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*Mar. 26
*Apr. 24

JOHN SCULLION ..... APPELLANT;

AND

CANADIAN BREWERIES TRANSPORT LIMITED ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Whether informant entitled to appeal to Court of Appeal on stated case in summary proceedings—Public Commercial Vehicles Act, R.S.O. 1950, c. 304—Summary Convictions Act, R.S.O. 1950, c. 379, s. 3—Criminal Code, s. 769A.

An informant has the right under s. 769A of the *Criminal Code,* (R.S.C. 1927, c. 36 as enacted by S. of C. 1947-48, c. 39, s. 34), to appeal to the Court of Appeal for Ontario from the judgment of a Justice of the Supreme Court of Ontario hearing an appeal by way of a stated case in proceedings under the *Summary Convictions Act,* R.S.O. 1950, c. 379, on grounds involving a question of law alone.

APPEAL from the judgment of the Court of Appeal for Ontario (1), quashing an appeal by an informant from the judgment of the Supreme Court of Ontario in a stated case.

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

J. Sedgwick, Q.C. for the respondent.

The judgment of Kerwin C.J., Taschereau, Fauteux and Abbott JJ. was delivered by:—

FAUTEUX J.:—The respondent company was, in February 1954, convicted by a magistrate of an offence under the *Public Commercial Vehicles Act,* R.S.O. 1950, c. 304; and this conviction, having been questioned on a stated case, was quashed by Stewart J. in chambers. Thereupon, the informant obtained leave to appeal to the Court of Appeal for Ontario which followed its recent decisions in *Regina ex rel. Morrison* v. *Canadian Acme Screw and Gear Limited* (2), and *Regina ex rel. Irwin* v. *Duesling* (3), and dismissed the appeal (1). Hence the appeal to this Court, leave being granted under s. 41 of the *Supreme Court Act,* on the following question of law:—

> Did the Court of Appeal for Ontario err in law in holding that it had no jurisdiction to entertain an appeal by an informant from the judgment of a Justice of the Supreme Court hearing an appeal by way of stated case in a summary conviction matter?

The prosecution was taken under the provisions of the *Ontario Summary Convictions Act,* R.S.O. 1950, c. 379, s. 3(1) of which enacts:—

> Except where inconsistent with this Act, Part XV and sections 1028, 1029, 1035A, 1054, 1055, 1121, 1124, 1125, 1131 and 1142 of the *Criminal Code* (Canada) as amended or re-enacted from time to time, shall apply *mutatis mutandis* to every case to which this Act applies as if the provisions thereof were enacted in and formed part of this Act.

Under Part XV of the *Criminal Code,* a decision rendered in first instance may be questioned by means of a trial *de novo* (s. 749 to s. 761), as was the situation in the cases above referred to, or by means of a stated case (s. 761 to s. 769A), as in the present instance; and the decision

(1) 112 C.C.C. 274. (2) [1955] O.R. 513.
(3) [1955] O.W.N. 588.

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rendered, upon either one of such modes of appeal may itself be brought for revision under section 769A(1) providing:—

(1) An appeal to the Court of Appeal, as defined in s. 1012 against any decision of the Court under the provisions of s. 752 or s. 765 with leave of the Court of Appeal or a Judge thereof, may be taken on any ground which involves a question of law alone. (1948, ch. 39, s. 34).

(2) The provisions of sections 1012 to 1021, inclusive, shall *mutatis mutandis* insofar as the same are applicable, apply to an appeal under this section. (1948, ch. 39, s. 34).

(3) The decision of the Court of Appeal shall have the same effect and may be enforced in the same manner as if it had been made by a Justice at the hearing. (1948, ch. 39, s. 34).

No one disputes that a right of appeal, particularly against an acquittal, must be given in clear, express and unambiguous language. The only issue, in the premises, is whether, contrary to what was decided in the Court below, the provisions of s. 769A meet with this requirement.

Sub-section (1). As is the case under s. 41(1) of the *Supreme Court Act,* and as was also the case in the much more general terms of the enactment considered, in the House of Lords, in *Cox* v. *Hakes* (1), the formula, here adopted by Parliament to give a right to appeal against any of the decisions of the nature therein specified, says nothing in terms as to whom this new right is given. Such general language is not apt, *per se,* to justify the inference of any limitation such as the one contended for by respondent. On the contrary and evidently because no limitation was intended, nothing was said. Nothing more needed to be said to vest the "prosecutor or complainant as well as the defendant" with this new right of appeal when, under the then state of the law, they were equally entitled by s. 749 or s. 761 to seek, in an appeal against the judgment of a magistrate, a decision under s. 752 or s. 765, henceforth made appealable under sub-section (1) of section 769A. The appeal is clearly against the decision, whatever it may be and whoever in the case may have cause to complain.

Sub-section (2). To give effect to, but not to affect, this new right of appeal, comprehensively stated in (1), Parliament adopted by reference the procedure already established under sections 1012 to 1021 inclusive, "*mutatis mutandis* insofar as applicable". The latter expressions are not in any way related to the right of appeal fully

(1) [1890] A.C. 506.

stated in (1), but only to the method by which such right may be perfected. They imply an obligation to make, to such of the provisions of sections 1012 to 1021 inclusive as may be apt to effectuate the true purpose of the section, such changes—material as they may be—not inconsistent with the provisions of the section. It appears that in considering this particular sub-section, the Court below formed the view that section 769A, read together with s. 1013(4), does not provide for an appeal by the informant against an acquittal. Section 1013(4) gives to the Attorney-General—and not to "the prosecutor or complainant", whose status as party to the case has long been lost at that stage of the procedure by indictment—a right to appeal against any judgment or verdict of acquittal in respect of an indictable offence. With deference, I cannot agree with these views. In reaching them, no sufficient account appears to have been taken of the fact that the right of appeal under s. 769A is fully stated under sub-section (1) and unqualified by sub-section (2); and, in the result, proper and full effect was not given to the expressions "*mutatis mutandis* and insofar as applicable". Properly and fully implemented, these expressions are as apt to justify, in s. 1013(4), a substitution of the words "the prosecutor or complainant" to the words "the Attorney-General" as they are recognized to be, for the substitution of the word "offence" simpliciter to the words "indictable offence" appearing in the same provision. As stated, in part, by Roach J.A. when granting leave to appeal in *Regina ex rel. Morrison* v. *Canadian Acme Screw and Gear Limited* (1):

> . . . where the parties to the appeal . . . are the complainant and the accused, the complainant, as well as the accused, has a further right of appeal, by leave, to the Court of Appeal, and subs. 2 of s. 769A has not the effect of preserving that right of the accused and destroying the otherwise equal right of the complainant.

Sub-section (3). The sub-section states the effect of the decision rendered in an appeal under s. 769A and provides for the method of its enforcement. Its language has no bearing upon the construction of sub-section (1) wherein the right of appeal is comprehensively established. For this reason, the decision in *Cox* v. *Hakes* (*supra*), while of assistance insofar as general principles are concerned, has no application here.

(1) [1955] O.W.N. 153 at 157.

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The only question of law upon which leave was granted to this Court must be affirmatively answered. The appeal should be allowed and the case returned for consideration to the Court of Appeal for Ontario.

The judgment of Rand and Kellock JJ. was delivered by:—

KELLOCK J.:—The respondent was convicted of operating a public commercial vehicle without a licence contrary to the *Public Commercial Vehicles Act,* R.S.O. 1950, c. 304, s. 2(1). This conviction was made in summary proceedings under the provisions of the *Summary Convictions Act,* R.S.O. 1950, c. 379. Section 3, s-s. (1) of this statute provides that, except where inconsistent with the statute, Part XV and certain named sections of the *Criminal Code* shall apply *mutatis mutandis.* S-s. (2) provides that where a case is stated under Part XV of the *Criminal Code,* it shall be heard and determined by a judge of the Supreme Court in chambers.

Stewart J., who heard the appeal by way of stated case, allowed the appeal and quashed the conviction. The appellant, having obtained leave, launched an appeal to the Court of Appeal (1) under s. 769A of the *Criminal Code* enacted by 1948, c. 39, s. 34, Canada. That court, however, quashed the appeal upon the ground that the section did not give any right of appeal to a private prosecutor such as the appellant.

In this decision the court followed its earlier decisions in *Regina ex rel. Morrison* v. *Canadian Acme Screw and Gear, Limited* (2) and *Regina ex rel. Irwin* v. *Duesling* (3), the latter having been based upon the former. The present appeal is in reality, therefore, an appeal from the decision in *Morrison's* case. Before considering that decision, it will be convenient to consider the relevant provisions of Part XV of the *Criminal Code* before the new *Code* of 1955.

Upon its conviction two remedies by way of appeal were open to the respondent, one under s. 749 to the County Court Judge, and the other, which was in fact followed, by

(1) 112 C.C.C. 274. (2) [1955] O.W.N. 479.
(3) [1955] O.W.N. 588.

way of stated case to a judge of the Supreme Court under s. 761. The right of appeal given by s. 749 is expressly conferred upon

> any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant.

Again, in the case of s. 761, "any person aggrieved, the prosecutor or complainant as well as the defendant" may appeal.

In the case of an appeal under s. 749, it is provided by s. 754 that the judge "may confirm, reverse or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just." In the case of an appeal by way of stated case under s. 761, it is provided by s. 765 that the court appealed to "shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination in respect of which the case has been stated." The section also provided that any order so made "shall be final and conclusive upon all parties."

By sections 31 and 32 of the amending statute of 1948, s-s. (1) of s. 752 and s-s. (1) of s. 765 were amended to bring them into accord with the new s. 769A, which was enacted by s. 34, s-s. (1) reading as follows:

> 769A. (1) An appeal to the Court of Appeal, as defined in section one thousand and twelve, against *any* decision of the court under the provisions of section seven hundred and fifty-two or section seven hundred and sixty-five with leave of the Court of Appeal or a judge thereof may be taken on any ground which involves a question of law alone.

As the right of appeal thus given is against *any* decision made under s. 752 or s. 765, such right is plainly conferred upon the person who was unsuccessful below, whether he was a person convicted or the complainant.

In *Morrison's* case, Schroeder J.A., who delivered the judgment on behalf of the court, would appear to have based his decision upon what he considered to be the effect of s-s. (2) of s. 769A, which reads as follows:

> (2) The provisions of sections one thousand and twelve to one thousand and twenty-one, inclusive, shall *mutatis mutandis* in so far as the same are applicable, apply to an appeal under this section.

After pointing out that, historically, appeals in criminal cases had long been confined to convicted persons and to the well settled principle of statutory construction that in

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order to establish any other right of appeal it is necessary to find clear and unambiguous language to that effect, the learned judge considered that, as s. 1013 (1) is expressly limited to an appeal by a convicted person and that the only right of appeal against an acquittal given by s-s. (4) is limited to a provincial Attorney-General, the learned judge concluded that he must construe s. 769A as providing no appeal in favour of a private prosecutor.

The view of the learned judge sufficiently appears from the following extract from his judgment, where, at p. 521, he deals with the contrary view:

> To give effect to this contention would be to ignore the fact that s. 1013 is incorporated by reference into s. 769A, and although other sections so incorporated are procedural, s. 1013 is clearly substantive in character. It provides who shall have a right of appeal in the case of an indictable offence, and by incorporating it into s. 769A it provides who shall have the right of appeal by leave conferred by s. 769A. The last mentioned section does not.

While no doubt the provisions of s. 1013 are *mutatis mutandis* incorporated into s. 769A, such incorporation is to be, however, only "in so far as the same are applicable" and it cannot be said that any provisions of ss. 1012 to 1021 can be considered "applicable" if to apply them would contradict the right of appeal expressly given by s-s. (1).

In my opinion, therefore, the Court of Appeal is clothed with jurisdiction to entertain an appeal of the character of that here in question. This accords with the view expressed by Roach J. on the application for leave to appeal in *Morrison's* case (1).

I would allow the appeal and remit the matter to the Court of Appeal for a decision upon the merits.

LOCKE J.:—The respondent was convicted by a magistrate at Chatham, Ont. of a charge of operating a public commercial vehicle without a licence, contrary to the provisions of the *Public Commercial Vehicles Act* (R.S.O. 1950, c. 304, s. 2(1)).

The *Summary Convictions Act* (R.S.O. 1950, c. 379) provides by s. 3 that, except where inconsistent with that Act, Part XV of the *Criminal Code,* as amended or reenacted

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from time to time, shall apply *mutatis mutandis* to every case to which the Act applies as if the provisions thereof were enacted in and formed part of it.

Upon the application of the respondent, the magistrate, after reciting the terms of the conviction, stated the following question for the opinion of a judge of the Supreme Court:—

> On the facts as stated, was I right in holding that the defendant was not, as a matter of law, exempted from the provisions of *The Public Commercial Vehicles Act* by reason of the fact that it, being a wholly owned subsidiary of Canadian Breweries Ltd., carried goods only for other wholly owned subsidiaries of Canadian Breweries Ltd.?

The stated case was heard by Stewart J. who answered the question propounded in the negative and quashed the conviction, acquitted the respondent of the charge and directed that the fine imposed be remitted.

From this decision the present appellant appealed to the Court of Appeal, relying upon the provisions of s. 769A of the *Criminal Code*. I refer throughout to the sections of the Code in force prior to April 1, 1955. That appeal was quashed by a judgment of the Court of Appeal delivered by the Chief Justice of Ontario on the ground that the court was without jurisdiction to entertain it.

By special leave of this court, the present appeal was brought to determine the following question:—

> Did the Court of Appeal for Ontario err in law in holding that it had no jurisdiction to entertain an appeal by an informant from the judgment of a Justice of the Supreme Court hearing an appeal by way of stated case in a summary conviction matter?

In *Reg. ex rel Morrison* v. *Canadian Acme Screw and Gear Ltd.* (1), the Court of Appeal of Ontario quashed an appeal taken to that court from the judgment of a county court judge on an appeal from a magistrate under Part XV of the *Code* which resulted in the acquittal of the accused. That decision was followed by the same court in *Reg. ex rel Irwin* v. *Duesling* (2). While the appeal in the present matter was taken from a judgment of a judge of the Supreme Court upon a stated case, the learned Chief Justice of Ontario was of the opinion that there was no distinction in the principles to be applied.

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The *Criminal Code* provides alternative means whereby a conviction such as this under the *Summary Convictions Act* may be questioned. S. 749 provides in the Province of Ontario for an appeal to the County Court from a conviction or an order dismissing an information or complaint by:—

> any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant as well as the defendant.

S. 761 under which the case was stated in the present matter provides that:—

> any person aggrieved, the prosecutor or complainant as well as the defendant who desires to question a conviction, order, determination or other proceeding of a justice under this Part on the ground that it is erroneous in point of law

may apply to such justice to state a case, setting forth the facts and the grounds on which the proceeding is questioned.

S. 769A, so far as it need be considered, reads:—

> (1) An appeal to the Court of Appeal, as defined in section one thousand and twelve, against any decision of the court under the provisions of section seven hundred and fifty-two or section seven hundred and sixty-five with leave of the Court of Appeal or a judge thereof may be taken on any ground which involves a question of law alone.
>
> (2) The provisions of sections one thousand and twelve to one thousand and twenty-one, inclusive, shall *mutatis mutandis* in so far as the same are applicable, apply to an appeal under this section.

This section, enacted in 1948 (c. 39, s. 34), replaced s. 752A, enacted in 1947, which permitted a further appeal in appeals arising under ss. 749 et seq. but did not deal with decisions upon stated cases.

Unlike s. 749, which permits in terms an appeal either from a conviction or an order dismissing an information, and s. 761, which permits either the prosecutor or complainant as well as the defendant who desire to question a conviction, order, determination or other proceeding under Part XV, to apply to the Justice to state a case, s. 769A merely says that an appeal to the Court of Appeal against *any decision of the court* may be taken.

It is an elementary principle of the law that an acquittal by a court of competent jurisdiction, acting within its jurisdiction, cannot as a rule be questioned and brought before any other court. In *Benson* v. *Northern Ireland Road Transport Board* (1), Lord Simon said that very

(1) [1942] A.C. 520.

clear statutory language by way of exception to the general rule would be required to establish a right of appeal from a decision dismissing a criminal charge. The question to be determined is whether s. 769A fulfils these requirements.

When the *Criminal Code* was first enacted in 1892, it provided certain exceptions to the general rule above referred to. Ss. 879 and 900 of the *Code,* as then enacted, permitted the propriety of an acquittal to be questioned, either by an appeal or by a stated case. With amendments which do not affect the present consideration, these sections were enacted as ss. 749 and 761 in the revisions of the statutes of 1906 and 1927. No further appeal lay until the amendments of 1947 and 1948 above referred to.

It is not my opinion that the decisions in *Benson's Case* or in *Cox* v. *Hakes* (1), referred to by Lord Simon, are decisive of the question. If the point was, as in *Benson's Case,* whether an appeal lay under a section worded as is the first subsection of s. 759A from a court of first instance such as a magistrate's court, I think that, on the authority of that case, there could be no appeal from an acquittal. The situation here, however, seems to me to be essentially different. Parliament has, in clear and unmistakable terms, provided for an appeal from an acquittal by s. 749 and for what is in essence an appeal by the provisions of s. 761. The common law rule is abrogated by these sections. The decision of the court whether proceedings are taken under s. 749 or s. 761 may be, *inter alia,* either to affirm a conviction or to acquit the accused. The appeal provided by s-s. 1 of s. 769A is against any decision of the court: that this includes a decision acquitting the accused appears to me to be perfectly clear. This is, in my view, statutory language which complies with the requirements stated by Lord Simon. It is not the language of s-s. 1 which establishes the exception to the general rule that a man shall not be vexed twice for the same wrong: the exceptions to that rule were already provided for in ss. 749 and 761.

As to s-s. 2 of s. 769A, counsel for the Crown contends that this neither adds to or limits the meaning to be assigned to s-s. 1. In *Reg. ex rel. Irwin* v. *Duesling* (2), Pickup C.J.O., referring to this subsection, said that he did

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not consider that s-s. 4 of s. 1013 could be said to be applicable to a summary conviction proceeding at the instance of a private prosecutor. With this I respectfully agree. None of the other sections of the *Code* referred to in s-s. 2 can affect the matter to be decided here.

I would allow this appeal.

Appeal allowed.

Solicitor for the appellant: *C. P. Hope.*

Solicitor for the respondent: *J. Sedgwick.*

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*PRESENT: Rand, Kellock, Locke, Cartwright and Abbott JJ.