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*Oct. 7
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HER MAJESTY THE QUEEN .....APPELLANT;

AND

HARRY P. BAMSEY .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Summary convictions—Plea of guilty—Whether right to appeal—Conditions precedent for appeal—Whether accused can change plea on trial de novo—Whether grounds of appeal must be stated with particularity—Criminal Code, 1953-54 (Can.), c. 51, ss. 708(2), 722, 723, 726, 727.

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

The accused pleaded guilty to a charge of impaired driving and was summarily convicted by a magistrate. His appeal was heard and allowed by a County Court judge notwithstanding the preliminary objections of the Crown that the notice of appeal was not sufficient. The Crown applied for leave to appeal to the Court of Appeal, which considered the merits of the case and ruled that "the said leave and the appeal be and the same are hereby dismissed". On the Crown's application for leave to appeal to this Court, the accused argued that the judgment of the Court of Appeal was not a "final judgment" within the meaning of s. 41(1) of the *Supreme Court Act,* since that Court had not dismissed the appeal but only the application for leave to appeal.

Held: The judgment of the Court of Appeal should be treated as one dismissing the appeal and leave should be granted.

Held further: The appeal should be allowed and the conviction restored.

If an accused who has pleaded guilty before a magistrate at his summary trial is able to comply with the requirements of s. 722, then his appeal by way of trial *de novo* under s. 727 "shall be set down for hearing before the Appeal Court", and when he enters the latter Court he may change his plea if he can satisfy the Appeal Court that there are valid grounds for his being permitted to do so.

In the present case, the grounds of appeal were not set forth in such manner as to comply with s. 722. The grounds that "the magistrate did not apply the principle as to reasonable doubt as to the evidence" and that the "conviction was contrary to the evidence and to the weight of the evidence", were irreconcilable with the accused's plea of guilty. Far from the conviction being contrary to law, it was the verdict which the law required the magistrate to enter after the plea of guilty. The setting forth of the grounds for appeal is a condition precedent to jurisdiction, and there is no right to a trial *de novo* under s. 727 upon grounds which are frivolous or apparently lacking in substance, as was the case here.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a decision of Hanna Co. Ct. J. Appeal allowed.

J. J. Urie, for the appellant.

K. E. Eaton, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—The respondent herein, having pleaded guilty, was convicted by G. W. Scott, Esq., Deputy Police Magistrate in and for the City of Vancouver, on the charge that he unlawfully drove his motor vehicle on a highway

[1] 124 C.C.C. 95, 30 C.R. 339, 28 W.W.R. 385.

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while his ability to drive was impaired and thereupon filed and served a notice of appeal to the County Court of Vancouver wherein he specified the following grounds of appeal:

(*a*) That the said conviction is contrary to law in that the magistrate did not apply the principle as to reasonable doubt as to the evidence adduced at the said trial;

(*b*) That the said conviction is contrary to the evidence and to the weight of the evidence.

Upon the appeal coming on to be set down for hearing before His Honour, Judge Hanna, Judge of the County Court of Vancouver, counsel for the Crown raised the following preliminary objections:

(*a*) That no grounds of appeal were in fact disclosed;

(*b*) That the accused, having pleaded guilty in the court below, was bound by such plea unless the grounds of appeal set out special circumstances;

(*c*) That the said grounds were not reasonable, certain, adequate or sufficient as required;

(*d*) That the principle as to reasonable doubt in connection with the evidence adduced at the trial before the learned magistrate could not apply because of the plea of guilty accepted from the accused by the learned magistrate.

Notwithstanding these objections, the learned County Court judge heard and allowed the appeal, and in due course counsel for the Attorney-General of British Columbia made application for leave to appeal to the Court of Appeal of British Columbia upon the following grounds:

1. That the learned County Court judge was in error in permitting and accepting a plea of not guilty on the trial *de novo* after the respondent had pleaded guilty before the magistrate.
2. That the learned County Court judge was in error in holding that the grounds set out in the respondent's Notice of Appeal were reasonable, certain, adequate or sufficient or were grounds of appeal at all.

This appeal was considered by the Court of Appeal of British Columbia[1] at the same time as two others in which kindred questions were raised and a perusal of the decisions of Sheppard J.A. and Davey J.A. clearly indicates that the merits of this case were considered by that Court, and the concluding words of Mr. Justice Sheppard's decision in relation thereto are:

However, for the reasons given, the grounds of error assigned by the Crown should not succeed and the appeal should be dismissed.

[1] 124 C.C.C. 95, 30 C.R. 339, 28 W.W.R. 385.

Some doubt and difficulty has, however, arisen as a result of the wording of the final clause of the formal order for judgment granted herein by the Court of Appeal which reads as follows:

> THIS COURT DOTH ORDER AND ADJUDGE that the said leave to appeal and the appeal be and the same are hereby dismissed.

Upon application being made for leave to appeal to this Court, which application was adjourned to the October sittings thereof, it was argued on behalf of the respondent that the judgment sought to be appealed from did not dismiss the appeal but rather dismissed the application for leave to appeal to the British Columbia Court of Appeal, and that as such it was not "a final or other judgment of the highest court of final resort in a province . . . in which judgment can be had in the particular case sought to be appealed . . . ." within the meaning of s. 41(1) of the *Supreme Court Act* and that leave should accordingly be refused.

It is true that the final paragraph of the formal judgment of the Appeal Court of British Columbia quoted above is not entirely clear in that it purports to dismiss both the application for leave to appeal and the appeal itself, but if there be any doubt as to whether or not this constitutes an order dismissing the appeal then it is permissible to consider the reasons of the Court to see what was actually done, and it then becomes apparent that the appeal was heard on its merit and dismissed.

I am of opinion that the judgment from which leave to appeal is now sought should be treated as one dismissing the Crown's appeal to the Appeal Court of British Columbia and that such leave should be granted.

The grounds raised by the present application are:

1. That the Court of Appeal erred in holding that having pleaded guilty before the magistrate the accused had an appeal as of right from his conviction.
2. That the Court of Appeal erred in holding that the Notice of Appeal to the County Court judge set forth the grounds of appeal with sufficient particularity as required by s. 722 of the *Criminal Code*.

As to the first ground, I agree with what has been said by the learned judges of the Court of Appeal to the effect that the words of s. 720(*a*) of the *Criminal Code* "the

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defendant in proceedings under this Part may appeal to the Appeal Court" include a defendant who has pleaded "guilty" in the summary conviction Court, but it must be borne constantly in mind that no defendant can have his appeal set down for hearing until "he has complied with section 722", and this includes the preparation of a notice setting forth the grounds of appeal. As will be seen from what I have said in this Court in the case of *Regina v. Dennis*[1], I agree with the learned judges in other Courts (see *R. v. Crawford*[2] and *R. v. Tennen*[3]), who have held that the "trial *de novo*" for which provision is made in s. 727 is to be treated as a "trial" in the restricted sense of that word which does not include either arraignment or plea, but I do not agree with those who consider that this construction precludes a defendant who has pleaded guilty from asserting an appeal. In my view, if a man who has entered a guilty plea before the magistrate is able to comply with the requirements of s. 722, then his appeal "shall be set down for hearing before the Appeal Court", and when he enters that Court he is in exactly the same position procedurally as he was immediately after pleading "guilty" before the magistrate and before he had been convicted. This being so, he may change his plea if he can satisfy the Appeal Court that there are valid grounds for his being permitted to do so. See *Thibodeau v. The Queen*[4].

A discussion of the question raised by the second ground follows logically from what has just been said because if the grounds of appeal are not set out in such manner as to comply with s. 722 then the appeal cannot be set down for hearing under s. 723.

The relevant portion of s. 722 reads as follows:

> Where a Notice of Appeal is taken under section 720, the appellant shall
>
> (*a*) prepare a Notice of Appeal in writing setting forth
>
> (i) with reasonable certainty the conviction or order appealed from or the sentence appealed against; and
>
> (ii) the grounds of appeal; . . . .

[1] Ante p. 286. [2] [1959] O.W.N. 75, 123 C.C.C. 14.
[3] [1959] O.R. 77, 122 C.C.C. 375. [4] [1955] S.C.R. 646.

There has been considerable conflict of judicial opinion as to the nature of "grounds of appeal" required by this section, and in this regard Sheppard J.A., summarizing the view of the Court of Appeal in this case, has said:

> Hence, while in compliance with section 722 grounds of appeal are to be given, nevertheless by reason of the nature of the review, the grounds would not appear to be required to be stated with the same particularity as in appeals in indictable offences where the Appeal Court is restricted to the record of the proceedings in the lower Court and where counsel for the respondent is entitled to know specifically the grounds on which the conviction or dismissal is attacked.

It is true that the grounds of appeal referred to in s. 722(1)(*a*)(ii) need not be "stated with the same particularity as in appeals in indictable offences . . .". but it must be remembered that the setting forth of these grounds is one of the acts required to be done as a condition precedent to the jurisdiction of the Appeal Court and although they require neither nicety of pleading nor expert draftsmanship in their preparation it should not be possible to obtain the trial *de novo* for which s. 727 provides upon grounds which are frivolous or apparently lacking in substance.

To appeal as the respondent did in this case from a conviction founded on a plea of "guilty" on the grounds that the magistrate did not comply with the principle as to reasonable doubt in connection with the evidence and that the verdict was contrary to the evidence and the weight of evidence is to present the Appeal Court with a self-evident contradiction in terms.

Far from the conviction being contrary to law, it was the verdict which the law required the magistrate to enter after the plea of "guilty" (see s. 708(2)), and there is, therefore, no room for the application of the principle of reasonable doubt and it is idle for a defendant to complain that the conviction was contrary to the evidence and to the weight of evidence because the conviction was not based on evidence but on the "guilty" plea.

Such grounds are not unacceptable by reason of lack of particularity but because they are irreconcilable with the plea in the Court below which is a part of the material to be kept by the clerk of the Appeal Court with the records of that Court in accordance with the provisions of s. 726(1).

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The plea of "guilty" entered in the summary conviction Court concluded against the respondent the issues raised by the information and after the filing of the notice of appeal in this case the Court of Appeal was faced with an outstanding plea of "guilty" without any reason having been put forward to support an application for its withdrawal and without any question of law having been raised to cast doubt on its effect.

The following observations of Sidney Smith J.A. in *R. v. Sanders*[1], although made with reference to the old Code, seem most pertinent to the circumstances of this case:

> On the face of it, there would seem something anomalous in the law if it allowed an accused person, with full understanding, to plead "guilty" before a magistrate and then, because he found the sentence unexpectedly heavy, or had unexpected consequences, or for some other reason having nothing to do with the merits, allowed him to appeal to the county court and, *without explanation,* blandly plead "not guilty," and thus obtain a full trial on the merits. That seems to be playing fast and loose with the administration of justice.

(The italics are mine.)

With the greatest respect, it seems to me that the proceedings before the County Court judge in the present case constitute an example of the type of procedure to which this quotation applies.

After an extensive argument had been presented to the County Court judge and after the proceedings had been adjourned for consideration of the questions as to whether the accused was entitled to a trial *de novo* after a plea of "guilty" and as to the validity of the grounds set forth in the notice of appeal, the following exchange is reported as having taken place in the County Court:

> The COURT: On the objection raised by Crown counsel before the adjournment that the grounds of appeal were not disclosed in the notice of appeal, I am holding that clause 1 of the notice of appeal is sufficient statement of grounds in this particular appeal and I am not making that as a precedent. I understand the matter is before the Court of Appeal now—another one—but that is my present decision. I take it that plea is the same as the Court below?
>
> Mr. DEAN (for the accused): There will be a plea of not guilty here.
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> The COURT: What was it in the Court below?
>
> Mr. DEAN: It was a plea of guilty in the Court below. Should be another plea taken here.
>
> The COURT: You will waive the reading of the information and plead not guilty?

[1] (1953), 8 W.W.R. 656, 106 C.C.C. 76.

Mr. DEAN: Yes.

The COURT: Where is your client?

Mr. DEAN: Right here. Stand up, please.

The COURT: This is for impaired driving.

Mr. MACKOFF (for the Crown): May it please your honor, the Court of Appeal in a decision handed down just last week in the case of Baumer ruled that on these appeals apparently the reading of the information is a prerequisite now.

The COURT: Is a what?

Mr. MACKOFF: It is required to have a reading of the charge.

The COURT: In spite of the waive?

Mr. MACKOFF: In spite of the waive. Apparently that is a decision of the British Columbia Court of Appeal.

The COURT: Well, this is under the Criminal Code, is it not?

Mr. MACKOFF: Yes, your honor, section 223.

The COURT: He should be in the box. Read the charge.

The accused was accordingly arraigned and permitted to plead "not guilty" without any reason being given to support his change of plea. This quotation indicates that the learned County Court judge erred in determining the validity of the notice of appeal without any reference to the nature of the plea in the summary conviction Court with the result that he upheld the validity of a ground of appeal alleging that a conviction made pursuant to the mandatory provisions of s. 708(2) of the *Criminal Code* and without taking evidence was contrary to law in that the principle of reasonable doubt was not applied in connection with the evidence.

From all the above it will be seen that I am of opinion that the Court of Appeal did not err in holding that the accused had an appeal as of right from his conviction subject to compliance with s. 722, but that I have concluded that the same Court did err in holding that the notice of appeal to the County Court judge in this case set forth "the grounds of appeal" as required by s. 722(1)(*a*)(ii) of the *Criminal Code*.

I would accordingly allow the appeal and set aside the judgments of the Court of Appeal and of the County Court of Vancouver.

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The result is that the conviction entered by the learned magistrate is restored.

Appeal allowed; conviction restored.

Solicitor for the appellant: G. D. Kennedy, Victoria.

Solicitors for the respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.