

Regina v. Lorne Wilson Transportation Ltd.;
Regina v. Travelways School Transit Ltd.

(1982), 40 O.R. (2d) 86

ONTARIO
COURT OF APPEAL
MARTIN, LACOURCIERE and ROBINS JJ.A.
25th MAY 1982

1982 CanLII 2174 (ON CA)

Criminal law -- Trade offences -- Bid-rigging -- Appellant transportation companies charged with bid-rigging as result of submission of identical bids in response to call for tenders -- Bid-rigging defined as submission of bids arrived at by agreement where agreement is not made known to person calling for bids at or before time when bid is "made" -- Bid "made" when opened and not when initially submitted -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.2.

Criminal law -- Trade offences -- Bid-rigging -- Elements of offence -- Bid-rigging defined as submission of bids arrived at by agreement where agreement is not made known to person calling for bids at or before time when bid is "made" -- Express notification of the agreement or arrangement required in order that it be "made known" -- Not sufficient that inference of agreement could be drawn from fact of submission of identical tenders -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32.2.

APPEAL from a judgment of Dupont J., 32 O.R. (2d) 719, 123 D.L.R. (3d) 159, 60 C.C.C. (2d) 510, sub nom. R. v. Charterway Transportation Ltd. et al., convicting the appellants of a charge under s. 32.2 of the Combines Investigation Act.

G. H. Marsden, Q.C., for appellant Lorne Wilson

Transportation Limited.

A. Riswick, for appellant, Travelways School Transit Ltd.

J. E. Thompson, and J. W. Leising, for the Crown, respondent.

The judgment of the Court was delivered orally by

ROBINS J.A.: This is an appeal from a judgment of Dupont J., pronounced on May 25, 1981, after a trial before him, holding the appellants guilty of the charge that they and others:

...between the 8th day of March, 1977 and the 30th day of March, 1977, at the City of Mississauga, in the Judicial District of Peel and elsewhere in the Province of Ontario, unlawfully were each a party to bid-rigging, namely, the submission by each of them in response to a call or request for tenders by the Peel Board of Education for the school year 1977-78, of tenders for school transportation for such periods that were arrived at by agreement or arrangement among them, where such agreement or arrangement was not made known to the said Peel Board of Education, at or before the time when such tenders were made by them, and did thereby commit an offence contrary to s. 32.2(2) of the Combines Investigation Act, R.S.C 1970, c. C-23, as amended.

Section 32.2(1) [enacted 1974-75-76, c. 76, s. 15] of the Combines Investigation Act provides:

32.2(1) In this section, "bid-rigging" means

- (a) an agreement or arrangement between or among two or more persons whereby one or more of such persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, and
- (b) the submission, in response to a call or request for bids or tenders of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers.

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

The learned trial judge set out fully the facts of the case in his comprehensive reasons and it is not necessary to repeat them here.

We are unanimously of the opinion that this appeal must be dismissed. The findings made by the trial judge are supported by the evidence and he made no error in concluding on the basis of those findings that the appellants were guilty of bid-rigging as that offence is defined in s. 32.2 of the Combines Investigation Act.

It is clear that the tenders submitted by the appellants and their co-accused were in response to a call or request for tenders by the Peel Board of Education and were arrived at by agreement or arrangement among the accused tenderers. It is equally clear that the agreement or arrangement was not made known to the board of education at or before the time when such tenders were made. We do not accept the argument that the tenders were not made, as the trial judge held, when they were opened. In our view, in the circumstances of this case, the tenders in question must be taken to have been made at least by the time the sealed tender documents were opened by the board's representative pursuant to the conditions of tendering laid down by the board.

Nor do we accept that an agreement or arrangement is "made known" within the meaning of s. 32.2 to a person requesting tenders because it was or may be inferred from the fact that identical tenders were submitted that such tenders represent the product of an agreement or arrangement between the tenderers. As we construe the section, express notification of the agreement or arrangement is required. A person submitting a bid or tender which contravenes s. 32.2(1)(a) or (b) must give actual notice of the agreement or arrangement to the person calling for or requesting the bids or tenders at or

before the time when the bid or tender is made in order to take advantage of the proviso in s. 32.2(1).

With respect to the mens rea argument we think it unnecessary to determine in the rather unusual factual circumstances of this case whether the offence created by s. 32.2 is one of strict liability. Manifestly, the appellants intended to do the very thing prohibited by the section. Their motive may be relevant in regard to sentence but is irrelevant in establishing the offence. They intended to engage in conduct proscribed by the section under which they were charged and the trial judge correctly concluded that the elements of the offence had been made out.

We further agree with the learned trial judge that the provisions of s. 10 [rep. & sub. 1971, Vol 2, c. 50, s. 74(5)] of the Public Vehicles Act, R.S.O. 1970, c. 392 [now R.S.O. 1980, c. 425] do not have the effect of precluding the operation of s. 32.2 of the Combines Investigation Act. We agree with him that the existence of a bid-rigging arrangement would prevent the appropriate provincial authority from effectively exercising the power given to protect the public interest under that Act.

For these reasons, the appellants' appeals against their convictions will be dismissed.

With respect to their appeals against sentence, leave to appeal is granted but those appeals will also be dismissed. The sentences imposed do not reflect any error in principle.

Appeal dismissed.

MVRT