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R. v. Walker

**Between
Regina, and
Douglas E. Walker**

[1955] O.J. No. 345

Ontario Supreme Court - Court of Appeal
Toronto, Ontario

Pickup C.J.O., Hogg and Gibson JJ.A.

October 31, 1955.

(7 pp.)

Counsel:

J. Allen, for the appellant.

W.C. Bowman, Q.C., for the Crown.

The judgment of the Court was delivered by

1 PICKUP C.J.O.:-- This is an appeal, in a summary conviction matter, by special leave granted by this Court on 15th September 1955, the appeal being upon questions of law alone.

2 The appellant was convicted on 4th April 1955 on a charge under s. 29(1) of The Highway Traffic Act, R.S.O. 1950, c. 167. The information on which the appellant was tried and convicted contained two offences, namely, the offence of driving a motor vehicle without due care and attention, and the offence of driving a motor vehicle without reasonable consideration for other persons using the highway. The case was heard before the Magistrate before the decision of the Supreme Court of Canada in *Regina v. Archer*, 20 O.R. 181, which decision settled the law as to whether s. 29(1) of The Highway Traffic Act, referred to, created two offences or only one. This Court had, prior to the decision of the Supreme Court of Canada referred to, held that the subsection of The Highway Traffic Act, referred to, created only one offence and not two. In these circumstances, in accordance with the law as it had been declared by this Court, the Magistrate proceeded to try the appellant on the information as laid before him, counsel for the appellant taking no objection to the information in the Magistrate's court. It would have been futile for him to have done so, because the Magistrate would undoubtedly consider himself bound by the decision of this Court, which at that time had not been reversed in the Supreme Court of Canada. The section of The Highway Traffic Act, referred to, has since been amended by Statutes of Ontario, 1955, c. 29, s. 4, which would appear to be intended to make it one offence to drive a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway. This amendment was not in effect at the time of the trial of the instant case either before the Magistrate or before the County Judge, and it does not require to be considered in this case.

3 The appellant appealed from his conviction by the Magistrate to the Judge of the County Court of the County of Simcoe, this being an appeal in the nature of a trial de novo before the County Judge. At the time of the hearing of the appeal before the County Judge, the decision of the Supreme Court of Canada in the Archer case was known, and counsel for the appellant objected to being tried or convicted on an information containing two offences. The learned County Judge considered this objection to the information to be one which should have been taken before the Magistrate and, applying s. 753 of the Criminal Code (as in force at the time of the commencement of the proceedings), held that no effect should be given to the objection. He proceeded to hear the appeal, by way of trial de novo, on the information containing two offences.

4 Although the decision of the Supreme Court of Canada in the Archer case had not been given when this case was tried by the Magistrate, the law as declared by the Supreme Court in the Archer case was the law at that time. It follows that the Magistrate had no right to proceed to try the accused on the information as laid, and in my opinion, this is so, whether objection was taken to the information or not. If the learned Magistrate had not felt himself bound by the decision of this Court in the Archer case, the proper course for him to have taken would, in my opinion, have been the course suggested by Lord Chief Justice Goddard in the case of *Edwards v. Jones*, (1947) 1 K.B. 659. That was a traffic violation case in which the information charged two offences. Lord Goddard C.J. said, at p. 661:

" In the Summary Jurisdiction Act, 1848, it is laid down that an information shall be for one offence only. There is also a provision in the same Act that no objection as to substance or form is to prevail, but that does not mean that the justices can, where a statute provides that an information shall be for one offence only, proceed to hear an information which charges two offences at the same time. If magistrates find an information preferred which contains two offences and not one, they should take steps to see that it is amended. The way they should do it the authorities bear this out - is by saying to the prosecutor: 'On which offence do you elect to proceed?' The prosecutor can then say: 'I will elect to proceed upon offence A.' Thereupon the information should be amended by striking out the second offence charged, so that the defendant is only called upon to answer to the one offence. On the other hand, if the prosecutor says: 'I decline to elect,' then the information is bad. No conviction could take place upon it, because any such conviction would be bad for duplicity. Therefore magistrates in those circumstances should say: 'If you will not elect we dismiss the information because it is bad.'"

5 It follows, in my opinion, that the conviction made by the learned Magistrate was bad for duplicity. The trial before the learned Magistrate was a nullity. (*Reg. v. Georgieff and Dickemous*, 20 C.R. 143.) In my opinion, the proceedings before the learned County Judge were likewise a nullity. I am not saying that the information was a nullity. I do not need to say that, but I am saying that neither the learned Magistrate nor the learned County Judge had any right to try or re-try the appellant on such an information containing two offences. The change in the law made by s. 696(1) of the new Criminal Code which came into effect on April 1st, 1955, and which permits an information to contain more than one offence, need not be considered in this case.

6 I would, therefore, allow the appeal, quash the conviction and set aside the order of the learned County Judge. I would make no order as to costs.

PICKUP C.J.O.

HOGG J.A.:-- I agree.

GIBSON J.A.:-- I agree.

qp/s/wlh/idj