

drawn from the facts, whether she was or was not seaworthy 1924.  
 at the commencement of the voyage: *Anderson v. Morice* W. LANGLEY  
 (L.R. 10 C.P. 58); *Ajum Goolam Hossen & Co. v. Union* & SONS LTD.  
*Marine Insurance Co. Ltd.* ([1901] A.C. 362); *Reynolds v.* v.  
*North Queensland Insurance Co.* (17 N.S.W.L.R. 121). Without AUSTRALIAN  
 expressing any opinion as to whether I should have arrived at PROVINCIAL  
 the same conclusions as the jury, I do not think their finding ASSURANCE  
 can be disturbed. ASSOCIATION  
LTD.  
Ferguson, J.

In my opinion, therefore, the appeal must be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Norton, Smith & Co.*

Solicitors for the respondents: *Sly & Russell.*

## R. v. GREENHALGH, SALON & WILSON.

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*Criminal Law—Conspiracy—Three persons charged with con-* May 23, 26,  
*spiring together — Evidence — All three found guilty—* 30; June 6.  
*Conviction of one quashed on appeal—Effect on verdict.* The C.J.  
Gordon, J.  
James, J.

Three persons were charged for that they amongst themselves conspired together to cheat and defraud, &c. The jury found all three guilty. On appeal the conviction of one was quashed and the conviction of the other two was upheld and their appeals dismissed.

Subsequently the matter was re-opened when it was contended that on the finding of the Court of Criminal Appeal all three were entitled to be discharged.

THE COURT (JAMES, J., dissenting) affirmed their former decision.

### CRIMINAL APPEAL.

The three appellants Greenhalgh, Salon and Wilson were tried before *Edwards*, Acting D.C.J., Chairman of Quarter Sessions and all three were convicted on a charge that they amongst themselves conspired together to cheat and defraud certain persons of divers large sums of money.

It appeared that Greenhalgh and Salon were partners in a

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business which had been carried on for six months without any complaints. They conducted an auction room in which various classes of goods were auctioned. Wilson was an employee. The police went to the premises on the 30th October, and saw Greenhalgh standing at the door inviting people in to the auction room. Wilson was on that occasion in the rostrum conducting the sale and Salon was at the side of the rostrum. The door at which Greenhalgh was standing was "about the length of the Court room" from the rostrum. The police visited the room on two other occasions when Salon was in the rostrum and Wilson was at the side of the rostrum and walking about the room. There was no evidence as to Greenhalgh's presence on these two occasions.

The case for the Crown was, that the accused put up gold articles (watches) for sale, made a speech extolling the gold quality of their articles, and "rang in" brass articles which looked like gold, but were not so, in such a way that some unwary bidder would be induced to believe that he was buying a gold article.

The auctioneer said: "The watches I am going to submit are gold, not rolled gold, gold filling or any fictitious name used for gold, but solid gold." They were passed round, some were sold others passed in. He then held up a lady's watch and said: "This watch is no better than the last two I have just sold, and remember if you were to offer a £100 or pay £100 for a watch you can do no more than ask it to tell you the time." It was not a gold watch. Witnesses swore that they bought articles which were expressly declared by the auctioneer to be gold, and which they believed to be gold, but were handed brass articles.

His Honour when summing up dealt with the case against Salon and Wilson first and directed the jury to acquit all three unless they found a conspiracy between these two. He then dealt with Greenhalgh's case and told the jury that if they found a conspiracy between Salon and Wilson they were to consider whether Greenhalgh was a party to such conspiracy.

The appellant Greenhalgh appealed on the following grounds:—1. That his Honour should have directed an acquittal as a matter of law. 2. That his Honour should have

directed the jury as a matter of law that there was no evidence of conduct inconsistent with any theory other than that of guilt. 3. That his Honour should have directed that there was no evidence of conspiracy on his part. 4. That his Honour should have directed the jury, as a matter of law that there was no evidence of fraud or intent to defraud on his part. 5. That the verdict was against the evidence and the weight of evidence.

The appellants Salon and Wilson moved on the following grounds:— 1. That on the evidence the appellants were entitled to be acquitted as a matter of law. 2. That his Honour the Chairman, should have withdrawn the case from the jury. 3. That the evidence was insufficient to establish a case of conspiracy. 4. That his Honour should have directed the jury that unless they were satisfied that the accused had stated that the articles sold were gold they could not find them guilty of conspiracy to defraud.

*Mack*, K.C., and *Sherwood*, for Greenhalgh. There is no evidence connecting Greenhalgh with the selling whether there was fraud or no fraud. The evidence does not prove (1) fraud, or (2) conspiracy on his part because there is no evidence connecting him with the charge. The evidence against Greenhalgh is equally consistent with innocence as guilt and his Honour should have taken the case from the jury. This Court will direct an acquittal: *R. v. Maloney* (15 S.R. 461); *R. v. Hendricks* (18 S.R. 24), and *Peacock v. The King* (13 C.L.R. 619). The evidence as to his being a partner is no evidence of fraud against Greenhalgh. The partnership was in a genuine business carried on for a long time. There is no evidence that this business, so far as Greenhalgh was concerned, was carried on by fraud. There is no evidence that he did, or even could, hear what was going on in the auction room. The partnership is not direct evidence of conspiracy, and the Crown must go further and show that Greenhalgh knew of the swindle: *R. v. Jellyman* (16 C.A.R. 43).

*Windeyer*, K.C., and *A. L. Campbell*, for Salon and Wilson. This was a large *bona fide* auctioneering business. The only element of concert proved, is referable to a *bona fide* business. Every article was handed round for inspection. Wilson was

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not a partner only an employee. There is nothing to show they acted in concert. If they did each act alone, then, no conspiracy : *R. v. Maloney* (15 S.R. 461). If it is consistent with the totality of facts that either man is innocent, there is no conspiracy. If at a jeweller's you are shown some gold watches, then some rolled gold and are told the prices, and later you are shown brass watches without being told that the last watches shown were not gold and two men continue so to sell, could they be said to be committing a crime? Here the evidence shows no positive misrepresentation, but a mere puffing of the goods. He referred to *R. v. Barnard* (7 C. & P. 784); *R. v. Cooper* (2 Q.B.D. 510); *R. v. Bryan* (7 Cox. 312 at 321); *Peacock v. The King* (13 C.L.R. 619 at 628, 661, 662); *R. v. Neil Kerr* (15 C.A.R. 165 at 168).

*McKean*, for the Crown.

THE CHIEF JUSTICE. In the case of the appellant Greenhalgh, the Court is of opinion that there was sufficient room for an innocent construction to be placed on his actions, and thus make it improper to sustain the conviction of conspiracy. Assuming that the other two were engaged in a conspiracy, if there had been evidence of similar acts repeatedly being done at the place of business on earlier occasions, it would have been very difficult indeed to support any innocent hypothesis applicable to Greenhalgh. But in spite of the clear evidence of constant suspicions and of complaints in previous cases, there was no evidence tendered at the trial to show that a previous dishonest course of business had been engaged in. Therefore we think that in Greenhalgh's case the charge of conspiracy, founded, so far as any dishonest combination is concerned, so largely upon circumstantial evidence, is not sufficiently established against him.

As regards the other two, the evidence of conduct between the two in the place of business—the evidence that each of them was guilty of fraudulent misleading of purchasers—seems to me too strong to suggest that an innocent construction should be put either upon their individual actions or upon the serious complicity between the one and the other. It was contended on their behalf that nothing was shown in evidence

here that amounted to a positive misrepresentation that goods put up for sale were gold, although they really were of inferior metal. I think that the evidence is extremely strong; I think that such a misrepresentation can be made as effectually, and possibly more dangerously, by conduct than by words, and that the analogy between the conduct described in evidence upon the part of these appellants individually and the mere puffing of goods is not solidly based. Here, there was a great deal more than a mere puffing of the quality of the goods; the goods were auctioned in such a way as would inevitably produce the understanding that they were being sold as gold articles. The fact that an opportunity was offered to those attending the auction of inspecting the goods was before the jury; and it would be by no means an answer in ordinary cases to the charge that a deception was being practised. Then it is contended that the mode of conducting the auction was referable to an honest business being carried on on those premises, and not to any attempt to deceive purchasers; but all the dangers of any misjudgment were forcibly pointed out by the Judge of trial, and it seems to me that there was such clear evidence of dishonesty of purpose on the part of them individually that no question can arise on that part of the case. In regard to their acting in concert or complicity, I cannot see any reasonable construction to be placed upon their conduct under the circumstances, except that each was conniving at the deception being practised by the other, fully aware of it and being a party to it. Then, was it merely complicity in an individual act of dishonesty, or was there sufficient evidence of repeated actions to exclude the reasonable supposition that it was merely an isolated instance or two in which the wrong was practised? It seems to me that there again there was evidence before the jury that would lead any reasonable man to the conclusion that there was complicity in a system of dishonesty. It seems to me that, carefully considering all the different arguments put forward in the case of these two men, there is evidence of individual dishonesty, and evidence of complicity by the other in that—sufficient evidence of system to displace any reasonable hypothesis that each of them was acting

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independently, and not on a common understanding or in concert with the other.

Therefore I think that as regards the appellants Salon and Wilson the appeal must be dismissed, and that in regard to the appellant Greenhalgh the appeal should be sustained and the conviction set aside.

*Appeal of Greenhalgh upheld, and his release ordered; conviction of Salon and Wilson upheld, and the appeal dismissed; sentences to date from date of conviction.*

May 28th.

An application was then made to reopen the matter on the ground that the release of Greenhalgh entitled Salon and Wilson to be discharged.

*Windeyer*, K.C., and *A. L. Campbell*, for Salon and Wilson. The charge was a certain conspiracy between three persons Greenhalgh, Salon and Wilson. The conviction of Greenhalgh has now been quashed. He was not a conspirator and the jury have never dealt with the question as to whether there was a conspiracy between the other two. There is no knowing what the jury would have found without Greenhalgh. They may have found the two men guilty, but they have not done so. Here all three were found guilty of conspiring together as to all the objects of the conspiracy; Salon and Wilson were found guilty with Greenhalgh. The Appeal Court quashed Greenhalgh's conviction and therefore the others should be discharged: *R. v. Pollman* (2 Camp. 222 at 231 and 233); *O'Connell & Ors. v. The Queen* (11 Cl. & Fin. 155).

GORDON, J. Suppose the jury had found Greenhalgh not guilty and the other two guilty?

*Windeyer*, K.C. They could have convicted two but they did not do so. The two have not been convicted by the jury on their own. The only verdict is against the three and we do not know what the jury would have done in respect to Salon and Wilson if they had considered Greenhalgh to be innocent. They cannot be separated and should be discharged: *Reg. v. George, Byron, Lyon, Fellowes & Ors.*, (19 Upper Canada

Q.B.R. 48.) Here although the Judge told the jury they could find two guilty they found three and it is impossible to say what they would have found about two ; the third may have been the *nexus*. The Court will not usurp the functions of the jury : *R. v. Dyson* ([1908] 2 K.B. 454).

*McKean*, for the Crown. *R. v. Quinn* (19 Cox 78) and *R. v. Bradford & Forbes* (8 N.S.W.L.R. 33).

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THE CHIEF JUSTICE. These two appellants were jointly indicted with one Greenhalgh for that they on certain dates conspired amongst themselves to cheat and defraud certain persons of large sums of money. Each of the three was convicted under that indictment and appealed, and on the hearing of the appeals the Court set aside the conviction against Greenhalgh, but confirmed the convictions against the two appellants Salon and Wilson. After the decision of the Court had been given, an application was made to the Court to reopen the matter on a ground that had not been taken during the argument, but which, if sound, would have made it the duty of the Court to reconsider the matter. It was contended that the release of Greenhalgh entitled Salon and Wilson also to be discharged. Now, it cannot be contested that the jury on such an indictment could have convicted Salon and Wilson, whilst acquitting Greenhalgh. That appears from many decisions : *R. v. O'Connell & Ors.* (11 C. & F. 155), is one, and *R. v. Quinn*, (19 Cox's C.C., 78), is another instance. But it was contended that although the jury might convict two out of three persons indicted for conspiring amongst themselves, the Court of Criminal Appeal cannot do so where the jury have actually convicted all three. Now, there may be cases, of course, where to do so would be to usurp the functions of the jury, a thing always to be guarded against as was pointed out in *R. v. Dyson* ([1908] 2 K.B. 454). But in my opinion this is not such a case. The issues raised by the evidence here presented a clear distinction between the cases set up by the Crown against Greenhalgh on the one hand and against Salon and Wilson on the other hand. All the overt acts of dishonesty in evidence, which consisted of frauds

1924. practised in an auction room whereof Greenhalgh and Salon were the proprietors, and where Wilson was an employee, were acts done by Salon and Wilson, and the Court held that there was abundant evidence of fraud and of the fact that these two men were acting in concert. But the only evidence tending to implicate Greenhalgh, apart from the fact of his joint proprietorship of the place, consisted merely of his presence at the door of the auction room on a certain date, soliciting the public to enter. Though he was a partner in the business, the Court held that the evidence against him had been left in such a state as to be consistent with his ignorance of the frauds practised in the auction room, and set aside the conviction against him, there being no direct evidence of any arrangement having been made between the parties, that being left merely to inference from their conduct. The Judge of trial in this case presented these issues severally in the way that I have already said they arose upon the evidence; he pointed out that the case against Greenhalgh rested on a different basis altogether from that against the other two, and he invited the jury, without any objection being raised at the trial, to consider the case of Salon and Wilson first, and directed them to acquit all three unless they found a conspiracy between these two. But he went on to point out that if they did so find, then they were next to consider whether Greenhalgh was a party to such a conspiracy, and whether the evidence satisfied them that he was aware of the conduct of the others and was acting in concert with them. I cannot see any other way in which the issues raised by the evidence could have been approached by the jury. But it is argued that the fact of Greenhalgh being a partner in the business may have been the connecting link in the minds of the jury, between Salon and Wilson. True it is not necessary on such an appeal, if there was any ground for the contention, to show that it *must* have been the connecting link; it is enough that it *may* have been so. But I cannot see any support whatever for the hypothesis in this case, that the fact of Greenhalgh being a partner in the business even *may* have been regarded as the connecting link between Salon and Wilson.

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For these reasons I am of opinion that our decision was right and must be affirmed.

GORDON, J. I am of the same opinion.

JAMES J. In this matter I am of opinion that any two out of the three accused might have been found guilty and the third discharged, and it is true also that his Honour left it to the jury, as far as his summing up went, first of all to decide as to a conspiracy between Salon and Wilson, and then to consider Greenhalgh's case separately. The verdict of the jury finds all three guilty of conspiracy. This Court has said that there was not sufficient evidence against Greenhalgh, and the question is whether we can say that the jury would or would not have found the other two guilty, supposing Greenhalgh had not been joined with them in the indictment. I cannot put myself in the position of saying that the jury may not have found that Greenhalgh was the connecting link in the conspiracy. Greenhalgh was a partner in the business, he sold just the same as the others, although not on this particular occasion, the bills and receipts were headed "Salon & Greenhalgh," and the jury may have based their finding against all three on the fact that all three were concerned in the carrying on of the business. On the other hand, it is quite possible that the jury did follow his Honour's direction and say: "Well, we first of all find Wilson and Salon guilty, and we think that Greenhalgh was connected with them." But I cannot take upon myself to say that that was what they must have done. I think under the circumstances, as Greenhalgh has been discharged from the indictment on the finding of this Court, the conviction should be quashed of the other two, because I cannot say that the jury must have found them guilty independent of Greenhalgh.

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*Appeals of Salon and Wilson (by  
majority) dismissed.*

Solicitors for the appellants: *E. Maddocks Cohen and J. C. J. Ryan.*