1928

*Dec. 6.

ELDON BARTON .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Criminal law—Indictment containing three counts, charging: manslaughter (Cr. C., s. 268); causing grievous bodily injury (Cr. C., s. 284); and causing bodily harm by wanton or furious driving, etc., of motor vehicle (Cr. C., s. 285)—Acquittal on first two counts, and conviction on third count—Joinder of counts—Right of jury to find guilty on third count, while finding not guilty on other counts.

The appellant was tried on an indictment containing three counts (referring to the same occurrence), viz., (1) manslaughter (Cr. C., s. 268); (2) causing grievous bodily injury (Cr. C., s. 284); and (3)

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

(1) [1922] 2 A.C. 128.

causing bodily harm by wanton or furious driving, etc., of a motor vehicle (Cr. C., s. 285). The jury found him not guilty on the first and second counts, but guilty on the third count. From the affirmance by the Appellate Division, Ont., of his conviction on the third count, he appealed, on the ground that, as the facts upon which the three counts were based were the same as to each of the three offences charged, it was not open to the jury, after acquitting him upon the first two counts, to convict him upon the third.

Held: It was open to the jury to find as they did. It was permissible to join the other counts to the first one charging manslaughter (Cr. C., s. 856). Whether the three counts should be tried together was in the discretion of the trial judge (Cr. C., s. 857). Had appellant been charged only with manslaughter, but so described as to include the offences charged in the said second and third counts, then, under s. 951, Cr. C., he could properly have been convicted of either of these latter offences, as "other offences" the commission of which was included in the offence "as charged in the count," if, in the jury's opinion, "the whole offence charged was not proved." (*R.* v. *Shea*, 14 Can. Cr. Cas. 319, if it implies the contrary, overruled). In the case at bar, that the jury had found that the whole offence charged either in the first count or in the second count had not been proved, was an intendment which must be made in support of the verdict; and it was within the jury's province so to find, while finding that the offence charged in the third count was proved; and it was not open to this Court to consider the evidence for the purpose of determining whether upon it the jury, as reasonable men, could have negatived the existence of any element necessary to constitute either of the offences charged in the first and second counts, consistently with their finding of guilty on the third count.

R. v. *Forseille*, 35 Can. Crim. Cas. 171, overruled.

Judgment of the Appellate Division, Ont., (35 Ont. W.N. 172; Middleton J.A. dissenting) affirmed.

Smith J. dissented, agreeing with the dissenting judgment of Middleton J.A., in the Appellate Division, and with the judgment in *R.* v. *Forseille*, and holding that, where injuries have been caused by the accused to a deceased person (as found in this case) and these injuries have caused the death, as was unquestionably so in this case, counts under ss. 284 and 285, Cr. C., should not be allowed to go to the jury; an acquittal on the charge of manslaughter is necessarily a finding that there was no criminal negligence, which negligence is necessary to constitute a crime under ss. 284 and 285.

APPEAL by the defendant under section 1023, and, by leave of Lamont J., under section 1025 of the *Criminal Code*, from the affirmance of his conviction by the Appellate Division of the Supreme Court of Ontario, Mr. Justice Middleton dissenting (1).

The question raised is whether, as was decided by the Court of Appeal for Saskatchewan in *R.* v. *Forseille* (2)

(1) (1928) 35 Ont. W.N. 172. (2) (1920) 35 Can. Cr. Cas., 171.

1928

BARTON v. THE KING.

when an accused is tried on a charge containing two counts, one for manslaughter and the other for causing grievous bodily harm, the second count should not be allowed to go to the jury; and, a jury having found him not guilty of manslaughter but convicted him on such second count, the conviction must be quashed.

In the case at bar the appellant was acquitted on the first two counts and was convicted on the third count in the following indictment:

1. That [he] at the Township of Sandwich East, in the County of Essex, on the sixteenth day of September, 1928, did unlawfully kill and slay one Albert J. Strockean, contrary to section 268 of the Criminal Code.

2. That [he, at the place and on the date aforesaid] by an unlawful act, or by doing negligently or omitting to do an act which it was his duty to do, did cause grievous bodily injury to one, Albert J. Strockean, contrary to section 284 of the Criminal Code.

3. That [he, at the place and on the date aforesaid] having charge of a motor vehicle, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, did cause or caused to be done, bodily harm to one Albert J. Strockean, contrary to section 285 of the Criminal Code.

As authorized by subs. 5 of s. 1013 of the *Criminal Code*, Middleton, J. A., adverting to the view to the same effect which he had expressed in *R.* v. *Stark* (1) delivered a dissenting judgment, avowedly to enable the appellant to appeal as of right to this Court. The sole ground of this dissent is expressed in these terms:

This case seems to me to be one well illustrating the difficulty resulting from what I humbly think is a departure from sound principle. The unfortunate victim was undoubtedly killed as the result of the accident. If his death was the result of the fault of the accused, the crime was manslaughter. He has been acquitted and as the death and the fact that the death resulted from the accident are not disputed, the finding of not guilty can only mean that in the opinion of the jury the death was not caused by the misconduct of the accused.

Similarly the finding of not guilty on the second count, that of causing grievous bodily harm, must mean that in the opinion of the jury the bodily harm unquestionably sustained by the deceased was not caused by the misconduct of the accused.

The finding of guilt on the third count must, in the light of the finding on the other counts, mean that the jury understood that it had the right to find this man guilty of the lesser offence while acquitting him of the only offence of which it was open to them to find him guilty upon the evidence.

(1) (1927) 60 Ont. L.R. 375.

The only relevant ground of appeal to the Appellate Divisional Court is thus stated in the judgment of the majority of that Court delivered by Orde, J. A.:

That, as the facts upon which the three counts are based are the same as to each of the three offences charged, it was not open to the jury after acquitting the accused upon the first two counts, to convict him upon the third.

After alluding to the fact that the Appellate Divisional Court had in the *Stark case* (1) declined to follow the judgment of the Court of Appeal for Saskatchewan in *R.* v. *Forseille* (2), Orde, J. A., proceeds:

It may be difficult to understand how upon the evidence in a particular case a jury could come to the conclusion that the accused had by his negligence done bodily harm to another and at the same time acquit him of manslaughter. But it is not open to us in my opinion to approach the matter in that way. The question is one of law simply, and I can see no legal reason for saying that a verdict of guilty of doing bodily harm is bad because upon the same state of facts the Appellate Court, not the jury, thinks it ought to have convicted the accused of manslaughter.

The relevant provisions of the *Criminal Code* are as follows:

856. Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in form 63, or to the like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined.

857. When there are more counts than one in an indictment each count may be treated as a separate indictment.

2. If the court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately: Provided that, unless there be special reasons, no order shall be made preventing the trial at the same time of any number of distinct charges of theft, not exceeding three, alleged to have been committed within six months from the first to the last of such offences, whether against the same person or not.

898. Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards, except by leave of the court or judge before whom the trial takes place, and every court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.

2. No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

907. On the trial of an issue on a plea of *autrefois acquit* or *autrefois convict* to any count or counts, if it appear that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that he

(1) (1927) 60 Ont. L.R. 375.

(2) (1920) 35 Can. Crim. Cas. 171.

1928

BARTON
v.
THE KING.

might on the former trial, if all proper amendments had been made which might then have been made, have been convicted of all the offences of which he may be convicted on the count or counts to which such plea is pleaded, the court shall give judgment that he be discharged from such count or counts.

2. If it appear that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of some offence or offences of which he could not have been convicted on the former trial, the court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged.

951. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

2. On a count charging murder, if the evidence proves manslaughter but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence.

S. W. Springsteen for the appellant.

E. Bayly, K.C., for the respondent.

After hearing counsel for the appellant and the Court having retired for consideration of his argument, the Chief Justice, without calling on counsel for the respondent, announced that a majority of the Court was of the opinion that the appeal failed and should be dismissed.

Subsequently the following reasons for judgment were delivered.

The judgment of the majority of the Court (Anglin C. J. C. and Duff, Newcombe and Rinfret JJ.) was delivered by

ANGLIN, C. J.C.—The only question open on this appeal is whether in law it was competent to the jury to convict the accused on the third count of the indictment while finding him not guilty on the first and second counts. No ground of appeal involving a question of fact, or mixed fact and law can be considered here (s. 1023, Cr. C.). Whatever the evidence may disclose, all findings or intendments of fact necessary to support the verdict must now be made. Thus, it must be assumed that the jury, while it found that the evidence established beyond reasonable doubt that the accused while

having charge of a motor vehicle, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, did cause or caused to be done, bodily harm to one Albert J. Strockean, contrary to Section 285 of the Criminal Code.

nevertheless deemed such evidence insufficient to warrant a finding that some other elements or ingredients necessary to constitute either of the offences charged in the two other counts of the indictment, on which they returned a verdict of not guilty, were also proven. Especially must this be the case when, as here, the trial judge had correctly instructed the jury as to what constituted each of the two offences of which they acquitted the accused.

While, sitting here and considering the evidence as reported, we may find it difficult to appreciate how the jury, finding that the accused by doing an unlawful act had caused bodily harm to Strockean, could, death having ensued, acquit him of manslaughter, we cannot give effect to such a view without invading the realm of fact, which is closed to us by the statute.

Having regard to the provisions of s. 856 of the *Criminal Code,* and notably to the proviso thereto, it was, in our opinion, clearly permissible for the Crown to join counts nos. 2 and 3 to the first count charging manslaughter. Whether the three counts should be tried together was in the discretion of the trial judge (s. 857, Cr.C.).

Under s. 951, had the accused been charged only with manslaughter, but so described as to include the offences charged in counts nos. 2 and 3 of the indictment now before us, he could properly have been convicted of either of these latter offences as "other offences" the commission of which was included in the offence "as charged in the count," if, in the opinion of the jury, "the whole offence charged was not proved." If *R.* v. *Shea* (1), implies the contrary, that decision cannot be supported. In a case such as that at bar, that the jury had found that neither the whole offence charged in count no. 1 nor the whole offence charged in count no. 2 had been proved, is an intendment which we must make in support of the verdict. Moreover, had the accused been tried on an indictment framed as above indicated though charging manslaughter only, and been acquitted, and had he been sub-

(1) (1909) 14 Can. Cr. Cas. 319.

1928

BARTON v. THE KING.

Anglin C.J.C.

sequently charged upon the same facts with either of the offences set forth in the second and third counts, he could successfully have pleaded *autrefois acquit* (s. 907 (2), Cr. C.). No harm can result from the indictment expressly charging the two lesser offences set forth in the second and third counts respectively, of either of which the jury might have convicted the accused upon an indictment charging manslaughter only, but so describing that offence as to include such lesser offences. Moreover, any objection to the indictment on the ground of the unlawful inclusion in it of counts nos. 2 and 3, if tenable, should have been the subject of a demurrer or motion to quash the indictment under s. 898 of the Code.

Whatever may be the powers of the provincial appellate courts in that regard, it is not open to this court to consider the evidence for the purpose of determining whether upon it the jury, as reasonable men, could have negatived the existence of any element necessary to constitute the offence of manslaughter, or the offence charged in the second count, consistently with their finding of guilty on the third count. It is clearly impossible to say as a matter of law that in no case where manslaughter is charged can a jury convict of some lesser offence included in that charge as laid, or that an indictment may not contain counts charging such lesser offences as well as the offence of manslaughter, which the evidence may not prove. It was within the province of the jury to find that the offence charged in the third count was satisfactorily proven, but that, for reasons which we can only surmise and as to the validity or the adequacy of which we are not at liberty to inquire, some essential element of each of the offences charged in the first and second counts respectively was, in their view, not established beyond reasonable doubt.

SMITH J. (dissenting).—With great respect I differ from the view expressed by the Chief Justice in this case. I am in accord with the view taken in the unanimous judgment of the Court of Appeal for Saskatchewan in *Rex* v. *Forseille* (1), and by Mr. Justice Middleton in this case. Where the death of a person is caused by the criminal negligence of another, the crime is manslaughter. Sections

(1) (1920) 35 Can. Cr. Cas. 171.

284 and 285 have no application, in my opinion, in such a case, as they are only applicable where the injuries have not caused death. Where injuries are caused by the accused to a deceased person (as has been found here), and these injuries have caused the death, as was unquestionably the case here, I agree with the Court of Appeal for Saskatchewan, and Mr. Justice Middleton, that counts under sections 284 and 285 should not be allowed to go to the jury.

In such case an acquittal on the charge of manslaughter is necessarily a finding that there was no criminal negligence, which negligence is necessary to constitute a crime under sections 284 and 285. It is, in my opinion, not proper in such a case to endeavour to entice a jury to convict the accused by presenting to it an option to convict of a lesser offence, not warranted by the facts, because it may be thought more easy to get a conviction for such lesser offence. It is an invitation to the jury to stultify themselves as the jury in this case has done, by first finding that the accused was not guilty of criminal negligence, and then that he was so guilty. It is said that the jury may have concluded that the injuries did not cause the death. If they made such a finding, it was contrary to all the evidence, and should be set aside.

The jury concluded that the accused was guilty of criminal negligence, and, had it not been for the holding up to them of the option of convicting either for the real crime or a lesser crime, they would in all probability have convicted for the real crime. At all events the crime committed by the accused, if any, was manslaughter and nothing else, and he was entitled to a trial and a verdict on that charge, untrammelled by the introduction of minor charges of which he could not, in my opinion, be properly convicted on the facts.

In submitting a count for the lesser offence to the jury in such a case, the prosecution is in effect saying to the jury, "The accused is first charged with having, through criminal negligence, killed the deceased, which is the very serious crime of manslaughter, of which you may not be inclined to convict him. There is, however, a less serious offence charged, which has nothing to do with the killing of the deceased. Under that count the only question is, did the accused, by criminal negligence in driving his auto-

1928

BARTON v. THE KING.

Smith J.

mobile, inflict bodily harm on the deceased? If you conclude that he did, you may disregard the killing altogether, and convict him of the minor offence under this count."

Where there is a real question as to whether or not the injuries inflicted by the accused caused the death, the case is entirely different, and the alternative counts are quite proper. In that case it would be the duty of the trial judge to tell the jury that if they found criminal negligence, they must then find whether or not death resulted from the injuries inflicted by the accused, and that if they should find that death did result from these injuries, they must convict of manslaughter, but if they should find that death did not result from this cause, they should convict of an offence under s. 284 or s. 285.

Appeal dismissed.

Solicitors for the appellant: *McTague, Clark & Racine.*

Solicitor for the respondent: *W. H. Price.*

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*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

(1) (1927) 33 Ont. W.N. 79 (correction note, 33 Ont. W.N. 133).