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LOUIS GATTO AND ALPHONSE TONELLATTO ..... APPELLANTS; * May 16. * June 23.

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Criminal law—Indictment attacked as bad for multiplicity—Several matters stated in alternative—Cr. Code, s. 854—Charge under s. 193 (3) of Customs Act, R.S.C., 1927, c. 42, and amendments—Form of verdict.

Appellants were charged and convicted on an indictment that they "did * * * assist or were otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting or in the harbouring of goods liable to forfeiture under the Customs Act, to wit: spirituous liquors of a value for duty of over" $200, contrary to s. 193 (3) of said Act, R.S.C., 1927, c. 42, and amendments. The indictment was attacked on the ground that it was bad for multiplicity, in that appellants were charged with several offences in the alternative in the one count.

Held: The attack on the indictment failed. Appellants were not charged with any one of the offences of "importing," "unshipping," etc. They were charged with an offence created by s. 193 of the *Customs Act,* which creates a substantive offence, and the guilt of a person charged thereunder depends in no degree whatever upon the fact or otherwise that the acts in which such person is concerned are themselves offences. S. 854 of the *Cr. Code* applies.

Held, also, that the form of the jury's verdict, finding accused "guilty of harbouring only," was unobjectionable when read in connection with the indictment and the trial Judge's charge.

Judgment of the Supreme Court of Nova Scotia *in banco,* 12 M.P.R. 483, sustaining, on equal division, the conviction of accused, affirmed.

APPEAL by the accused from the judgment of the Supreme Court of Nova Scotia *in banco* (1), which, on equal division, dismissed their appeal from their conviction, at trial before Graham J. and a jury, on an indictment that they

did * * * assist or were otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting or in the harbouring of goods liable to forfeiture under the Customs Act, to wit: spirituous liquors of a value for duty of over Two Hundred Dollars,

contrary to s. 193 (3) of the *Customs Act,* R.S.C., 1927, c. 42, and amendments thereto.

At trial, before plea by the accused, their counsel objected to the indictment, claiming that it was bad for a

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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multiplicity of charges. The trial Judge over-ruled the objection.

After the jury had been charged and had retired, they returned and asked for instruction with regard to the form of verdict. The trial Judge instructed them as follows:—

I understand you want to know whether or not you can specify on which of the matters you find the accused guilty. There are a number in the indictment—did assist or were otherwise concerned in the importing, unshipping, landing, removing, subsequent transportation of or in the harbouring—and I say to you that if you find them guilty of any of these things you may find them "guilty" and leave it at that. It is not necessary for you to pick out one of them. If you find they assisted or were otherwise concerned in the importing you may find them "guilty." If you find they assisted or were otherwise concerned in the unshipping or the landing or the removing or the subsequent transportation of the liquor, a verdict of "guilty" will cover it. I don't think it would be an error if you designated the particular thing of which you found them guilty, but it seems to me there is less likelihood of an error if you enter the general verdict of guilty.

Bring in whatever verdict you think proper, and if for any reason I think it is incomplete or not satisfactory I will tell you or send you back.

The jury found the accused "guilty of harbouring only."

The grounds of appeal specified by the accused in their notice of appeal to the Supreme Court of Nova Scotia *in banco* were:—

1. Because the indictment charged six offences and thereby prejudiced us in our defence;

2. Because the indictment is bad for multiplicity and should have been quashed when the motion was made to quash same before we pleaded;

3. Because the special verdict found by the jury does not constitute an indictable offence;

4. Because the learned trial Judge erred in instructing the jury that they could bring in a verdict of guilty of any one of the particular offences mentioned in the indictment.

The appeal to the Supreme Court of Nova Scotia *in banco* was dismissed on equal division; the judgment for dismissal of the appeal being written by Doull J., concurred in by Hall J.; and the judgment *contra* (in favour of directing a new trial) was written by Carroll J., concurred in by Archibald J. (1).

The accused appealed to this Court. By the judgment now reported, the appeal was dismissed.

J. W. Maddin K.C. for the appellants.

D. D. Finlayson for the respondent.

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The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is an appeal from the Supreme Court of Nova Scotia dismissing by an equal division an appeal from the judgment of Mr. Justice Graham who, at the trial, had rejected a motion to quash the indictment. The indictment is as follows:—

Louis Gatto and Alphonse Tonellatto, of the Town of New Waterford, in the County of Cape Breton, Province of Nova Scotia, did on or about the twenty-fourth day of December, in the year of Our Lord, One Thousand Nine Hundred and Thirty-six, at or near Gabarus, in the said county and province, assist or were otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting or in the harbouring of goods liable to forfeiture under the Customs Act, to wit:

spirituous liquors of a value for duty of over Two Hundred Dollars, contrary to subsection 3 of section 193 of the Customs Act, being chapter 42 of the Revised States of Canada, 1927, and amendments thereto, being the form of Statute in that behalf made and provided.

The application to quash proceeded on the ground that the indictment is bad for multiplicity, that is to say, that several offences are charged in one count.

We have carefully considered the able judgment of Mr. Justice Carroll (with whom Mr. Justice Archibald concurred) who thought the appeal should be allowed and the indictment quashed; but have come to the conclusion that the weight of argument is definitely in favour of the view expressed in the judgment of Mr. Justice Doull, who agreed with the view of the learned trial judge.

The charge is laid under subsection 3 of section 193 of the *Customs Act*. Section 193 is in these words:—

193. (1) All vessels, with the guns, tackle, apparel and furniture thereof, and all vehicles, harness, tackle, horses and cattle made use of in the importation or unshipping or landing or removal or subsequent transportation of any goods liable to forfeiture under this Act, shall be seized and forfeited.

(2) Every person who assists or is otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting, or in the harbouring of such goods, or into whose control or possession the same come without lawful excuse, the proof of which shall be on the person accused, shall, in addition to any other penalty, forfeit a sum equal to the value of such goods, which may be recovered in any court of competent jurisdiction, and, where the value for duty of such goods is under two hundred dollars, shall further be liable on summary conviction before two justices of the peace to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding one month, or to both fine and imprisonment.

(3) Where the value for duty of the goods so imported, unshipped, landed, removed, subsequently transported, or harboured or found, is two hundred dollars or over, such person shall be guilty of an indictable

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offence and liable on conviction, in addition to other penalties to which he is subject for any such offence, to a penalty not exceeding one thousand dollars and not less than two hundred dollars, or to imprisonment for a term not exceeding four years and not less than one year, or to both fine and imprisonment.

The argument on behalf of the appellant is that under this section "importing" goods of the character to which it relates is one offence, "unshipping" another offence, "landing" another offence, "removing" another offence, "transporting" another and "harbouring" still another, and, accordingly, that the appellants were charged with six offences in the alternative in the one count.

Mr. Justice Doull, with whom Mr. Justice Hall concurred, says:—

> The fallacy in this argument is that the appellants were not charged with any one of the offences mentioned. They were charged with an offence created by section 193 of the Customs Act, which, leaving out irrelevant matter for the moment, provides that "Every person who assists or is otherwise concerned in the importing, unshipping, landing or removing or subsequent transportation or in the harbouring of such goods (i.e., goods liable to forfeiture under this Act), where the value of the goods so imported, &c., is Two Hundred Dollars or over, *shall be guilty of an indictable offence* and liable to a penalty not exceeding One Thousand Dollars and not less than Two Hundred Dollars or to imprisonment for a term not exceeding four years and not less than one year or to both fine and imprisonment.
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> Section 193 creates a substantive offence, and the guilt of a person charged thereunder depends in no degree whatever upon the fact or otherwise that the acts in which such person is concerned are themselves offences.

We agree with this view and we think it is conclusive of the controversy. Section 854 of the *Code* applies. We agree also with Mr. Justice Doull and Mr. Justice Hall that the form of the verdict is unobjectionable when it is read in connection with the indictment and the charge of the learned trial judge.

Appeal dismissed.

Solicitor for the appellants: *J. W. Maddin.*

Solicitor for the respondent: *M. A. Patterson.*