall J. comes to the conclusion that everything unlawful in *count two* was part and parcel of the agreement covered by *count one;* consequently, his decision is that *res judicata* has been established and the convictions should therefore be quashed.

Regarding the three additional counts against W, the majority held that the jury's verdict had merely acquitted him of *conspiracy* and in no way could the verdict be construed to absolve him from having committed the substantive offences himself.

Hall J. agrees that the Crown is not estopped from bringing the charges because of the conspiracy count. However he echoes the position of Donnelly J., at trial and would hold that *res judicata* necessitates a finding of not guilty by reason of the jury's conclusion on the one issue it had before it at the first trial.

Cartwright J., in a short dissent quotes from a unanimous judgment written by Douglas J., of the United States Supreme Court in *U.S. v. Sealfon.*[3] His purpose is to display a reasonable approach in deciding the question of a defence of *res judicata* in conspiracy cases. In deciding if there has been a determination of facts favourable to the present defendant, Douglas J. advises the consideration of ". . . the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial." Douglas J. goes on to advise the consideration of the whole set of circumstances of the proceedings for hints valuable in the search for the issues decided by the jury.

It is true that a blanket verdict of guilty or not guilty is not weighty authority for the proposition that one of the issues before the jury has been decided one way or another. However, there are cases in which logic and the final balance of all probabilities indicate with reasonable certainty the jury's settlement of a matter of fact. In the case under consideration the Supreme Court of Canada had an excellent opportunity to apply a process such as that outlined in the judgment of Douglas J.

The Court's reluctance to accept any but the most certain of proofs of a jury's decision on a particular issue is not without serious implications. It would seem to follow that the defence of *res judicata* is now of little usefulness where the prior decision relied upon was a criminal one with its customary blanket verdict. Perhaps only in such

[3] (1948), 332 U.S. 575.

clear cut situations as where identity is the issue common to the two trials, will *res judicata* retain its usefulness in protecting defendants from double exposure to the deliberations of their peers.

The majority's determination of the broad question of whether there were two conspiracies or only one is equally ominous. In such a decidedly factual question, the formalistic approach of the court in fixing largely upon the wording of the charges is not the most fruitful approach.

In view of the decision of the majority of the Supreme Court of Canada in this case there is now considerable doubt as to the availability of the defence of *res judicata* in cases which involve criminal conspiracy.

P.G.J.