NORMAN ARCHER ....APPELLANT;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

1954 *Dec. 1

1955 *Jan. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Driving—"Without due care and attention or without reasonable consideration for other persons using the highway"—Whether two offences—The Highway Traffic Act, R.S.O., 1950, c. 167, s. 29 (1)—The Summary Convictions Act, R.S.O. 1950, c. 379, s. 3 (1)—the Criminal Code—ss. 710 (3), 723 (3), and 725.

The appellant in proceedings taken under *The Summary Convictions Act,* R.S.O. 1950, c. 370, was charged with having driven a motor vehicle "without due care and attention or without reasonable consideration for other persons using the highway" contrary to s. 29 (1) of *The Highway Traffic Act,* R.S.O. 1950, c. 167. He was acquitted of the charge by a magistrate but on appeal by the Crown, a conviction was entered by the County Court judge whose judgment was affirmed by a majority of the Court of Appeal for Ontario.

Held: that two separate offences were created by s. 29 of *The Highway Traffic Act* (Ont.) and the appellant having been charged with two offences in the alternative contrary to s. 710 (3) of the *Criminal Code,* the conviction was invalid.

The King v. *Surrey Justices* [1932] 1 K.B. 450 followed.

Gatto v. *the King* [1938] S.C.R. 423, distinguished.

Appeal by the accused, by special leave, from the judgment of the Court of Appeal for Ontario which by a majority judgment, Aylesworth and F. G. Mackay JJ.A. dissenting, dismissed the accused's appeal from a judgment of Shaunessy, County Court Judge by which, on an appeal by the Crown, he was found guilty of the offence charged of which he had been acquitted by a magistrate.

E. P. Hartt for the appellant.

W. E. Bowman, Q.C. for the respondent.

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The judgment of Kerwin C.J. and Estey, Fauteux and Abbott JJ. was delivered by:—

The CHIEF JUSTICE:—The appellant was charged with having driven a motor vehicle on Russell Street, in the City of Sarnia, "without due care and attention or without reasonable consideration for other persons using the highway", contrary to s-s. (1) of s. 29 of *The Highway Traffic Act,* R.S.O. 1950, c. 167. This subsection reads as follows:—

Every person who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway shall be guilty of an offence and shall be liable to a penalty of not less than $5 and not more than $100, or to imprisonment for a term of not more than one month, and in addition his licence or permit may be suspended for a period of not more than six months.

The proceedings were taken under *The Summary Convictions Act,* R.S.O. 1950, c. 379, and by s-s. (1) of s. 3 thereof, except when inconsistent with the Act, Part XV of the *Criminal Code* applies. In that Part there are the following enactments to be considered:—

710. (3) Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences.

723 (3) The description of any offence in the words of the Act or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law.

725. No information, summons, conviction, order or other proceeding shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively.

The question to be determined is whether or not one offence only is created by s-s. (1) of s. 29 of *The Highway Traffic Act.* If the answer is in the affirmative the information is sufficient, but, if more than one offence is created, the provisions of s-s. (3) of s. 723 of the Code do not apply so as to restrict the application of s-s. (3) of s. 710. S-s. (3) of s. 723 speaks of *any* offence and s. 725 is restricted to the case where the information charges only one offence but which is alleged to have been committed in alternative ways.

Opinions have differed in the Courts below, but upon consideration I am of opinion that two offences are created by s-s. (1) of s. 29 of *The Highway Traffic Act,* as was decided by the Court of Criminal Appeal, upon a similar

enactment, in *The King* v. *Surrey Justices* (1), one of which is driving without due care and attention and the second of which is driving without reasonable consideration for other persons using the highway. There is nothing inconsistent with this conclusion and the decision of this Court in *Gatto* v. *The King* (2). The fact that there the proceedings were by way of indictment does not affect the matter, but the important point is that the Court decided that the gist of the offence was assisting or being concerned in smuggling contrary to a provision of the Customs Act and the accused were not charged with having committed any of the specific acts in which they were concerned.

The appeal should be allowed and the conviction quashed.

RAND J.:—I agree that there are two offences stated in s. 29(1) of *The Highway Traffic Act* of Ontario from which it follows that the conviction is bad.

The appeal must then be allowed.

The judgment of Kellock and Cartwright JJ. was delivered by:—

KELLOCK J.:—I agree with the opinion of Aylesworth J.A., upon the construction of s. 29 of *The Highway Traffic Act,* R.S.O. 1950, c. 167, as creating two offences. This is the view taken in England upon a similar statute by the Court of Criminal Appeal in *The King* v. *Surrey Justices,* (1). At p. 452, Avory J. said:

> On consideration of this section, however, I have come to the conclusion that it contemplates two separate offences: (1) driving without due care and attention, and (2) driving without reasonable consideration for other persons using the road. It is not necessary to give illustrations of how a man may be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons, but, if a person may do one without the other, it follows as a matter of law that an information which charges him in the alternative is bad.

The majority in the Court of Appeal distinguished this decision upon the ground that the court in the *Surrey Justices* case had not to discuss the effect of statutory provisions such as are contained in ss. 723(3) and 725 of the *Criminal Code.* It is quite true that there appears to be no English legislation applicable to summary convictions in

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the terms of s. 725 of the *Code,* but s. 39(1) of the English Summary Jurisdiction Act, 1879, c. 49, is identical with s. 723(3).

In my opinion, however, the existence of s. 725, as enacted by 1947-48, c. 39, s. 24, does not constitute a valid ground for distinction in that it does no more than authorize the stating of "the offence" as having been committed in different modes but it does not thereby authorize the charging of two different offences, a matter prohibited by s. 710(3). S. 725 can operate in the case of a statutory offence only where, on a proper construction of the statute, it can be said that only one offence is thereby described. Accordingly, s. 725 provides no assistance with respect to the primary problem of construing the statutory provision from the standpoint as to whether one or more than one offence is thereby stated.

With respect to the decision of this court in *Gatto* v. *The King* (1), it is first to be observed that the proceeding there in question was by indictment rather than under Part XV of the *Code,* which deals with summary convictions. S. 854 was accordingly the applicable section which, although by s-s. (2) of s. 855 made subject to ss. 852 and 853, is not in the same words as the sections in Part XV already referred to.

I do not think, in any event, that the court in *Gatto's* case intended to lay down any general principle which would practically eliminate the application of s-s. (3) of s. 853 in the case of all statutory provisions attaching criminal consequences to conduct of varying descriptions so long as the acts described are expressed disjunctively.

The decision in that case was based upon the judgment of Doull J., although only a small portion of that judgment is reproduced in the judgment of this court. There are other passages in the judgment of the learned judge which are illuminating with respect to what was in the mind of this court when construing the section of the *Customs Act* there in question. Doull J., also said:

In my opinion, it was not the intention of Parliament, under this section, to make persons, who were part of the gang employed to unship, land, remove, transport or harbour, which were *being carried out as a*

(1) [1938] S.C.R. 423.

continuous operation, guilty of several offences but to enact that any person, who is concerned in any part of such performance, is guilty of an indictable offence.

The italics are mine.

Again, the learned judge said:

In the present case, I think that the gist of the offence is "assisting or being concerned in" smuggling. The particular elements of the smuggling operation, which might themselves be substantive offences, are only different stages of the process, at any one or at all of which this offence may occur. I do not think that any of the cases cited are in principle opposed to this opinion.

Included in the cases to which the learned judge refers are *Rex* v. *Surrey Justices, ubi cit; R.* v. *Molloy* (1) and *R.* v. *Disney* (2). Neither Doull J., nor this court therefore, intended to depart from the principle of these decisions.

In *Gatto's* case the court took the view that the offence created by the statute consisted not in "importing", "unshipping", "landing" or any of the other specific acts mentioned, but in "assisting or being otherwise concerned in" any of them. The court considered that a charge of "assisting or being otherwise concerned in" fell within the language employed in s. 854 of the *Code,* as charging "in the alternative several different matters, acts, or omissions which are stated in the alternative in the enactment describing any indictable offence or declaring the matters, acts, or omissions charged to be an indictable offence."

Coming to s. 29 of *The Highway Traffic Act,* it is plain that is not constructed upon the same footing as the section of the *Customs Act* in question in *Gatto's* case. It does not say, as Middleton J.A., considered he could read the statute in question in *Rex* v. *Rousseau* (3), that

If any person drives improperly either by driving without due care and attention or without reasonable consideration for other persons using the road

he shall be guilty of an offence. So to read the statute is, in my opinion, to supply words which are not there. I do not think that such a construction finds any support in anything decided in the case of *Gatto.*

For these reasons I would allow the appeal and quash the conviction.

(1) (1921) 15 Cr. App. R. 170; [1921] 2 K.B. 364.
(2) (1933) 24 Cr. App. R. 49.
(3) [1938] O.R. 472.

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LOCKE J.:—The charge laid against the appellant was in the following terms:—

At the City of Sarnia, on or about the 26th day of September, 1952, Norman Archer, 261 Essex Street, at about 1.55 p.m. did drive motor vehicle bearing Licence No. B-59226, north on Russell Street in the City of Sarnia, without due care and attention or without reasonable consideration for other persons using the highway, contrary to section 29(1) of the Highway Traffic Act.

Of this charge he was acquitted by the Magistrate but, on an appeal by the Crown, His Honour Judge Shaunessy, of the County Court of the County of Lambton, found the appellant guilty of the offence charged. He then appealed to the Court of Appeal and, by a judgment delivered by the Chief Justice of Ontario, with whom Roach and Hope JJ.A. agreed, the appeal was dismissed. Aylesworth J.A., with whom F. G. Mackay J.A. agreed, dissented and would have allowed the appeal. This appeal comes before us by special leave granted by an order of this Court made on May 10, 1954.

S. 29(1) of *The Highway Traffic Act* (R.S.O. 1950, c. 167) reads:—

29. (1) Every person who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway shall be guilty of an offence and shall be liable to a penalty of not less than $5 and not more than $100, or to imprisonment for a term of not more than one month, and in addition his licence or permit may be suspended for a period of not more than six months.

The point to be decided is as to whether the charge laid against Archer and of which he has been convicted was of having committed one or more than one offence.

The learned Chief Justice of Ontario, agreeing with an earlier decision of the Court of Appeal for Ontario in *Rex* v. *Rousseau* (1), was of the opinion that s. 29(1) creates one offence only, being one which might be committed in two ways and adopted as the description of that offence a statement from Mazengarb on Negligence on the Highway (2nd Ed. at p. 270) reading:—

The desirability of ensuring safety upon the roads has also resulted in the creation of a statutory offence: that of driving without due care and attention, or without reasonable consideration for other persons using the road.

Being of this opinion, he considered that the conviction was in a form permitted by s. 725 of the *Code*.

(1) [1938] O.R. 472.

The proceedings against the appellant were taken under the provisions of the Summary Conviction Act (c. 379, R.S.O. 1950) and Part XV and the sections of the *Criminal Code* referred to in s. 3 of that Act, to the extent there mentioned, apply. The following provisions of the Code contained in that part must be considered:—

710. (3) Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only and not for two or more offences.

723. (3) The description of any offence in the words of the Act or any order, bylaw, regulation or other document creating the offence or any similar words shall be sufficient in law.

725. No information, summons, conviction, order or other proceedings shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively.

S. 710(3), with an addition which does not affect the matter to be considered, appeared as s. 845(3) of the *Criminal Code* of 1892 and was taken apparently from s. 10 of *The Summary Jurisdiction Act, 1848* (c. 43 Imp.). That section appears to have been a codification of the law, as decided in the early cases (See *R.* v. *Sadler* (1); *R.* v. *North* (2); *R.* v. *Pain* (3).)

S. 725, as it read prior to the amendment of 1948, appeared as s. 907 of the *Code* of 1892. This was, in turn, taken from s. 107 of the *Summary Convictions Act* (c. 178, R.S.C. 1886) and first appeared as s. 4 of c. 49 of the statutes of that year. It does not appear that there was any counterpart of this section in England.

S. 12(1) of *The Road Traffic Act,* 1930 (Imp.) (20-21 Geo. V, c. 43) reads:—

If any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence.

The description of the offence or offences in s. 29(1) of *The Highway Traffic Act* is the same.

In *The King* v. *Surrey Justices* (4), the charge laid under s. 12 of *The Road Traffic Act* was that the accused had driven:

without due care and attention or without reasonable consideration for other persons using the road.

(1) (1787) 2 Chitty 519.
(2) (1825) 6 Dowl. & Ry, 143.
(3) (1826) 7 Dowl. & Ry. 678.
(4) [1932] 1 K.B. 450.

and a conviction was made by the Justices in these terms. A rule *nisi* for a writ of *certiorari* required them to show cause why the conviction should not be quashed upon the grounds that two offences appeared in the information and in the conviction, contrary to the terms of s. 10 of the *Summary Jurisdiction Act, 1848.*

The report of the argument shows that it was contended for the Justices that s. 12(1) created only one offence, although it was expressed in the alternative, but this was rejected. Avory J., who delivered the judgment of the Court, after saying that the only question was as to whether the section in question could be read as comprising two separate offences, or whether it created only one, said that they had been invited to construe its language as if it read:—

> If any person drives a motor vehicle on a road without due care and attention *and* without reasonable consideration for other persons using the road he shall be guilty of an offence.

After then saying that it was not necessary to give illustrations of how a man might be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons, he pointed out that, if a person may do one without the other, it follows as a matter of law that an information which charges a person in the alternative is bad, saying (p. 452):—

> It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois convict.*

R. v. *Jones* (1) and *R.* v. *Wells* (2), were referred to as illustrating the distinction which is to be drawn between charging offences in the alternative and charging that a man may, by one act, have committed two offences. In the first of these cases it was held that a man might properly be convicted under the *Motor Car Act, 1903* of driving "recklessly and at a speed which is dangerous to the public", since the act of driving was one indivisible act: in the second, the accused was charged under the same Act of driving "at a speed *or* in a manner which was dangerous to the public" and the conviction was held to be bad for duplicity because he had been charged in the alternative.

(1) [1921] 1 K.B. 632. (2) (1904) 68 J.P. 392.

In the reasons for judgment delivered by the learned Chief Justice of Ontario reference is made to the decision of this Court in *R.* v. *Gatto* (1). The prosecution in that case was by indictment for an offence or offences against s. 193(3) of the *Customs Act* (R.S.C. 1927, c. 42). The count in the indictment and the conviction read that the accused:—

did assist or were otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting or in the harbouring of goods liable to forfetiture under the Customs Act.

On an equal division of the Supreme Court of Nova Scotia *in Banco,* the attack on the indictment and conviction for multiplicity was dismissed. On the appeal to this Court, Sir Lyman Duff C.J., by whom the judgment of the Court was delivered, adopted a passage from the judgment of Doull J. which contained the statement that the section of the *Customs Act* created one offence and not several, as contended on behalf of the accused. Doull J. had held that s. 854 of the *Code* applied and that, accordingly, if the acts or omissions are stated in the alternative in the enactment describing an indictable offence, a count is not objectionable if it charges these matters alternatively. The decision of the Court of Appeal in *R.* v. *Molloy* (2), where the proceedings were by indictment, and Rule 5 of *The Indictment Act, 1915* (5 & 6 Geo. V, c. 90), the terms of which are at least as wide as those of s. 854, was considered as insufficient to support the conviction, and while referred to by Doull J. is not mentioned in the reasons for judgment delivered in this Court.

The proceedings in the present matter not being for an indictable offence, s. 854 has no application and the decision in *Gatto's* case, if relevant in determining it, is of importance only as deciding that a conviction in the language of s. 193 of the *Customs Act* is for one offence only. As to this, the argument addressed to the Supreme Court of Nova Scotia *in Banco* and, so far as may be judged from the reasons delivered, to this Court, was not directed to the point as to whether to "assist" or "to be otherwise concerned" in the importing etc. of goods described two separate offences, but rather whether "importing", "unshipping", "landing", "removing", "subsequent transporting"

(1) [1938] S.C.R. 423. (2) [1921] 2 K.B. 364.

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and "harbouring" were distinct offences. It was the latter contention that was rejected by Doull J. in the passage approved in the judgment of this Court. The former does not appear to have been considered in either Court.

There can be no doubt, in my opinion, that the conviction in the present matter cannot be upheld, unless by virtue of s. 723(3) and s. 725 of the *Criminal Code.* It appears to me equally clear that neither of these sections support the contention of the Crown if s. 29(1) of *The Highway Traffic Act* creates two offences and not merely one.

S. 723(3) merely says that to describe *any offence,* in the words of the Act creating it, shall be sufficient in law, but if two offences are created by the Act it cannot follow that charging them in the alternative is permissible, since this would directly conflict with s. 710(3). S. 725 speaks of the information or conviction stating *the offence* to have been committed in different manners and is, of necessity, applicable only if one offence only is created.

Upon this aspect of the matter, I can see no answer to the reasoning of Avory J. in the *Surrey Justices* case. As was said in that case, a person may be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons on the highway. To drive "without due care and attention" is an offence under the section subjecting a person guilty of such conduct to the prescribed penalty: to drive "without reasonable consideration for other persons using the highway" is a distinct offence punishable in like manner. If a person were to be convicted for the first of these offences and be later prosecuted for the second, in respect of the same act would a plea of *autrefois convict* be a defence? The answer to that question is, in my opinion, in the negative.

I would allow this appeal and set aside the conviction.

Appeal allowed and conviction quashed.

Solicitor for the appellant: *G. A. Martin.*

Solicitor for the respondent: *C. P. Hope.*