

CANADA / JUDGMENT

Lafrance v. R.

[1975] 2 SCR 201

COURT

Supreme Court of Canada

DECIDED

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Lafrance v. R.

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Supreme Court Judgments

Date

1973-08-27

Report

[1975] 2 SCR 201

Judges

Fauteux, Joseph Honoré Gérard; Abbott, Douglas Charles; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Hall, Emmett Matthew; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Lafrance v. R., [1975] 2 S.C.R. 201

Date: 1973-08-27

Leo Lafrance (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1972: December 11; 1973: August 27.

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal Law—Theft of automobile—Joy-riding—Whether included offence—Whether offences mutually exclusive—Elements of theft—Criminal Code, ss. 283, 294, 295.

Appellant had been drinking at his home in North Bay with some friends. Around midnight they decided to deliver some stereo tapes and lacking transport went to the home of one Trudel who told them that he would get them a ride. Trudel took them to the motel parking lot next to his home, found a car with the keys in it, drove appellant and his friends around and later returned to his home. Appellant then took the car intending to go for a drive alone and then return the car to the motel. While returning to North Bay he was stopped by a police constable and later charged with the theft of the car under s. 280 (now s. 294) of the Criminal Code. Appellant admitted at trial that Trudel had indicated that the car was stolen but was acquitted on the basis of the intention of both Trudel and himself to return the car and because the offence of joy-riding, s. 281 (now s. 295) of the Criminal Code, was not an included offence. The Court of Appeal decided however that all the elements of theft as defined in s. 269 (now s. 283) of the Criminal Code were present.

Held (Hall, Spence and Laskin JJ. dissenting): The appeal should be dismissed.

Per Fauteux C.J.: The distinction between the offences of theft and joy-riding makes them mutually exclusive and permits no verdict other than a verdict on the offence actually charged. However the trial judge erred in holding that there was no evidence on which to enter a conviction for theft. Per Abbott, Martland, Judson, Ritchie and Pigeon JJ.: The provision contained in s. 281 (now s. 295) of taking a vehicle without the owner's consent creates a separate offence in order to provide a penalty where it may be difficult or impossible to establish the offence of theft. The two offences are separate and taking a vehicle without the owner's consent is not necessarily included in the charge of the theft of a vehicle. In certain fact situations the accused may be prosecuted under either section. In this case however the Court of Appeal properly found that all the elements of theft were established. The trial judge erred in law in holding that because the appellant intended to return the vehicle he could not have intended to commit theft but could only be charged under s. 281 (now s. 295) and this gave to the Court of Appeal jurisdiction to determine the appeal as it did.

Per Hall, Spence and Laskin JJ. dissenting: The trial judge found that the evidence was not sufficient to establish the intent necessary to support a conviction of theft but was sufficient to establish a conviction of joy-riding, under s. 281 (now s. 295). To differ with this finding is to differ on the factual inferences from the evidence.

The two offences set out in ss. 280 and 281 (now ss. 294 and 295) are separate and mutually exclusive offences and the required element of intent in each is not common to both. Theft is defined as involving a taking or conversion “fraudulently and without colour of right” while s. 281 (now s. 295) does not associate with the actus reus of the offence, and with the intent that is an element thereof, the dishonesty imported into the elements of theft. There was no question of law involved in this case to entitle the Court of Appeal to interfere with the acquittal of the appellant. The findings of fact bring the present case within s. 295 rather than s. 294. The appeal should therefore be allowed and the acquittal restored.

[R. v. Wilkins, [1964] 2 O.R. 365 distinguished; R. v. Williams, [1953] 1 Q.B. 660, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario allowing an appeal from an acquittal at trial by Gratton, Co. Ct. J. Appeal dismissed, Hall, Spence and Laskin JJ. dissenting.

J.T. Morin, for the appellant.

M.A.F. Lindsay, for the respondent.

THE CHIEF JUSTICE—Charged with the offence of theft of an automobile of a value exceeding \$50, contrary to s. 280, now s. 294 of the Criminal Code, the appellant was tried and acquitted by His Honour Judge Gratton, District Judge. The Trial Judge held that there was an absence of any evidence to support a finding of intent to commit theft but only evidence of the offence of taking a motor vehicle without consent, contrary to s. 281, now s. 295 Criminal Code, upon which he would have entered a conviction had he been of the opinion that such an offence was included under s. 280 [now s. 294] of the Criminal Code.

Pursuant to s. 584(1) Criminal Code, now s. 605(1), respondent appealed to the Court of Appeal for Ontario against this verdict of acquittal on the ground that the Trial Judge had erred in law in holding that there was no evidence to support a finding of intent to commit theft and a conviction under s. 280 [now s. 294] of the Criminal Code.

The Court of Appeal allowed the appeal, set aside the verdict of acquittal and, as authorized by s. 592(4)(b)(i), now s. 613(4)(b)(i), entered a verdict of guilty with respect to the offence charged and remanded the case to the County Court Judge for sentence. Delivering orally the reasons for the Court at the close of the argument on the appeal, Mr. Justice Aylesworth declared in conclusion:

“...that the charge of theft of the automobile, as laid, was made out and there was evidence, and ample evidence, before the County Court Judge upon which the conviction should have been recorded. We think he erred in law in charging himself that there really was no such evidence before him.”

Hence the present appeal to this Court pursuant to s. 597(2)(a)(i), now s. 618(2)(a)(i) Criminal Code.

I had the advantage of reading the reasons for judgment of my brothers Martland, Spence and Laskin. I will defer the consideration of the jurisdictional ground raised by my brother Laskin and precise at first my views with respect to (i) the essence of the distinction between the offence under s. 280 and the offence under s. 281, and (ii) the evidence in the case.

Dealing with point (i):—In *R. v. Wilkins*[1], the Court of Appeal for Ontario decided that, in essence, the distinction between the two offences lies in the difference that characterizes the intent of the taker which, in the case of theft, is to convert, permanently or temporarily, the property of another in a motor vehicle—or in any other thing—to the use of the taker and which, in the case of the offence under s. 281, is merely to drive a motor vehicle or cause it to be driven. Speaking for the majority of the Court of Appeal, Roach J.A., said this at p. 370 of the report:—

“Ordinarily and were it not for s. 281 the taking of a motor vehicle without the consent of the owner and driving it would carry with it the notion that the taker intended to and in fact did convert it—that is, the property in it—to his own use and in so doing, deprive the owner of the use of it even though such deprivation were only temporary. Where a person in violation of s. 281 takes a motor vehicle without the consent of the owner with the intention merely of driving it, he still deprives the owner of the use of it but Parliament has decreed that there can be a taking and use resulting in deprivation that does not amount to theft and that which distinguishes such a taking is the intent of the taker. If the intent, so said Parliament, is merely to drive it then it is not theft but a separate offence. Plainly, however, Parliament did not intend that every such taking would bring the act of the taker without the definition of theft contained in s. 269. Otherwise a person could take a motor vehicle without the consent of the owner and no matter how long or how far he drove it if he could be heard to say that he took it for no other purpose than to drive it, he could escape a charge of theft. That submission would be ridiculous. The taking under s. 281 must be consistent with an intention by the taker that, having driven it, he shall return it or cause it to be returned to the owner and the circumstances under which it was taken the length of time the taker retained possession and the distance he drove it are important indicia in determining whether in taking it the taker intended merely to drive it as contemplated by the section or whether he intended to convert the property in it to his own use. Each case must depend on its own facts.”

With this view of the law, I am in respectful agreement. While the infringement of possession in the case of theft of anything constitutes a crime—or to use the familiar expressions of the common law, a criminal trespass, a felony—generally subject under our Criminal Code to prosecution by way of indictment and punishable by imprisonment for ten years, the infringement of possession of a motor vehicle under s. 281 constitutes an offence which, participating rather of the nature of a civil trespass or misdemeanor, is subject under the Criminal Code to prosecution by way of summary conviction and punishable by either a fine of no more than \$500 or to imprisonment for six months, or to both. In both cases, as is generally the case for any other offences, mens rea must necessarily be proved by circumstantial evidence—except, of course, where the accused confesses. The difficulty which may, in a particular case, attend the determination of the specific intent, is foreign to what constitutes the essential and fundamental distinction between the two offences, which distinction, founded as it is on a specific intent, makes these offences mutually exclusive and permits, in the absence of a special

provision, no verdict other than a verdict on the offence actually charged.

Dealing with point (ii):—It is appropriate to note that in the consideration of the evidence, this Court, as was the case for the Court of Appeal, is not concerned with the question whether the Trial Judge ought to have inferred guilt of the offence charged—which is a question of fact—but whether he might and could have legally drawn such inference therefrom—which is a question of law.

The evidence is simple. Two witnesses were heard for the prosecution, namely John B. Lanigan, the owner of the automobile, a Pontiac, and Constable Michael Fawcett who, while patrolling highway 17 during the night, encountered and stopped that vehicle then driven by Lafrance. No witness other than the latter was heard for the defence. According to these testimonies, the facts are:—On September 24, 1970, after his day's work, Lanigan, an Ontario Hydro technician, drove back in his Pontiac to the Voyager Hotel in North Bay where he was lodging. He parked his car in the parking lot of the hotel, leaving the keys in the key hole and some scientific instruments on the rear seat and in the trunk. The next morning, he found out that his automobile had disappeared and reported it as stolen to the police. As to what took place in the interval, during the night, Lafrance, for his part, testified as follows: He and three companions, namely Michael Trudel, Jacques Carrière and Paul Boissonneault, drank wine in his home for about two hours when at about midnight, they decided to drive to Corbeil in order to deliver some stereo tapes which were then in the possession of Carrière. For this alleged purpose, they went to one of Trudel's friends to "get a ride" but with no avail. Trudel told them not to worry, that they would get a ride. They proceeded to the parking lot of the Voyager Hotel where several cars were parked. Trudel saw the keys in Lanigan's Pontiac and then all, but Boissonneault, boarded that car and left with Trudel at the wheel. They did not go to Corbeil. They drove behind the airport "because there was less traffic and less people". On their way, Carrière threw out of the car the scientific instruments of Lanigan which were on the rear seat. Eventually, Trudel drove Carrière to his home because the latter was scared. After cruising for some time through the city with Lafrance, Trudel decided to go home. He then left the vehicle to Lafrance and told him to do what he wanted to do with it. Lafrance boarded the car and then proceeded to Sturgeon Falls intending, he said, "—on just going for a ride and then returning it to the Voyager so it would not be noticed that it was stolen". About half way to Sturgeon Falls, he turned around and was heading back to North Bay when, at 3.40 a.m., he was stopped by Constable Fawcett who had observed that the car was driven in an erratic manner. Asked for his driver's licence, owner's permit and insurance certificate, Lafrance said he left them at home. He declared falsely that the scientific instruments in the trunk belonged to his father. He gave a false name, i.e., the name of Lachance, and the address of 132 Norwood in North Bay. Constable Fawcett then locked and secured Lanigan's car and proceeded with Lafrance to that address to ascertain the truth of the answers he received. Upon arriving at that point, Lafrance entered the house and eventually disappeared. In cross-examination, Lafrance testified: that "he figured that Trudel was stealing the car" when the latter at the parking lot walked to the Pontiac, looked through the window, saw the keys, climbed in and started the motor; that having driven three blocks from the lot, Trudel told them that the car had been stolen and that when Trudel left the car with him, he knew that it

was a stolen car. I agree with the Court of Appeal not only that the Trial Judge erred in law in holding that there was no evidence from which he might and could have legally inferred the guilt of the accused with respect to the offence of theft but also with the conclusion of the Court of Appeal that there was indeed ample evidence upon which such a conviction could have been recorded.

Dealing with the jurisdictional ground:—Obviously, the Court of Appeal had no jurisdiction to entertain the appeal of the Attorney General unless it raised—as indeed it did—a question of law which, as above indicated, was that the Trial Judge had erred in holding that there was no evidence upon which a verdict of theft could be recorded. The jurisdictional ground raised rests on interpretation given to the reasons of the Trial Judge who, it is said, did not conclude that there was no evidence upon which to convict for theft but that the evidence was not sufficient on the crucial question of intent. The members of the Court of Appeal were unanimously of opinion that the Trial Judge had charged himself that there was an absence of evidence and not an insufficiency of evidence. With this interpretation, I am in agreement. Furthermore, the conclusion of the Trial Judge rests on the invalid premise that in the absence of any evidence from Trudel, he could not find the accused guilty of theft. The evidence of Lafrance, which he accepted, on the crucial point of intent, was quite sufficient.

For all these reasons, I would dismiss the appeal. The judgment of Abbott, Martland, Judson, Ritchie and Pigeon JJ. was delivered by

MARTLAND J.—This is an appeal from the unanimous judgment of the Court of Appeal for Ontario, which allowed an appeal by the present respondent from the present appellant's acquittal at trial on a charge of theft of an automobile contrary to s. 280 (now s. 294) of the Criminal Code. Theft is defined in s. 269 (now s. 283) of the Criminal Code, the relevant portions of which read as follows:

269. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,
- (a) to deprive, temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing or of his property or interest in it,

...

The facts which gave rise to the charge are as follows: Around midnight of September 23, 1970, the appellant and some friends who were drinking wine at his home at 132 Norwood Avenue, in North Bay, decided to go to Corbeil to deliver some stereo tapes in the possession of one of them, Jacques Carrière. They went to the home of Mike Trudel, who lived on Delaware Avenue, next door to the Voyager Motel. Trudel told them he would get them a ride and they went to the Voyager Motel parking lot where they saw a Pontiac automobile, which had been left there by the owner, John Lanigan, during the afternoon of September 23. The keys were in the car. Trudel entered the car and started the motor. The appellant and Carrière got in. Trudel drove them to

the airport, and, later, to Carrière's home. Carrière got out, and Trudel drove the car around the city. He drove back to his own house and parked the car. The appellant then drove the car alone towards Sturgeon Falls, intending to go for a drive, and, later, to return the car to the Voyager Motel. After driving part way to Sturgeon Falls, he turned around and headed back towards North Bay. He was stopped by a police constable before he reached North Bay. When asked to produce his driver's licence and the ownership and insurance certificates he said that he had left them at home. He gave his correct name and his address at 132 Norwood Avenue. He said that some survey equipment located in the trunk of the car belonged to his father. The police constable drove him to the address which he had given. The appellant left the vehicle, advising that he would be right out. He did not return.

The appellant, in evidence at the trial, said that when Trudel took the car, he, the appellant, thought that it might have been stolen. He asked Trudel, while Trudel was driving, if the car was stolen and Trudel said: "Yes."

The learned trial judge, relying on the judgment of the Court of Appeal for Ontario in *R. v. Wilkins*[2], said this:

Not only am I bound by this decision, but I agree entirely with the judgment of Mr. Justice Roach in his approach to the distinction which surely must exist between Sec. 280 and Sec. 281, and on the basis of the findings that I have made, that is about the intentions at all times of the people who took it originally and Lafrance when he did take over the control, i.e. of the intention of returning it, and in view of the fact that he actually did deprive the owner for only a few hours of the possession of this motor vehicle, not for such a lengthy period as would lead me to a different conclusion than the one that he actually intended to return it, and in the absence of any evidence on the part of the original taker, that is Trudel, that he intended at that time to deprive the owner in such circumstances as is called for under Sec. 280, then I must conclude in view of these findings that the accused at no time, either as a party to the commission of the offence or as the main offender himself, ever intended to commit an offence under the circumstances contemplated by Sec. 280. Sec. 281 not being an included offence under Sec. 280, the charge will accordingly be dismissed. Section 281 (now s. 295) to which reference is made, provides:

281. Every one who, without the consent of the owner, takes a motor vehicle with intent to drive or use it or cause it to be driven or used is guilty of an offence punishable on summary conviction.

Under s. 280, a person who commits theft is guilty of an indictable offence.

In the *Wilkins* case the accused took a policeman's motorcycle, while the latter was standing on the sidewalk making out a parking ticket, intending to drive it a short distance for the purpose of playing a joke on the policeman. He was charged with theft of the motorcycle. The majority of the Court, Roach and Kelly JJ.A., held that the accused should have been charged under s. 281 and that he was not guilty of theft under s. 280. MacKay J.A., dissenting, was of the view that all of the elements of theft had been proved.

The majority of the Court, in that case, expressed the following opinion as to the effect of s. 281 in relation to s. 269:

Ordinarily and were it not for s. 281 the taking of a motor vehicle without the consent of the owner and driving it would carry with it the notion that the taker intended to and in fact did convert it—that is, the property in it—to his own use and in so doing deprive the owner of the use of it even though such deprivation were only temporary. Where a person in violation of s. 281 takes a motor vehicle without the consent of the owner with the intention merely of driving it, he still deprives the owner of the use of it but Parliament has decreed that there can be a taking and use resulting in deprivation that does not amount to theft and that which distinguishes such a taking is the intent of the taker. If the intent, so said Parliament, is merely to drive it then it is not theft but a separate offence. Plainly, however, Parliament did not intend that every such taking would bring the act of the taker within the definition of theft contained in s. 269. Otherwise a person could take a motor vehicle without the consent of the owner and no matter how long or how far he drove it if he could be heard to say that he took it for no other purpose than to drive it, he could escape a charge of theft. That submission would be ridiculous. The taking under s. 281 must be consistent with an intention by the taker that, having driven it, he shall return it or cause it to be returned to the owner and the circumstances under which it was taken the length of time the taker retained possession and the distance he drove it are important indicia in determining whether in taking it the taker intended merely to drive it as contemplated by the section or whether he intended to convert the property in it to his own use. Each case must depend on its own facts.

In the instant case the facts could not possibly justify a conviction of theft. The accused did not intend to steal the vehicle, that is, to convert the property in it to his own use but only to drive it as contemplated by s. 281. His intention was merely to play a joke on Nichol and the Judge so found. The intention to perpetrate this joke, stupid though it was, is incompatible with the evil intent which is inherent in the crime of theft.

In the present case, Aylesworth J.A., who delivered the reasons of the Court, had this to say about the application of the Wilkins case:

We distinguish the case on its facts most decidedly from those present in *Regina v. Wilkins*, a judgment of this Court. We are all of the opinion that the application of the Wilkins case should be confined to its own facts and we treat it in that manner.

He went on to hold that the charge of theft of the automobile had been made out and that there was ample evidence upon which a conviction should have been recorded by the trial judge. He added:

We think he erred in law in charging himself that there really was no such evidence before him.

The point of law upon which the appeal to this Court is founded is stated in the appellant's factum as follows: It is respectfully submitted that because of Section 281 every temporary taking of a motor vehicle without the consent of the owner is not theft. In the light of that section theft of a motor vehicle must involve an intention on the part of the accused person to convert the property in the vehicle to his own use.

The contention is that when Parliament created the lesser offence, as defined in s. 281, it must be presumed to have intended thereby to curtail the definition of theft by excluding from it any taking which would constitute an offence under s. 281.

I do not agree with this submission. In my opinion, when the predecessor of s. 281 was enacted, the purpose of Parliament was not to amend the existing law of theft in relation to automobiles. Its sole purpose was to create a new and separate offence in order to provide a penalty in certain fact situations in which it was difficult or impossible to establish the offence of theft. The provision contained in s. 281 does not purport to do anything more than to define a separate offence in relation to the taking of automobiles. The definition of theft still covers the taking of "anything".

The offence provided for in s. 281 is defined in such a way that in certain fact situations the accused might be prosecuted under either s. 280 or s. 281. In such an event it is for the Crown to elect which charge should be laid, as is the case under s. 221(1) and (4) (now s. 233(1) and (4)) where the facts might warrant a charge either of criminal negligence in the operation of a motor vehicle or of dangerous driving.

It would have been open to Parliament to have provided specifically, as it did in relation to the offences defined in s. 221(1) and (4), that an offence under s. 281 should be an included offence under s. 280, but this was not done. In the absence of such specific provision, in my view, it is not an included offence under the provisions of s. 569(1) (now s. 589(1)), because the offence created by s. 281 is not necessarily included in the charge of theft, as defined in s. 269, and it is not included in the count as charged in the present case.

I agree with the Court of Appeal that all of the elements of theft, as defined in s. 269, were established in this case. The taking was intentional, under no mistake and with knowledge that the motor vehicle was the property of another. In my opinion this made the taking fraudulent. (See *R. v. Williams*[3], at p. 666.) The appellant took the vehicle without colour of right and deprived the owner of it temporarily.

In my opinion the learned trial judge erred in law in holding that because the appellant intended to return the motor vehicle he could not have intended to commit theft within s. 280, but could only have been charged under s. 281. This was a question of law on which, in my opinion, the respondent was properly entitled to appeal from the appellant's acquittal, and, accordingly, the Court of Appeal had jurisdiction to determine the appeal in the manner in which it did.

I would dismiss the appeal.

The judgment of Hall, Spence and Laskin JJ. was delivered by

LASKIN J. (dissenting)—This appeal was first heard by a Bench of five of which I was one. It was re-argued before the full Court pursuant to a direction by the Court for a re-hearing. The same counsel appeared. Prior to the direction for a re-hearing I had prepared draft reasons for allowing the appeal and restoring the order of acquittal. The re-hearing has not only confirmed me in the view expressed in my draft reasons but it has persuaded me that there is also a jurisdictional ground upon which the order of acquittal should be restored. I set out below as Part I my opinion on the jurisdictional aspect. Part II is substantially my set of reasons prepared after the first hearing.

PART I

The jurisdiction of the Ontario Court of Appeal to hear an appeal against acquittal depends on whether a question of law alone is involved in the appeal. In the present case, the point at issue was the intent associated with the offence charged. The trial judge was of the opinion that the evidence was not sufficient to establish the intent necessary to support a conviction of theft but that it was sufficient to establish a conviction of “joy-riding” under s. 281. In his reasons, he stated that there was “an absence of evidence showing intention on the part of Trudel [who had been a companion of the accused but left him before the culminating events] to commit an offence under sec. 280, but rather there is evidence of the intention to commit an offence under sec. 281”. He then went on to deal with the intent of the accused which he found to be short of that required to warrant a conviction of theft. Counsel for the Crown fastened on the words “absence of evidence” to urge that a question of law was involved, but this is an unacceptable literalism when regard is had to the context.

The context is well shown by the concluding portion of his reasons where the trial judge said this:

...on the basis of the findings that I have made, that is about the intentions at all times of the people who took it originally and Lafrance when he did take over the control, i.e. of the intention of returning it, and in view of the fact that he actually did deprive the owner for only a few hours of the possession of this motor vehicle, not for such a lengthy period as would lead me to a different conclusion than the one that he actually intended to return it, and in the absence of any evidence on the part of the original taker, that is Trudel, that he intended at that time to deprive the owner in such circumstances as is called for under Sec. 280, then I must conclude in view of these findings that the accused at no time, either as a party to the commission of the offence or as the main offender himself, ever intended to commit an offence under the circumstances contemplated by Sec. 280. Sec. 281 not being an included offence under Sec. 280, the charge will accordingly be dismissed.

Intent is as much a question of fact as is physical action. Here the trial judge did not conclude that there was no evidence upon which to convict for theft but that the evidence did not go far enough on the central question of intent. To differ from him on this appraisal is to differ on the factual inferences from the evidence. No question of law alone is involved.

I appreciate that this assessment depends on a prior determination that the two offences of theft and joy-riding, as set out respectively in ss. 280 and 281 (theft being defined for purposes of s. 280 in s. 269) of the Criminal Code, are separate offences, and that the required element of intent in each is not common to both. This is the view I hold, as will be evident from Part II hereof, and it is on this basis (which I hold is the one upon which the Ontario Court of Appeal should have proceeded) that I conclude that no question of law was involved before that Court to entitle it to interfere with the acquittal of the accused.

PART II

The Canadian Criminal Code, from its first promulgation in 1892, has defined theft in terms of an intent to deprive an owner “temporarily or absolutely”. Clearly, these words encompassed the taking and driving of a motor vehicle without the owner’s consent, albeit there was no intention of permanent deprivation. When the predecessor of s. 281 was first enacted in 1910 by 9-10 Edw. VII, c. 11, it was included in a group of provisions dealing with automobile offences and in a part of the Criminal Code preceding the theft sections. It was not until the Criminal Code Revision of 1953-54, c. 51 that s. 281 was separated and put under the heading of “Offences Resembling Theft”.

There is, of course, nothing commanding in rules of construction that oblige this Court to defer to the arrangement from time to time of the various sections of the Criminal Code. They do, however, consist of separate enactments, so far as they define separate offences; and the question that is raised by the enactment of the fore-runner of s. 281, at a time when intentional temporary deprivation was part of the definition of theft, is whether the enveloping force of the present s. 294 (formerly s. 280) remained or whether the present s. 295 (formerly s. 281) diminished, according to its terms, the scope of s. 294.

Parliament ought to have spoken clearly on a matter on which there was no difficulty in doing so. But it did not, and we are left to reach for policy determinants. For myself, a principal one arises from a preference against a construction that would expose an accused person to more than one offence for the same conduct. That such double exposure (even apart from conspiracy and the concurrent force of competent provincial penal legislation) is foreseeable is attested by s. 11 of the Criminal Code, which goes on to provide against double punishment. It seems to me, however, that where, as here, the liability to alternative offences is not obvious, it is better to avoid assigning the same act or omission to more than one defined offence rather than to rely on the punishment rule of s. 11.

On a more pragmatic plane, in extension of an argument based on the original enactment of s. 295 as an exception from s. 294, there is the fact that theft over \$50 was an indictable offence under s. 294(a) (it is now theft over \$200: see 1972 (Can.), c. 13, s. 23), punishable by a maximum prison term of ten years, while s. 295 has from its inception been a summary conviction offence, punishable now under s. 722 by a maximum term of six months or a maximum fine of \$500 or both. Although the Criminal Code exhibits instances where a particular offence is punishable on indictment or on summary conviction (thus permitting the Crown to elect how it will proceed),

as, for example, common assault and publication of obscene matter, I cannot be persuaded that two separately defined offences, the one punishable on indictment only and the other on summary conviction only, should be merged to embrace the same facts so as to give the Crown an election not simply on the form of procedure, with its consequent punishment, but rather on the character of the substantive charge itself.

United Kingdom experience with legislation similar to that which is now s. 295 is not of direct assistance because of the differences between our respective definitions of theft. Prior to the enactment of the Theft Act, 1968 (U.K.), c. 60, the opinion was expressed in respect of the then s. 217 of the British Road Traffic Act, 1960 (U.K.), c. 16, (comparable to our s. 295) that “a person indicted for stealing a motor vehicle may be found guilty of this offence”: see Harris, *Criminal Law* (21st ed. 1968), at p. 478. This result, which treats the unauthorized taking and driving of a motor vehicle as an included but not an alternative offence to theft, was made statutory under s. 12(4) of the Theft Act, 1968 (U.K.), c. 60. There is, however, a cardinal difference between the definition of theft under the British act and that under the Canadian Criminal Code; in the former it is principally defined in s. 1(1) as involving “permanent deprivation”, which in turn is defined in s. 6 so as to give it an expanded meaning but yet one falling short of merely temporary taking: see Smith, *Law of Theft* (1968), at p. 46. It is this difference in definitions, and the fact that s. 295 is directed to the taking of the motor vehicle with intent to drive or use it, without reference to or intent towards the owner, that precludes the conclusion here that s. 295 is an included offence on a charge of theft. The theory of an included offence, as reflected in s. 589 of the Criminal Code, is that the including offence requires proof of an element without which there is proof of another lesser offence. That is not the case as between ss. 294 and 295 when the latter involves an element not involved in the former. Sections 294 and 295 are either alternative offences to the degree to which the former is restated in s. 295 or are mutually exclusive so far as facts exist to bring s. 295 into play.

I do not think that there can be any half-way house whereby the two offences can be viewed as alternative and yet admit of separateness under particular sets of facts. If there are facts which invite a charge under s. 295 and not under s. 294, the two offences are perforce mutually exclusive, leaving as the central issue the specification or definition of the features which differentiate them. This is a matter of determining the scope of the one or the other, and however narrowly s. 295 be viewed it must to that extent have its separate identity.

There is, however, another factor which must be considered in this connection, and it reinforces my opinion of the mutual exclusiveness of the two offences. Theft is defined in s. 283 as involving a taking or conversion “fraudulently and without colour of right”. Although there has appeared to be recurrent difficulty in assigning a meaning to the term “fraudulently” which is not already embraced in the other telling words of the definition of theft (that is, taking or converting without colour of right, with intent to deprive, etc.), the presence of the term in s. 283 and its absence from s. 295 must be given some effect: see *Marsh v. Kulchar*[4], at p. 335. I would put it that, as formulated, s. 295 does not associate with the actus reus of the offence and with the intent that is an element thereof the dishonesty towards the owner that is imported into the assessment of the

elements of theft under ss. 283 and 294; and, moreover, as I have already noted, s. 295 does not speak in terms of an intent directed to the owner. This, in my opinion, lies behind the appraisal of the two offences made by Roach J.A. in *Regina v. Wilkins*[5]. It also emphasizes, in my view, why s. 295 cannot be an included offence within ss. 283 and 294.

For the reasons above stated, I prefer the mutually exclusive construction of ss. 294 and 295. I have not thought it necessary to reach for the maxim *specialia generalibus derogant* because it says no more than does the fact of the subsequent enactment of the forerunner of s. 295 at a time when theft, as then and now defined, included what the ancestor of s. 295 carved out in words different from those used in the definition of theft. When one examines s. 295, in its different terms defining the offence and in its character as a summary conviction offence, it is reasonable to conclude that it has taken “joy-riding”, that is the unauthorized taking of a motor vehicle with the intent to drive or use it temporarily, out of the purview of the indictable offence of theft: see *Hirshman v. Beal*[6] at pp. 45 and 49.

The findings of fact in the present case bring it within s. 295 rather than within s. 294. In the result, I would allow the appeal, set aside the order of the Ontario Court of Appeal and restore the order of acquittal entered by Judge Gratton. Appeal dismissed, HALL, SPENCE and LASKIN JJ. dissenting.

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Solicitor for the respondent: W.C. Bowman, Toronto.

[1] [1964] 2 O.R. 365.

[2] [1964] 2 O.R. 365.

[3] [1953] 1 Q.B. 660.

[4] [1952] 1 S.C.R. 330.

[5] [1964] 2 O.R. 365.

[6] (1916), 38 O.L.R. 40.

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