RAYMOND JOSEPH KIPP .....APPELLANT;

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO } RESPONDENT.

1964
*June 17, 18, 19
Oct. 6

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Indictment—Duplicity—Charge of selling as food "dead animals" contrary to s. 25(b) of Food and Drugs Act, 1952-53 (Can.), c. 38 and regulations—"Dead animals" defined by regulations as either improperly killed or affected with disease—Whether indictment void for duplicity—Whether two different modes of committing single offence—Criminal Code, 1953-54 (Can.), c. 51, s. 703.

Criminal law—Mandamus—County Court judge erroneously quashing indictment for duplicity on preliminary objection—Whether order lies to compel judge to proceed with indictment.

The appellant was charged with having sold as food "dead animals" in violation of s. B.14.010 of the Food and Drug Regulations, thereby committing an indictable offence contrary to s. 25(*b*) of the *Food and Drugs Act*, 1952-53 (Can.), c. 38. At the trial after the indictment was read and before a plea was entered, the appellant moved to have the indictment quashed for duplicity. The County Court judge quashed the indictment on that ground. The basis for his judgment being that by the definition in s. 14.012 of the regulations, "dead animals" could mean either animals not properly killed or diseased animals. The Crown then moved for an order of mandamus directing the County Court judge or some other judge of the County Court to proceed with the trial on the indictment as framed. The order was granted and this judgment was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this Court, and argued that mandamus did

*PRESENT: Taschereau C.J. and Cartwright, Judson, Ritchie and Spence JJ.

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not lie in this case, and secondly, that the indictment was void for duplicity.

Held (Cartwright and Spence JJ. dissenting): The appeal should be dismissed.

Per Taschereau C.J. and Judson and Ritchie JJ.: There was no duplicity on the face of the indictment. It charged only the one offence of selling dead animals, and regulation B.14.012 did no more than define two different modes of committing the same offence. The phrase "dead animals" was not a synonym for meat. A butcher sells meat, not "dead animals".

Mandamus was available to the Crown in this case. The cases of *Re McLeod v. Amiro*, 27 O.L.R. 232, *R. v. Justices of Middlesex* (1877), 2 Q.B.D. 516 and *R. v. Hannah and MacLean*, 77 C.C.C. 32, did not touch the problem in the present case where the indictment was quashed before plea and no trial was held. The trial judge can be compelled to give a decision on the merits and it was no answer to such an application to say that he had exercised his jurisdiction in quashing the indictment and that such a decision could not be reviewed. The trial judge had the power to deal with the form of the indictment and he was acting within his jurisdiction when he erroneously quashed the indictment. He was there to try the charge. It was proper, in the circumstances, to issue the writ of mandamus.

Per Cartwright J., *dissenting:* The phrase "dead animal" is, for the purpose of the regulations, given two special meanings to the exclusion of all other meanings. The indictment must be read as if the extended meanings of that phrase were set out in it. Regulation B.14.010, read, as it must be to render it intelligible, with the definition of "dead animal", creates two distinct offences and not one offence which could be committed in two modes. The indictment was therefore void for duplicity.

On the assumption that the trial judge's decision that the indictment was void for duplicity was wrong in law, mandamus did not lie.

Per Spence J., dissenting: There is no doubt that mandamus is an extraordinary remedy by which a superior Court may direct any inferior tribunal to do some particular thing which appertains to its duty and which it has declined to do, and where, as in the present case, there is no other remedy available. But the argument of the Crown that mandamus will lie to compel the trial judge to hear this case on the merits, could not be supported. The trial judge did not decline jurisdiction but accepted it and, as part of the legal merits of the case, found that the indictment was void for duplicity. His decision was a decision upon the legal merits. Consequently, mandamus to compel him to do his duty did not lie despite the fact that the lower Courts were of the opinion that he was in error in the performance of his duty.

The indictment, furthermore, was void for duplicity.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the granting of an order of mandamus by Grant J. Appeal dismissed, Cartwright and Spence JJ. dissenting.

J. R. Maurice Gautreau, for the appellant.

T. D. MacDonald, Q.C., and *Arthur C. Whealy,* for the respondent.

The judgment of the Chief Justice and Judson and Ritchie JJ. was delivered by

JUDSON J.:—The appellant Raymond Joseph Kipp was charged with the offence of selling as food, dead animals or parts thereof in violation of the provisions of the *Food and Drugs Act*. He was committed for trial after a preliminary hearing and he elected to be tried under Part XVI of the *Criminal Code* by a judge without a jury.

At the trial after the indictment was read and before a plea was entered by the appellant, his counsel objected to the form of the indictment. The County Court Judge quashed the indictment on the sole ground that it was void for duplicity. The Crown then moved for an order of mandamus directing the County Court Judge or some other Judge of the County Court Judges' Criminal Court for the County of Carleton to proceed with the trial of the accused on the indictment as framed. Grant J. made this order and also set aside the quashing of the indictment[1]. The Court of Appeal affirmed the order of Grant J. Kipp now appeals with leave of this Court.

I agree with Grant J. that this indictment is not void for duplicity. It reads as follows:

> That he, the said Raymond Joseph Kipp, between the 9th day of August, A.D. 1961, and the 20th day of October, A.D. 1961, at the then Town of Eastview in the Province of Ontario, did unlawfully sell as food dead animals or parts thereof in violation of Section B.14.010 of the Food and Drug Regulations made by Order-in-Council P.C. 1954-1915 of the 8th December, 1954, as amended by Order-in-Council P.C. 1961-1097 of the 31st July, 1961, thereby committing an indictable offence contrary to paragraph (*b*) of Section 25 of the Food and Drugs Act, Statutes of Canada 1952-53, Chapter 38.

Regulation 14.010 simply provides that "No person shall sell as food a dead animal or any part thereof."

"Dead animal" is defined in Regulation B.14.012 as follows:

> B.14.012 For the purpose of Section B.14.010 and B.14.011, "dead animal" means a dead animal that

[1] [1963] 3 C.C.C. 72, 40 C.R. 366.

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(a) was not killed for the purpose of food in accordance with commonly accepted practise of killing animals for the purpose of food, which shall include exsanguination, or

(b) was affected with disease at the time it was killed.

To me it is plain that there is no duplicity on the face of this indictment. It charges only the one offence of selling dead animals or parts thereof, and Regulation B.14.012 does no more than define two different modes of committing the same offence. I cannot accept the phrase "dead animals" as a synonym for meat. A butcher sells meat, not "dead animals".

It is common ground that the Crown has no right of appeal from this erroneous quashing of the indictment. The only remaining question is whether an order of mandamus should issue directing the County Court Judge to proceed with the trial. Again, for the reasons given by Grant J., I am of the opinion that it should.

The appellant relies on *Re McLeod v. Amiro*[1]; *The Queen v. Justices of Middlesex*[2]; and *Rex v. Hanna & McLean*[3]. These are cases involving appeals from summary convictions which in the opinion of the reviewing court were finally but erroneously decided on the merits. The cases merely hold that such decisions are not reviewable by way of mandamus. They do not touch the problem in the present case where an indictment is quashed before plea and no trial is held. All that the Crown is seeking is an order directing the County Court Judge to proceed with the trial. If he proceeds with the trial and gives a decision, that decision is open to appeal and is not reviewable on mandamus. But he can be compelled to give a decision on the merits and it is no answer to such an application to say that he has exercised his jurisdiction in quashing the indictment and that such a decision cannot be reviewed.

The use of the word "jurisdiction" in this context does not help one towards a solution. There is no dispute that the judge had the power to deal with the form of the indictment and that he was acting within his jurisdiction when he quashed the indictment. But he made an error in quash-

[1] (1912), 27 O.L.R. 232, 25 C.C.C. 230, 8 D.L.R. 726.
[2] (1877), 2 Q.B.D. 516.
[3] (1941), 57 B.C.R. 52, 77 C.C.C. 32, 3 W.W.R. 753, 4 D.L.R. 584.

ing this indictment. He was there to try the charge. As the matter stands now, unless the order of mandamus issues, the case as framed cannot be tried and it should be so tried. It is proper, in the circumstances, to issue the writ of mandamus. I approve of the reasons of Grant J. on this point in their entirety[1].

I would dismiss the appeal. This being an indictable offence, there can be no order as to costs either here or in the Court of Appeal.

CARTWRIGHT J. (*dissenting*):—The proceedings in the courts below out of which this appeal arises are set out in the reasons of my brother Spence.

Two questions were fully argued before us, (i) whether in the circumstances mandamus lies, and (ii) whether the learned County Court Judge erred in holding that the indictment was void for duplicity.

On the first of these questions I agree with the reasons and conclusion of my brother Spence. As he points out, the decision that mandamus does not lie renders it unnecessary, for the disposition of this appeal, to deal with the second question; I think, however, that it is desirable to express an opinion upon it because if this appeal be allowed the respondent will be free to prefer a new indictment in the same words as that which was quashed by Gibson C.C.J. and the Judge before whom it comes for trial, in the absence of any expression by this Court, would, no doubt, follow the judgment of Grant J., affirmed by the Court of Appeal, holding that the indictment as framed was not void for duplicity.

The wording of the indictment is set out in full in the reasons of my brother Spence. The important words are:

> . . . did unlawfully sell as food dead animals or parts thereof in violation of section B.14.010 of the Food and Drug Regulations . . .

Regulation B.14.010 of the Food and Drug Regulations reads as follows:

> B.14.010—No person shall sell as food a dead animal or any part thereof.

[1] [1963] 3 C.C.C. 72, 40 C.R. 366.

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The phrase "dead animal" is defined in Regulation B.14.012 which reads as follows:

> B.14.012 For the purpose of sections B.14.010 and B.14.011, "dead animal" means a dead animal that
>
> (*a*) was not killed for the purpose of food in accordance with commonly accepted practice of killing animals for the purpose of food, which shall include exsanguination, or
>
> (*b*) was affected with disease at the time it was killed.

It is obvious that the words of Regulation B.14.010, standing alone, cannot have been intended to be given their plain and ordinary meaning. The words are clear and simple English words; they are unambiguous and if applied literally would bring about the result that every retail dealer in the country commits an indictable offence whenever he makes a sale of meat to a customer. Butchers do not sell parts of live animals.

The definition section, quoted above, makes this plain. The phrase "dead animal" is, for the purpose of the regulation, given two special meanings to the exclusion of all other meanings. I agree with Gibson C.C.J. that the indictment must be read as if the extended meanings of the phrase "dead animal" were set out in it. So read, the words of the charge to which the appellant was called upon to plead were as follows:

> . . . did unlawfully sell as food dead animals or parts thereof which were not killed for the purpose of food in accordance with commonly accepted practice of killing animals for the purpose of food, which shall include exsanguination, or which were affected with disease at the time they were killed.

The question is whether these words describe but one offence which may be committed in two modes or describe two different offences.

Counsel for the respondent relies on ss. 492 and 500 of the *Criminal Code*, which, so far as relevant read as follows:

> 492 (1) Each count in an indictment shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the accused committed an indictable offence therein specified.
>
> (2) The statement referred to in subsection (1) may be . . .
>
> (*b*) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence, . . .

(6) Nothing in this Part relating to matters that do not render a count insufficient shall be deemed to restrict or limit the application of this section.

* * *

500. (1) A count is not objectionable by reason only that

(*a*) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indictable offence the matters, acts or omissions charged in the count . . .

The effect of the corresponding sections dealing with offences punishable on summary conviction was fully considered in the reasons of this Court in *Archer v. The Queen*[1] and the effect of the sections quoted above was dealt with as follows in the unanimous judgment of this Court in *Cox* and *Paton v. The Queen*[2]. After quoting the relevant portions of ss. 492 and 500 the reasons continue:

It is clear since the judgment of this Court in *Archer v. The Queen* that these provisions do not render a count good if the words of the enactment which are adopted in framing the count describe more than one offence.

There is no difficulty in stating the applicable principle of law; if the indictment in one count charges more than one offence it is bad for duplicity. The question as to which there is room for differences of judicial opinion is whether in a particular case the words of a count describe one offence which may be committed in different modes or describe more than one offence.

In the case at bar, in order to support the submission that only one offence is charged, it is necessary to define the single offence which is committed (a) when a butcher sells parts of a perfectly healthy animal killed, for example, by being run into by a motor vehicle and therefore not "in accordance with commonly accepted practice" and, (b) when a butcher sells parts of a diseased animal.

Grant J. deals with this point as follows:

Here, as in *Gatto v. The King* (1938) S.C.R. 423, there is only one offence charged, namely, that of selling.

The difficulty I have in accepting this is that selling meat, *simpliciter,* is not an offence at all.

[1] [1955] S.C.R. 33, 20 C.R. 181, 110 C.C.C. 321, 2 D.L.R. 621.
[2] [1963] S.C.R. 500 at 517, 40 C.R. 52, 2 C.C.C. 148.

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To suggest that there is only one offence, "selling meat for food in contravention of the regulations", would be to beg the question which is whether the prohibitions as to the sale of meat for food contained in the regulations create more than one offence.

The one offence cannot be "selling meat for food which is unfit for human consumption" because as in case (a) suggested above, the flesh of an animal might be perfectly fit for human consumption but its sale nonetheless forbidden because of the manner in which it was killed.

In my opinion, Regulation B.14.010, read, as it must be to render it intelligible, with the definition of "dead animal", creates two distinct offences and I agree with Gibson C.C.J. that the indictment was void for duplicity. It follows that I would allow the appeal.

I base my judgment on the two grounds, (i) that Gibson C.C.J. was right in law in holding that the indictment was void for duplicity and (ii) that, even on the assumption that his decision was wrong in law, mandamus does not lie.

I would allow the appeal, set aside the orders of the Court of Appeal and of Grant J. and direct that the application for an order of mandamus stand dismissed. I would make no order as to costs in any Court.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario made on October 18, 1963, dismissing an appeal from the order of Grant J. made on May 27, 1963. By the latter order, Grant J. had issued a mandamus requiring Gibson C.C.J. to hear and determine a charge against the appellant.

The appellant had been charged before Gibson C.C.J. on an indictment which read as follows:

> that he did, between the 9th day of August, A.D. 1961, and the 20th day of October, A.D. 1961, at the then Town of Eastview in the Province of Ontario, unlawfully sell as food dead animals or parts thereof in violation of section B.14.010 of the Food and Drug Regulations made by Order in Council P.C. 1954-1915 of the 8th December, 1954, as amended by Order in Council P.C. 1961-1097 of the 31st July, 1961, thereby committing an indictable offence contrary to paragraph (*b*) of section 25 of the Food and Drugs Act, Statutes of Canada 1952-53, Chapter 38,

On the commencement of the trial before Gibson C.C.J. counsel for the appellant raised two points of law:

> (1) whether the indictment is void for duplicity, and

(2) whether the pertinent regulations were in force during the time covered by the alleged offence or offences.

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Counsel later withdrew the second objection but after argument Gibson C.C.J., in written reasons, allowed the first objection and concluded his judgment with the words "the bill of indictment is, therefore, quashed".

Counsel for the appellant in this Court based his appeal upon two propositions: firstly, that mandamus does not lie when the trial judge quashes an indictment on the preliminary objection that the charge is void for duplicity, and secondly, that the charge being void for duplicity, even had Grant J. jurisdiction, he should not have allowed the mandamus.

It is my purpose in these reasons to deal only with the first ground as I am of the opinion that is sufficient to dispose of the appeal to this Court.

Counsel for the Attorney General of Ontario submits in reply to the first ground the following propositions: firstly, that mandamus, generally speaking, lies to compel the execution of a public duty where no other specific remedy for enforcing the performance of that duty exists. Secondly, that in the present case there is no other remedy available. Thirdly, that mandamus will lie to compel the trial judge to hear a case on the merits where he has wrongly declined jurisdiction on a preliminary point of law, notwithstanding that his decision therein can be judicial in character.

There can be no doubt that mandamus is an extraordinary remedy by which the superior Court may direct any inferior tribunal to do some particular thing which appertains to its duty and which it has declined to do: *The Queen et al. v. Leong Ba Chai*[1]; Halsbury, 3rd ed., vol. 2, pp. 84-5.

The writ will not issue when there is other specific remedy available: *The Queen v. Commissioners of Inland Revenue*[2], (in Re Nathan 1884). It would appear that in the present case there is no other remedy available for the reconsideration of the judgment of Gibson C.C.J. As I have said, he concluded his judgment by quashing the bill of indictment. The sole right of appeal by the Attorney-General is found in s. 584(1)(*a*) of the Code and it is

[1] [1954] S.C.R. 10, 1 D.L.R. 401. [2] (1884), 12 Q.B.D. 461.

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"against a judgment or verdict of acquittal of a trial court . . ."

In *Regina v. Leveille*[1], the accused, a married woman, although only 16 years of age, was charged with having stolen goods in her possession. When she came before the municipal court her counsel moved that she should be tried in the Social Welfare Court due to her age despite her marital status. The judge upheld the motion and declined jurisdiction. Rinfret J. at p. 99, said:

(I quote the translation from page 100):

> It is clear from the judgment of the Municipal Court judge, at p. 10 of the record, that this was not a judgment of acquittal.
>
> The consequence is unavoidable: in the circumstances the Crown has no right of appeal.

In *Rex v. Hansher and Burgess*[2], a County Court judge in general sessions quashed the indictment. The Crown appealed to the Court of Appeal. Masten J.A., at p. 74, said:

> The nature and effect of the order in question appears to be procedural merely and does not acquit the accused of the charge which stands against him and the Crown is at liberty forthwith to lay a new indictment: *R. v. Bainbridge* (1918) 30 C.C.C. 214 at 231.

The Attorney-General's difficulty is in the support of his third proposition. In *Re McLeod v. Amiro*[3], Riddell J. considered an application by way of mandamus to compel a division court judge to reopen an appeal from a police magistrate's conviction and to hear and adjudicate upon the same. When the appeal before the division court judge commenced, counsel for the appellant took objection to the information as insufficient in form and substance. No evidence was taken and the division court judge acceded to the argument of counsel for the appellant and allowed the appeal on the sole ground that the information was insufficient. At p. 234, Riddell J. said:

> It is, of course, contended in the present case that if the Court below decides on a preliminary point without going into the merits, there is no real decision on the case, and mandamus will lie.
>
> No doubt—but we must be sure that the point upon which the decision rested was preliminary in reality and not on the merits.
>
> It is in the view that what the learned judge decided was preliminary, that both the applicant and his solicitor swear that "there was no argu-

[1] (1960), 32 C.R. 98.
[2] [1940] O.R. 247, 74 C.C.C. 73, 3 D.L.R. 478.
[3] (1912), 27 O.L.R. 232, 25 C.C.C. 230, 8 D.L.R. 726.

ment before the said judge of the legal merits of the case—the only question being argued was the question of the insufficiency of the information and complaint". And it is pointed out that the Code (sec. 753) expressly provides that no judgment shall be given in favour of the applicant upon an objection to the information and complaint which objection was not taken before the magistrate. The learned Judge was, in my opinion, wrong in the view he took of the appeal (I am of course speaking only upon the material before me, and the facts may be quite different); but he has the same power to go wrong that any other Judge has.

That such a decision is not on a matter preliminary, but on the merits, is, to my mind, quite clear.

In coming to that conclusion, Riddell J. relied upon the well-known and oft-quoted case of *The Queen v. Justices of Middlesex*[1]. There, the appellant had been convicted before a metropolitan police magistrate under a charge of breach of a statute which made punishable as a rogue and vagabond "every person . . . using any subtle craft or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects". The conviction described the offence omitting the words "by palmistry or otherwise". On appeal to the Middlesex Sessions, counsel for the appellant commenced with an objection that the omission of the above words made the conviction bad. The justices after hearing the point argued retired and on their return the assistant judge gave, it was alleged contrary to the view of the majority, a decision quashing the conviction on the objection taken against it. An application was made for a mandamus but the court composed of Mellor J. and Lush J. dismissed the application. Mellor J., at p. 520, having discussed the remedy of mandamus, said:

However, they declined to adopt either course and I think they are not amenable to our control, for they have exercised their jurisdiction, and it is a cardinal rule when jurisdiction is vested in magistrates or any body of men, which they may exercise so long as they act within their authority, that however erroneously they decide, we cannot supervise their decision.

Lush J. said at p. 521:

They returned, and they found the conviction bad on the face of it. That is a decision upon the legal merits of the case. If they decided upon the merits of the appeal, the legal merits, or the merits of the matters of fact, we cannot order them to rescind that decision. We are not a Court of Appeal from decisions of the magistrates, and, however erroneously they may have decided, we have no power to interfere.

[1] (1877), 2 Q.B.D. 516.

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Those two judgments have been followed in a series of cases in the Courts throughout Canada. The judgment in *McLeod v. Amiro* has been criticized and counsel for the Attorney-General in this Court sought to distinguish it on the ground that it was an appeal while the decision of the learned county court judge in this case was at trial, but I can see no valid distinction here as despite the fact that it was an appeal the appeal took the form of a trial de novo in the *McLeod* case. Again, it is submitted, the *McLeod* case was the decision of a single judge and against the weight of authority; it was, however, the decision of Riddell J., a very great judge, and has been quoted and adopted by many courts of appeal and by this Court: *Re Ault*[1]; *Re Sigurdson*[2]; *Re R. v. Spiers*[3]; *R. v. Stacpoole*[4]; *R. v. Lebrecque et al.*[5].

Although it was decided upon consent and without argument on behalf of the accused, at p. 234 Riddell J. said: "Amiro, through his counsel, consents: and a consent is also filed signed by the learned Judge," in my view, that certainly does not lessen the authority of the decision. Counsel who applied for the grant of the mandamus was present and evidently argued it extensively. Finally, it is said that the decision was overruled by *Regina ex rel. Hickman v. Marshall*[6].

In the latter case, the accused was charged before the magistrate with a breach of s. 400 of the Air Regulations. On the opening of the accused's trial, his counsel made an objection that the charge was barred by s. 693 (2) of the Code as it had been laid more than 6 months after the time when the subject-matter of the proceedings arose. Counsel for the informant submitted that the *Aeronautics Act*, R.S.C. 1952, c. 23, providing for a 12-months' limitation was the effective provision. After hearing argument the magistrate reserved his decision, accused pleaded not guilty, and evidence was taken. The magistrate later delivered reasons that because of the Code, s. 693(2), he lacked jurisdiction to

[1] (1956), 18 W.W.R. 428, 24 C.R. 260, 115 C.C.C. 132.

[2] (1915), 25 Man. L.R. 832, 33 W.L.R. 325, 25 C.C.C. 291, 9 W.W.R. 940, 28 D.L.R. 375.

[3] (1924), 55 O.L.R. 290.

[4] (1933), 41 Man. R. 670.

[5] [1941], O.R. 10, 75 C.C.C. 117.

[6] (1960), 127 C.C.C. 76.

try the accused and he endorsed the information "no jurisdiction". The informant appealed to the county court of the County of York and his appeal was dismissed on the ground that no appeal lay. The Attorney-General for Ontario obtained leave to appeal to the Court of Appeal of Ontario and on that appeal Morden J. said at p. 79:

> The right of appeal from summary convictions is one created by statute and is of strict law, and unless such a right is clearly given, it does not exist.

And at p. 80, speaking of the judgment of Cartwright J. in this Court in *R. v. Karpinski*[1]:

> In any event in that case the magistrate did not decline jurisdiction as was done here and I am unable to equate a denial of jurisdiction with an acquittal.
>
> In view of my opinion that no appeal lay to the County Court from the Magistrate's ruling, it is unnecessary, in fact it would be improper, to decide the second question upon which leave was granted to appeal to this Court.

And at p. 81:

> If the Magistrate persists in his opinion that he has no jurisdiction, then mandamus would be the proper remedy . . .

The learned justice in appeal cited a number of cases, *inter alia, McLeod v. Amiro,* but did not indicate whether he disagreed or agreed with those decisions.

In my view, the distinction between the present case on one hand and *Regina ex rel. Hickman v. Marshall* and the many other cases cited by counsel for the Ontario Attorney-General is that in each of the latter the court declined jurisdiction and did so usually in express words. In the present case, the court accepted jurisdiction. It was an ordinary case of a trial of an indictable offence where there had been a proper commitment for trial on preliminary hearing. The trial judge, Gibson C.C.J., commenced the trial and as part of the legal merits of the case found that the indictment was void for duplicity. Therefore, the decision in *The Queen v. Justices of Middlesex* was applicable. There the justices allowed the appeal because the conviction was bad on the fact of it; as Lush J. said, "That is a decision upon the legal merits of the case". I am of the opinion that those words are

[1] [1957] S.C.R. 343, 25 C.R. 365, 117 C.C.C. 241.

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exactly applicable to the actions of Gibson C.C.J. in this case. His decision was a decision upon the legal merits. Therefore, the learned county court judge having accepted jurisdiction and acted on it, mandamus to compel him to do his duty does not lie despite the fact that Grant J. and the Court of Appeal for Ontario were of the opinion that he was in error in the performance of his duty.

As Riddell J. said in *McLeod v. Amiro* at p. 236:

> It makes no difference if the learned Judge misconstrued sec. 753 of the Code—he has the power, untrammelled by me, to make mistakes: and I can find no reason why a misconception of the meaning of a statute is any worse than a misconception of a common law principle or equitable rule.

McDonald J.A. in the British Columbia Court of Appeal said in *Rex v. Hanna & McLean*[1]:

> When a Court has entered upon a case and has given a decision, however outrageous, it seems to me impossible to say it has refused jurisdiction. To take that course is simply to sit in appeal on a tribunal and to make mandamus another form of appeal. Although, as stated above, Courts have often taken that course, I think that on the weight of authority it cannot be justified. In order to justify awarding a mandamus to a County Court Judge who has given a judgment, however absurd, the Court must say that his judgment is no judgment, but a complete nullity . . . In my opinion the County Court Judge has jurisdiction to enter upon the hearing of this appeal; he did enter upon it; he was entirely wrong I think, in the course he took, for the plain intention of the *Criminal Code* is that he ought to have tried the case on the merits. Nevertheless, I have concluded that Robertson J., for the reasons given in his judgment and on the authorities above mentioned, was right in holding that he was powerless to compel the Judge in those proceedings to do otherwise than he has done.

In that case, the respondent had been convicted by a police magistrate on the charge of dangerous driving. He appealed to the County Court judge pursuant to the provisions of the Code and when the appeal came on he moved to quash on the ground that the evidence as disclosed by the magistrate's notes did not justify the conviction. The County Court judge looked at the depositions, refused Crown's counsel the right to call witnesses and quashed the conviction on that ground.

In *Dressler v. Tallman Gravel & Sand Supply Ltd.*[2], the appellant laid an information against his employer under *The Employment Standards Act,* 1957 (Man.), c. 20, charg-

[1] (1941), 77 C.C.C. 32 at 48, 57 B.C.R. 52, 3 W.W.R. 753, 4 D.L.R. 584.
[2] [1962] S.C.R. 564, 38 C.R. 48, 39 W.W.R. 39, 34 D.L.R. (2d) 399.

ing that the respondent had unlawfully failed to pay him overtime rates. Upon the matter coming on before the magistrate for trial, he, without hearing any evidence, ordered the charges dismissed on the ground that the information was in reference to an offence which took place more than six months before the institution of proceedings and also that the information was void for duplicity. The employee appealed by way of stated case and the respondent moved in the Court of Appeal, before any hearing on the merits, to dismiss the appeal on the ground, *inter alia,* that no appeal lay and that the appellant's proper procedure was to move for mandamus. By majority decision in the Court of Appeal of Manitoba the respondent's motion was granted and the stated case quashed. On appeal to this Court, the court adopted the dissenting judgment of Tritschler J.A. in the Court of Appeal of Manitoba. Locke J. giving the judgment of the Court quoted from the judgment of the learned justice in appeal and said at p. 569:

> As to the objection that the proper procedure was not by way of stated case but by *mandamus* to compel the magistrate to exercise his jurisdiction, he pointed out that this was not the case of a magistrate declining to enter upon a hearing because he was of the opinion that he had no jurisdiction, but one in which, exercising his jurisdiction, he had dismissed the information on grounds of law which appeared to him sufficient.
>
> With these conclusions, I agree and, with the greatest respect for the contrary opinion of the learned Chief Justice of Manitoba, I consider that the motion of the respondent to dismiss or quash the stated case, as it was expressed, should have been dismissed and the questions of law, which appear to me to be clearly raised, determined.

In the present case, I am of the opinion that the learned County Court judge did not decline his jurisdiction but accepted it and that therefore no mandamus lies. To the objection that this will result in there being no way of reviewing the allegedly erroneous decision of the County Court judge, it must be pointed out that such result need not be fatal. As was said by Masten J.A. at p. 174, in *Rex v. Hansher & Burgess, supra,* the Crown is at liberty forthwith to lay a new indictment. Boyd J. in *Re Ratcliffe v. Crescent Mills & Timber Company*[1] said at p. 333:

> That the plaintiff has no right of appeal in this case under the Division Courts Act may be a defect of legislation but it does not enlarge the remedy by mandamus.

[1] (1901), 1 O.L.R. 331.

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And in High, on Extra-Ordinary Remedies, 3rd ed., at p. 186, the learned author states:

> So when a court of appellate jurisdiction has dismissed an appeal, upon the ground that the act allowing appeals in such cases was unconstitutional and void, the writ will not go to compel the court to revise its actions and to reinstate the appeal. And this is true, even though the party aggrieved may have no other remedy to review the action of the court, since the absence of another adequate or specific remedy is not of itself ground for relief by mandamus. (The underlining is my own.)

For these reasons, I would allow the appeal.

Since drafting these reasons I have had the opportunity of perusing the reasons of my brother Cartwright. I agree with his conclusion that the indictment was void for duplicity and I concur in the disposition of the appeal which he proposes.

Appeal dismissed, CARTWRIGHT *and* SPENCE JJ. *dissenting.*

Solicitors for the appellant: McMichael, Wentzell & Gautreau, Ottawa.

Solicitor for the respondent: Arthur Whealy, Ottawa.