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HER MAJESTY THE QUEEN .....APPELLANT;

AND

RAYMOND JOHN DENNIS .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Summary conviction—Plea of guilty—Whether right to appeal—Conditions precedent for appeal—Whether accused bound by plea on trial de novo—Whether right to appeal to Court of Appeal—Criminal Code, 1953-54 (Can.), c. 51, ss. 708, 719, 720, 722(1)(a), 723, 727, 743(1)(a).

The accused pleaded guilty to a charge of impaired driving and was summarily convicted by a magistrate. He appealed to the County Court, and, on preliminary objection taken to the sufficienty of his grounds

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

for appeal, the County Court judge dismissed his appeal without hearing evidence or taking any plea. It was held that the grounds did not disclose a sufficient degree of particularity to comply with s. 722(1)(*a*) of the Code. The Court of Appeal allowed his appeal and referred the matter back to the County Court. The Crown was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

The taking of a plea from the accused forms no part of the hearing of the trial *de novo* by way of appeal from a summary conviction pursuant to s. 727 of the Code. Compliance with s. 722 is all that is required to found jurisdiction. Consequently, the failure of the County Court judge, in this case, to take a plea did not deprive him of jurisdiction. Although an accused, after pleading guilty in the first instance, is bound by such plea in the trial *de novo,* nevertheless he is not debarred from changing his plea upon showing proper grounds for so doing. *Thibodeau v. The Queen,* [1955] S.C.R. 646, applied.

The allegation, made in the present case, that "there was no legal evidence to support the conviction" was a proper and sufficient ground of appeal to comply with s. 722 of the Code on an appeal under that section from a summary conviction.

The accused had a right of appeal to the Court of Appeal when the County Court judge dismissed his appeal, as he did in this case, on preliminary objections, without a trial *de novo,* by virtue of s. 743(1)(*a*).

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Remnant Co. Ct. J. and referring the matter back to the County Court. Appeal dismissed.

J. J. Urie, for the appellant.

R. R. Maitland, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—In the present case the respondent, having been convicted and sentenced under Part XXIV of the *Criminal Code* by W. G. Harris, Esq., a Police Magistrate in and for the District of Powell River, for driving a motor vehicle whilst his ability to do so was impaired, appealed such conviction to the County Court of Vancouver on the following grounds:

1. The said conviction was against the law and the weight of evidence.
2. The said conviction was contrary to law.
3. There was no legal evidence to support the said conviction.

[1] 124 C.C.C. 95, 30 C.R. 339, 28 W W.R. 385.

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Preliminary objection having been taken to the sufficiency of these grounds, the learned County Court judge dismissed the said appeal without hearing evidence or taking any plea, holding that the said grounds did not disclose a sufficient degree of particularity to comply with the requirements of s. 722(1)(*a*) of the *Criminal Code*.

From this decision the respondent gave notice seeking leave to appeal to the Court of Appeal of British Columbia, and upon such leave having been granted the appeal was duly heard and allowed and the matter was referred back to the County Court by order of the said Court of Appeal[1].

From this latter order the appellant sought leave to appeal to this Court, and by order dated June 25, 1959, such leave was granted upon the following grounds:

1. Did the Court of Appeal of British Columbia err in holding that the Notice of Appeal under section 722 of the *Criminal Code* of the respondent from his conviction by the magistrate to the County Court of Vancouver set out the grounds of appeal in sufficient particularity?
2. Did the failure of the County Court to take a plea deprive it of jurisdiction?
3. Was there a right of appeal by the respondent to the Court of Appeal when the County Court had dismissed the appeal to it on preliminary objections without a trial *de novo*?

Although the first of these grounds was virtually abandoned by the appellant at the argument before this Court and counsel for the appellant found himself in agreement with the decision of the Court of Appeal giving a negative answer to the question raised by the second ground, this Court was nonetheless invited to express its views concerning the nature of the right of appeal for which provision is made in ss. 720 to 726 inclusive of the *Criminal Code* and the type of trial contemplated by the provisions of s. 727. It is, therefore, desirable to make some general observations before dealing specifically with the particular questions raised in this appeal.

Section 720 of the *Criminal Code* reads in part as follows:

> Except where otherwise provided by law,
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> (*a*) the defendant in proceedings under this Part may appeal to the appeal court
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> (i) from a conviction or order made against him, or
>
> (ii) against a sentence passed upon him; and

[1] 124 C.C.C. 95, 30 C.R. 339, 28 W.W.R. 385.

(b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court
(i) from an order dismissing an information, or
(ii) against a sentence passed upon a defendant . . . .

The Appeal Court referred to in this section means one of the Courts specified in s. 719. In the case of the Province of British Columbia this means the "County Court of the County in which the cause of the proceedings arose". In my opinion, the provisions of this section, unless cut down by some other provisions of the *Criminal Code,* accord a right of appeal to any "defendant in proceedings under this Part [Part XXIV]" irrespective of the nature of the plea taken in the Court of first instance and limited only by the necessity of complying with the following conditions:

722. (1) Where an appeal is taken under section 720, the appellant shall
(a) prepare a notice of appeal in writing setting forth
(i) with reasonable certainty the conviction or order appealed from or the sentence appealed against, and
(ii) the grounds of appeal; . . . .

As is indicated by Fauteux J., speaking on behalf of the majority of the Court in *Dennis v. The Queen*[1], compliance with these provisions is not only a condition precedent to the exercise of the right of appeal under s. 720 but it is the very foundation upon which the jurisdiction of the Appeal Court must and does rest as can be seen from the opening words of s. 723 which read as follows:

723. (1) Where an appellant has complied with section 722, the appeal court or a judge thereof shall set down the appeal for hearing at a regular or special sittings thereof and the clerk of the appeal court shall post, in a conspicuous place in his office, a notice of every appeal that has been set down for hearing and notice of the time when it will be heard.
(2) No appeal shall be set down for hearing at a time that is less than ten days after the time when service was effected upon the respondent of the notice referred to in paragraph (b) of subsection (1) of section 722, unless the parties or their counsel or agents otherwise agree in writing.

As is noted by Sheppard J.A., in the course of the decision rendered by him on behalf of the Court of Appeal, it is well to appreciate the significance of the last quoted section, requiring as it does that the Appeal Court or a judge thereof "shall set down the appeal for hearing" upon being satisfied that s. 722 has been complied with. Such power to "set down the appeal for hearing" presupposes jurisdiction to hear it

[1] [1958] S.C.R. 473 at 482, 121 C.C.C. 129.

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and in my view compliance with s. 722 is all that is required to found jurisdiction in the Appeal Court and the "plea" which, if it were required, would be taken at a later stage forms no part of the material upon which the jurisdiction of the Court is based.

The nature of the hearing of an appeal under Part XXIV of the *Criminal Code* is described in s. 727 and conflict of opinion has been expressed between the Courts of last resort in some of the provinces of Canada as to the effect of the following provisions of subs. (1) of that section:

> 727. (1) Where an appeal has been lodged in accordance with this Part from a conviction or order made against a defendant, or from an order dismissing an information, the appeal court shall hear and determine the appeal by holding a trial *de novo*, and for this purpose the provisions of sections 701 to 716, insofar as they are not inconsistent with sections 720 to 732, apply, *mutatis mutandis*.

The difficulty which has given rise to much of the conflict is centered about the question of whether the words "appeal by holding a trial *de novo*" are intended to describe "an appeal" in the sense of a review of the proceedings and decision in the Court of first instance as in the case of an appeal to a provincial Court of Appeal from conviction for an indictable offence or whether they are more descriptive of a "new trial" such as that which is held pursuant to order of the Court of Appeal after a conviction has been quashed.

As was said by Hogg J.A. in *R. v. Crawford*[1], the outstanding distinction between the trial *de novo* contemplated by s. 727 and the new trial which may be ordered by the Court of Appeal is that in the latter case the conviction has been *quashed* before the new trial starts whereas in the former the conviction remains outstanding, subject, however, to being reversed by the Appeal Court on evidence called afresh or indeed on entirely new evidence. In the one case, the conviction has gone while in the other it is under review by fresh eyes in the light of fresh evidence.

On the other hand, the distinction between "an appeal by holding a trial *de novo*" and an appeal to the provincial Court of Appeal is that although the object of both is to determine whether the decision appealed from was right or wrong, in the latter case the question is whether it was right

[1] [1955] O.R. 866 at 872, 113 C.C.C. 160.

or wrong having regard to the evidence upon which it was based, whereas in the former the issue is to be determined without any reference, except for purposes of cross-examination, to the evidence called in the Court appealed from and upon a fresh determination based upon evidence called anew and perhaps accompanied by entirely new evidence. It is to be borne in mind, of course, that under the provisions of s. 727(2) the Appeal Court may, under the circumstances therein specified, treat the evidence of any witness in the Court below as having the same force and effect as if the witness had given evidence before the Appeal Court. This can be done by consent of both the appellant and the respondent or if a witness cannot be reasonably obtained or if the evidence is purely formal or the Court is otherwise satisfied that this procedure will not prejudice the opposite party. When this procedure is followed, the evidence so introduced is to be treated by the Court of Appeal in all respects as if it were being actually given for the first time before that Court and all objections are available to either party in the same way that they would be if the evidence was being given *vivâ voce* for the first time.

A further difficulty which has given rise to some conflict is the question of whether the accused should be required to plead at a "trial *de novo*". This difficulty has been occasioned by the fact that s. 708 which in terms requires that the defendant "shall be asked" to plead is included in the group of sections (701 to 716) which apply to a trial *de novo* "insofar as they are not inconsistent with sections 720 to 732" (see s. 722).

While this point is not directly raised in the grounds specified in this appeal, it forms such an integral part of the whole question that it is as well to consider it here.

There can be no trial in the strict sense of that word until issue has been joined and as issue is not joined in a criminal case until the plea is entered the meaning of "trial" as used in the phrase "trial *de novo*" in s. 727 would seem both logically and grammatically to indicate the proceedings after the entry of the plea. This is the meaning which was attributed to its use in the other sections of Part XXIV which were under consideration in *The Queen v. Larson*[1],

[1] [1958] S.C.R. 513 at 516, 121 C.C.C. 204

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per Abbott J., and it should, therefore, be construed as connoting "the hearing alone" exclusive of the plea and arraignment. A consideration of proceedings on trial by jury brings to mind the fact that the trial proper does not start until the accused is given in charge to the jury which stage is, of course, not reached until after the plea has been taken and the adoption of this more restricted meaning of the word "trial" has been widely accepted in our own Courts for many years. See *In re Walsh*[1], approved in *Giroux v. The King*[2], *per* Anglin J., and *Clement v. The Queen*[3]. This is also the effect of what was said by Hogg J.A. in *R. v. Crawford, supra.* That the same connotation of the word "trial" applies to its use in relation to proceedings before a magistrate in England may be seen from the decision of Lord Goddard in *R. v. Craske*[4], and it is also to be noted that the plea is not required when a new trial is held on appeal from a conviction of an indictable offence. See *Welch v. The King*[5], *per* Fauteux J.

This interpretation is borne out by a consideration of the anomaly which would be created if an accused were *required* to plead to a charge in respect of which he had already been convicted in the course of a proceeding taken for the purpose of bringing such conviction into question and throughout the whole of which the conviction entered upon the earlier plea remains outstanding. These considerations seem to indicate that the procedure for taking a plea which is outlined in s. 708 is indeed inconsistent with the provisions of s. 727 and, therefore, inapplicable to the hearing for which provision is made in the latter section. This does not mean that an accused who has pleaded guilty in the Court of first instance is debarred from changing his plea upon showing proper grounds for so doing. He stands before the Appeal Court in exactly the same position procedurally as he stood before the magistrate after having made his plea and he may be allowed to change that plea. See *Thibodeau v. The Queen*[6], *per* Cartwright J. at 653 and Fauteux J. at 657.

[1] (1914), 48 N.S.R. 1 at 13, 23 C.C.C. 7, 16 D.L.R. 500.
[2] (1917), 56 S.C.R. 63 at 77, 29 C.C.C. 258, 39 D.L.R. 190.
[3] (1955), 22 C.R. 290, [1955] Que. Q.B. 580.
[4] [1957] 3 W.L.R. 308 at 312.
[5] [1950] S.C.R. 412 at 427, 97 C.C.C. 177, 3 D.L.R. 641.
[6] [1955] S.C.R. 646.

As to the first ground of appeal specified in the order granting leave to appeal to this Court, counsel for the appellant stated during the argument that after more mature consideration he had concluded, with respect to this ground, that the third ground of the respondent's original notice of appeal to the County Court was a proper one, namely, "There was no legal evidence to support the conviction". I am in entire agreement with this conclusion as were the learned judges of the Court of Appeal of British Columbia and no further comment is necessary on this phase of the matter in this case.

The second ground of appeal to this Court, "Did the failure of the County Court to take a plea deprive it of jurisdiction?" is in somewhat the same category as the first because in this regard counsel for the appellant agrees with the conclusion reached by the learned judges of the Court of Appeal with which conclusions, as can be seen, I am also in agreement for the reasons above stated which are substantially the same as those expressed by Sheppard J.A., speaking on behalf of the majority of that Court.

The third ground of appeal was fully argued and involves a consideration of the meaning to be attached to the words used in s. 743(1)(*a*) of the *Criminal Code*. These words are:

> 743. (1) An appeal to the court of appeal, as defined in section 581 may, with leave of that court, be taken on any ground that involves a question of law alone, against
>
> (a) a decision of a court in respect of an appeal under section 727 . . . .

It was argued on behalf of the appellant that when an Appeal Court, within the meaning of s. 719, has decided that it has no jurisdiction to hear an appeal under s. 727 because the notice of appeal required by s. 722 is inadequate, it has not, by so doing, made a decision "in respect of an appeal under section 727" at all, but rather one in respect of s. 722 from which there is no provision for appeal, and that the only remedy lies in a writ of *mandamus*. It seems to me that the time for making such a decision is the time when the appeal is to be set down for hearing as required by s. 723, and the nature of the decision to be made at this time is whether or not all formalities have been complied with so as to make it necessary to "set down the appeal for hearing

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at a regular or special sittings" of the Appeal Court. The "hearing" there referred to is obviously a hearing under s. 727, and the decision as to whether or not the Court will hear an appeal under that section certainly seems to me to be "a decision of a court in respect of an appeal under section 727". As was indicated by Fauteux J. at the hearing of this appeal, this construction is borne out by the French version of s. 743(1)(*a*) which reads as follows:

> 743. (1) Un appel à la cour d'appel, telle qu'elle est définie dans l'article 581, peut, avec la permission de cette cour, être interjeté, pour tout motif qui comporte une question de droit seulement,
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> (*a*) de toute décision d'une cour relativement à *un appel prévu par l'article 727* . . .

In view of all the above, it will be seen that I am of opinion that the notice of appeal of the respondent from his conviction by the magistrate set out the grounds of appeal in sufficient particularity, that the failure of the County Court to take a plea did not deprive it of jurisdiction, that the respondent had a right of appeal to the Court of Appeal when the County Court dismissed his appeal on preliminary objection and that this appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: G. D. Kennedy, Victoria.

Solicitor for the respondent: R. R. Maitland, Vancouver.