KENNETH GREEN AND GEORGE CONSTANTINE ..... } APPELLANTS;

1947

*May 27
*June 18

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal Law—Speedy Trials of Indictable Offences by County Court Judge—Several Charges—Mixing Trials—Refusal to hear argument and deliver judgment at conclusion of each charge—Criminal Code, ss. 838, 839 and 857 (2).

The accused, appellants, were charged on a number of counts on which, following a preliminary hearing, they elected speedy trial under Part XVIII of the Criminal Code, R.S.C. 1927, c. 36. The crimes charged fell into four groups. Those in the first group arose out of the breaking and entering of premises in the township of York on the 23rd August 1945; in the second, out of an armed robbery in the city of Hamilton on the 26th August 1945; in the third, out of an armed robbery in the city of Toronto on the 16th September 1945; and in the fourth, out of an armed robbery in the city of Stratford on the 12th October 1945.

As to the first group, both the appellants and one Dobbie were jointly charged on counts 1, 2 and 3. As to the second, the appellant Green alone was charged on count 7 and 8. As to the third, the appellant Constantine and one Hiscox were jointly charged on counts 4 and 5, and as to the fourth, both appellants were charged on count 6.

The accused Dobbie did not appear for trial.

*PRESENT: Rinfret C.J., and Kerwin, Taschereau, Kellock and Estey JJ.

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Counsel for the accused at the opening of the trial, requested that each charge be tried separately, but acceded to the suggestion of the Court, that those offences which arose out of the same set of circumstances should be tried together. The trial of the appellants on counts 1, 2 and 3 was then proceeded with, and when all the evidence had been heard, counsel for the accused, asked the Court to hear argument and deliver judgment before proceeding to hear the evidence on any of the other counts. The trial judge refused and stated that he would hear the evidence on all the charges and then give counsel an opportunity to present argument on all of them before he would deliver judgment. All the evidence was then heard on count 6, then on counts 7 and 8 and finally on counts 4 and 5.

At the conclusion of all the evidence on all the charges, the trial judge heard argument on all the charges and then reserved judgment. Four days later he delivered judgment and found the appellants guilty on counts 1, 3 and 6 and not guilty on count 2; the appellant Green guilty on counts 7 and 8; the appellant Constantine and the accused Hiscox not guilty on counts 4 and 5, and sentenced the appellants to 14 years imprisonment on each charge, sentences to be concurrent.

On appeal to the Court of Appeal for Ontario, the convictions on counts 1 and 3 were quashed and a new trial directed, but the appeal against the conviction of the appellants on count 6, and that of the appellant Green on counts 7 and 8 were dismissed.

It was contended on appeal to the Appeal Court of Ontario, that the trial judge erred in mixing the trials by refusing to hear argument and deliver judgment at the conclusion of the evidence on each charge or group of charges, where two or more were tried together; and by reserving judgment until he had heard all the evidence on all the charges.

This submission was not accepted by the appellate court, who followed its own previous decision in *Rex* v. *Bullock* (1); that decision being in conflict with the decision of the Court of Appeal of Nova Scotia in *The Queen* v. *McBerney* (2), application to appeal to this Court was granted under section 1025 of the *Criminal Code*.

Held, affirming the judgment of the Court of Appeal for Ontario, [1947] O.R. 264; [1947] O.W.N. 325; [1947] 3 D.L.R. 32, the appeal should be dismissed. Nothing should detract from the salutary rule that everything should be done to avoid even the appearance of prejudice in the mind of the convicting judge against the prisoner arising out of facts developed in a later prosecution, and, therefore the ordinary practice should be followed that one case should be disposed of, so far as the verdict is concerned, before entering upon the consideration of another. Irrespective of s. 838 of the *Criminal Code*, by which the judge may adjourn the hearing, it should not be laid down (as a rule of law) that a judge must acquit or convict in all cases before proceeding with another charge against the same accused; or must announce his decision on one count against two accused before proceeding with the trial of one of them on other counts. There may be cases where it is necessary to do so because an accused might, on the

(1) 6 O.L.R. 663; 8 Can. Cr. Cas. 8.

(2) 29 N.S.R. 327; (1897) 3 Can. Cr. Cas. 339.

subsequent trial, plead autre fois acquit or autre fois convict, and in no case may a judge convict a person on one charge by reason of evidence heard on the trial of another charge but, if it appears that these rules have not been infringed, then the convictions should not be set aside.

The joinder in a single charge sheet of several counts on which an accused has been committed for trial on a single information is permitted, *The King* v. *Deur* [1944] S.C.R. 435 and by section 857 (2) of the *Criminal Code,* which appears in Part XIX but which, by section 839, is made applicable to the formal statement and trial under Part XVIII, the Court, if it thinks it conducive to the ends of justice to do so, may direct that the accused shall be tried upon any one or more of such counts separately, subject to the proviso therein expressed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) insofar as that judgment affirmed convictions of the appellants on charges of armed robbery by his Honour Judge Parker sitting in the County Judges' Criminal Court of the County of York at the City of Toronto.

Gordon W. Ford and *Charles L. Dubbin* for the appellants.

W. B. Common, K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.—Leave to appeal from a decision of the Court of Appeal for Ontario was granted on the ground that it conflicted with the judgment of the Supreme Court of Nova Scotia en banco in *The Queen* v. *McBerny* (2). That case decided that where a judge tries a charge without a jury under the Speedy Trials clauses of the *Criminal Code,* it is not competent for him to postpone his decision on a first charge against an accused until he has heard the evidence on several other charges against the same party and to then decide the question of guilt in all. In the judgment appealed from, the matter is treated as one for consideration in each particular case and not as a rule of law of general application.

(1) [1947] O.R. 264; [1947] 3 D.L.R. 32.
(2) 29 N.S.R. 327; (1897) 3 Can. Cr. Cas. 339.

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Of the other decision referred to, *Hamilton* v. *Walker* (1) was distinguished in the subsequent case of *Regina* v. *Fry* (2) where it appeared from an affidavit filed on behalf of the justices that in adjudicating in each of several cases tried before them they applied to that case the evidence given in reference to it and no other, and that the evidence given in the second case in no way influenced their decision on the first. The decision of the Court of Appeal for Ontario in *Rex* v. *Bullock* (3) followed the *Fry* case. The British Columbia Court of Appeal in *The King* v. *Iman Din* (4), divided equally on the question.

Nothing should detract from the salutary rule that everything should be done to avoid even the appearance of prejudice in the mind of the convicting judge against the prisoner arising out of facts developed in a later prosecution, and, therefore, the ordinary practice should be followed that one case should be disposed of, so far as the verdict is concerned, before entering upon the consideration of another. I do not attach any importance to section 838 of the Code by which the judge may adjourn the hearing. Irrespective of that section, it should not be laid down that a judge must acquit or convict in all cases before proceeding with the trial of another charge against the same accused, or as in the case before us, announce his decision on one count against two accused before proceeding with the trial of one of them on other counts. There may be cases where it is necessary to do so because an accused might, on the subsequent trial, plead autrefois acquit or autrefois convict, and in no case may a judge convict a person on one charge by reason of evidence heard on the trial of another charge but, if it appears that these rules have not been infringed, then the convictions should not be set aside. It is not without importance in disposing of the matter to bear in mind that the joinder in a single charge sheet of several counts on which an accused has been committed for trial on a single information is permitted: *The King* v. *Deur* (5) and that by section 857 (2), which appears in Part XIX

(1) [1892] 2 Q.B. 25; 56 J.P. 583; 67 L.J. 135.
(2) (1898) 19 Cox C.C. 135.
(3) 6 O.L.R. 663; 8 Can. Cr. Cas. 8.
(4) 18 Can. Cr. Cas. 82.
(5) [1944] S.C.R. 435.

but which, by section 839, is made applicable to the formal statement and trial under Part XVIII, the Court, if it thinks it conducive to the ends of justice to do so, may direct that the accused shall be tried upon any one or more of such counts separately,—subject, of course to the proviso therein expressed.

In view of the evidence given in connection with counts 6, 7 and 8 and the reasons of the trial judge, the rules set out above have not been violated and the appeals should, therefore, be dismissed.

Appeal dismissed.

Solicitor for the appellant Green: *Joseph Sedgwick.*

Solicitor for the appellant Constantine: *Kimber & Dubbin.*