CRIMINAL LAW—THEFT—COLOUR OF RIGHT—MISTAKEN BELIEF

A recent decision of Mr. Justice Rand of the Supreme Court of Canada indicates a rather serious departure from what, it is submitted, has long been recognized as a defence to a charge of theft.

The external facts of the case, *R.* v. *Shymkowich*[1] are few and simple. The accused, a beachcomber, entered into the booming grounds of a lumber company situated on the Fraser River and removed two logs which he found floating outside a boom. He stated that he thought he was entitled to salvage any logs found floating outside a boom, even though they were still within a private booming ground.

The accused was charged with theft under s. 347 of the Code,[2] which reads:

> Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent,
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> (a) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property interest.

The accused maintained as a defence that he had a *bona fide* belief that he was entitled to salvage any logs floating outside a boom, and that the taking of the logs was, therefore, not "fraudulently and without colour of right."

It is interesting to consider, briefly, the decisions of the trial judge and of the British Columbia Court of Appeal.

In delivering judgment, the learned County Court Judge said, in part:

> I think that *mens rea*, that is, an intent to do wrong, is an integral part of this offence and must be proved, and in this connection I feel that the story and the actions of the accused have created more than a reasonable doubt in my mind as to there being any intent on his part to do anything wrong, and it is of course well-established practice that the accused shall be entitled to any reasonable doubt. In view of this, I feel I must dismiss the charge.[3]

The Crown appealed the decision of the county court judge to the Court of Appeal where judgment was given by the Chief Justice of British Columbia. He agreed with the learned trial judge that *mens rea* was an essential element of the offence and found that there was evidence to support his conclusion that there was no *mens rea* on the part of the respondent. He further expressed the opinion that the evidence disclosed that the respondent was under the honest impression that he had the right to take possession of the logs in order to recover some portion of their value from their owners. The appeal was, therefore, dismissed and the Crown brought a final appeal to the Supreme Court of Canada.

Three decisions are reported. Rand J. and Estey J. give the majority decisions, while Locke J. is dissenting. The appeal is allowed and the accused found guilty of the offence of theft.

Locke J., in his dissenting judgment, approves the reasoning of the county court judge and the Court of Appeal. He states:

> Other than to construe the language of the *Code* defining theft, I see no question of law

in this matter other than as to whether there was any evidence upon which the learned County Court Judge could find that the respondent took possession of the logs believing that he was entitled to do so with the intention not of stealing them but of profiting by obtaining salvage from the owners if they were found, or which left him in such doub tas to require him to acquit him. I respectfully agree with the Chief Justice of British Columbia that there was evidence upon which the trial Judge could so find.[4]

Although Estey J. allows the Crown's appeal, and finds the accused guilty of theft, he does so only upon his conclusion, after carefully reviewing the fact, that the belief of the accused in a right to take the logs was not an honest or *bona fide* belief.

However, the important result of these decisions is the unanimous conclusion, after a review of the authorities, that the law is correctly stated in Kenny's Outlines of Criminal Law:

> If property is taken by a true legal right, obviously no criminal wrong is committed by taking it. But immunity is carried further, because the common law has always admitted that a man's honest, though erroneous or unreasonable *belief* that he had a legal right to take the thing should negative criminal guilt. This clearly covers a mistake of law and it is incorrect to state that a belief in a right which has no existence in law will not suffice.[5]

We now come to the decision of Rand J., with which this comment is mainly concerned. As previously stated, Estey J. allows the appeal and finds the accused guilty because he concludes, on the facts, that the belief of the accused that he had a legal right to take the logs was not an honest belief. Although Rand J. arrives at the same result, that is, he finds the accused guilty of theft, he does so on the basis that what the accused claims as a defence is no defence at all. In other words, Rand J. states that, even did the accused honestly believe he had a right to take the logs, this is not admissible as a defence. He states his conclusions as follows:

> What, then, he believed was that by the general law he had a right to collect them as he did, to dispose of them, and in effect to require the owners to pay him or the person to whom he transferred them remuneration for his salvage work. Is that admissible as a defence I have no doubt that it is not. As Kenny in his outlines of criminal law, 1952 Ed. at p. 48 says:—
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> 'The final condition is, that the mistake, however reasonable, must not relate to matters of law but to matters of fact. For a mistake of law, even though inevitable, is not allowed in England to afford any excuse for crime. Ignorantia juris neminem excusat. The utmost effect it can ever have is that it may occasionally, like drunkenness, rebut the existence of the peculiar form of mens rea which some particular kind of crime may require.'[6]

The result, then, is that Rand J. arrives at an opposite conclusion to the other judges referred to, in his ruling that the accused was mistaken as to matters of law, and, therefore, had no defence to the charge of theft. Obviously, it is paradoxical that opposite conclusions can be arrived at and yet the same authority be cited in support of both conclusions. Both Rand J. and the other judges cite statements from Kenny's Outlines of Criminal Law as correctly stating the law, and each statement seems to support one of the diverse views.

There must be an explanation, and, of course, there is. Either there are conflicting statements in Kenny's Outlines of Criminal Law or else one of the statements does not support its proponent's contention. It is submitted, with respect, that the statement in Kenny referred to by Rand J. is incomplete and, therefore, does not support his contention.

The statement from Kenny as quoted by Rand J. concludes:

> The utmost effect it [mistake of law] can ever have is that it may occasionally, like drunkenness, rebut the existence of the peculiar form of mens rea which some particular kind of crime may require.

Unfortunately, this is where Rand J. stops. However, the statement in Kenny goes on to say:

> Thus larceny even at common law could only be committed when a thing is stolen without even the appearance of right to take it; and, accordingly, a *bona fide* and reasonable mistake, even though it be of law . . . will afford a sufficient defence.[7]

This latter statement, then, is in complete agreement with the statement on page 241, which the other judges cite as a correct statement of the law. In other words, Rand J. relies for his decision on a general rule, whereas, the very next sentence in Kenny points out that larceny was always on exception to the general rule, and a *bona fide* belief, even though a mistake of law, is a defence.

Possibly, Rand J. felt that defence to larceny at common law is, for some reason, inapplicable as a defence to a charge of theft as defined by the Criminal Code. However, as Locke J. points out, the definition of theft in the Code embodies the accepted defnition of the offence of larceny at common low. Therefore, there is no apparent reason why a defence to a charge of larceny which would have prevailed at common law should not prevail as a defence to a charge of theft under the Code. This was, in effect, the unanimous agreement of the learned county court judge, the Chief Justice of British Columbia, and Locke and Estey JJ. in the Supreme Court of Canada.

Our law has long recognized that an honest claim of right, though it may be unfounded in law or fact, will prevent a taking from being felonious. It is submitted that the decision of Rand J. in the case of *R. v. Shymkowich* is a serious narrowing of the accepted principle.

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[1] [1954] S.C.R. 606, 19 C.R. (Can.) 401, 110 C.C.C. 97.

[2] R.S.C., 1927, c. 36. Estey J. states, at [1954] S.C.R. 609, that the charge in question was laid under s. 396 of the Code. But Locke J.'s intimation at [1954] S.C.R. 622, that the charge was laid under s. 347 of the Code seems more probable.

[3] Quoted by Sloan C.J.B.C. at (1954), 12 W.W.R. (N.S.) 49, at p. 51.

[4] [1954] S.C.R., at p. 624.

[5] 16th ed., 1952, at p. 241 ff.

[6] [1954] S.C.R. at p. 608.

[7] *Op. cit.*, at p. 49.