

CANADA / JUDGMENT

R. v. Clunas

[1992] 1 SCR 595

COURT

Supreme Court of Canada

DECIDED

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R. v. Clunas

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Date

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Report

[1992] 1 SCR 595

Case number

22320

Judges

Lamer, Antonio; Sopinka, John; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank

On appeal from

Ontario

Subjects

Criminal law

Notes

SCC Case Information: 22320

Decision Content

R. v. Clunas, [1992] 1 S.C.R. 595

Ian Scott Clunas Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Clunas

File No.: 22320.

1991: November 12; 1992: February 27.

Present: Lamer C.J. and Sopinka, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for ontario

Criminal law -- Procedures -- Joinder -- Summary conviction offence and indictable offence in separate informations tried together with consent -- Whether proceedings constituted two separate trials with the evidence in one trial applying in the other trial -- Whether a court has jurisdiction to try two separate informations in a single trial -- Whether a summary conviction offence and an indictable offence can be properly joined and tried together -- Whether the proceedings constituted a procedural irregularity, and if so, whether s. 686(1) (b)(iv) of the Criminal Code could be applied to uphold a conviction -- Criminal Code , R.S.C., 1985, ss. 591, 686(1)(b)(iv).

Appellant pleaded not guilty to the indictable offence of assault causing bodily harm and to assault (which was dealt with summarily). The charges arose from separate incidents. When appellant appeared on the assault causing bodily harm charge, he elected trial before a provincial court judge thereby foregoing a preliminary inquiry. Both matters were put over to the same date. Defence counsel, when the matter came on to be heard, proposed that it would be more efficient to deal with both charges at once and the Crown consented. Appellant was convicted of both charges.

Appellant's appeal to the Summary Conviction Appeal Court from conviction for assault was not resolved when the appeal from conviction for assault causing bodily harm was heard and dismissed by the Court of Appeal.

At issue here were: (1) whether the proceedings constituted two separate trials with the evidence in one trial applying in the other trial; (2) whether a court has jurisdiction to try two separate informations in a single trial; (3) whether a summary conviction offence and an indictable offence can be properly joined and tried together; and (4) whether the proceedings constituted a procedural irregularity, and if so, whether s. 686(1) (b)(iv) of the Criminal Code could be applied to uphold a conviction.

Held: The appeal should be dismissed.

When joinder of offences, or of accuseds, is being considered, the court should seek the consent of both the accused and the prosecution. If consent is withheld, the reasons should be explored. Whether the accused consents or not, joinder should occur only when, in the court's opinion, it is in the interests of justice and the offences or accuseds could initially have been jointly charged. Here, a trial was conducted simultaneously as regards two distinct informations. This was done at the suggestion of the defence and, therefore, with the accused's consent and that of the Crown.

While an elaborate procedure is provided under the Criminal Code for joint trials, all that has to be done is that, to the extent possible, the same procedure should be followed when joining indictments.

Accused persons being dealt with in separate informations at the same time should not be any more compellable against each other, especially in light of s. 11 (c) of the Canadian Charter of Rights and Freedoms, than when tried on one single information or indictment. When two or more accused in different informations are charged with the same offence or with different offences, if they are proceeded against jointly, they will not be compellable one against the other. When the Crown chooses to proceed at the same time, the Crown then waives the right to call one accused against the other, as is the case of proceeding against the two accused on the same document. An accused who might wish to testify with respect to only one information should not and would not give his or her consent to a joint trial; and, when consent is withheld, under such circumstances it would be inappropriate for the judge to order a joint trial.

Joinder can be effected between charges for summary convictions and charges for indictable offences, notwithstanding the difference in procedure. The difference of the process as regards indictable offences and summary convictions must, however, be kept in mind. That indictable offences must on some occasions, and may in others, be tried by a judge and a jury, is an impediment to proceeding jointly when before that court with a summary conviction. That preliminary inquiries are available for most indictable offences is another impediment for the joinder of trials.

Summary convictions should be joined with indictable offences only where the accused has waived the right to be tried in a higher court (either with or without a jury) and has also foregone his or her right to a preliminary hearing. Joinder therefore may occur only where trial on the indictable offence is to take place before the provincial court. In the event of any conflict as to the applicable procedure, indictable offence procedures should apply.

Where an issue common to both informations has gone to the Summary Conviction Appeal Court and the Court of Appeal, the Summary Conviction Appeal Court should await decision by the higher court.

Proceeding jointly here did not constitute a procedural irregularity.

Cases Cited

Considered: *In re Clayton*, [1983] 2 W.L.R. 555; *Phillips and Phillips v. The Queen*, [1983] 2 S.C.R. 161; *Khan v. The Queen*, [1984] 2 S.C.R. 62; *Crane v. Director of Public Prosecutions*, [1921] 2 A.C. 299; distinguished: *R. v. Pottinger* (1990), 54 C.C.C. (3d) 246; referred to: *R. v. Kennedy*, [1971] 2 O.R. 445; *Matheson v. The Queen*, [1981] 2 S.C.R. 214; *R. v. Cloutier* (1988), 43 C.C.C. 35; *R. v. Dennis*, [1924] 1 K.B. 867.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 11 (c).

Criminal Code, R.S.C. 1970, c. C-34, ss. 118(a), 520(1) (as am. S.C. 1985, c. 19, s. 119).

Criminal Code, R.S.C., 1985, c. C-46, ss. 591(1) , 686(1) (b)(iv), 795 .

Criminal Law Amendment Act, 1985, S.C. 1985, c. 19, s. 119.

Game Act, R.S.N.B. 1973, c. G-1.

Authors Cited

Canada. Law Reform Commission. Working Paper 55. The Charge Document in Criminal Cases. Ottawa: The Commission, 1987.

Rules of Criminal Procedure, in *Federal Criminal Code and Rules*, 1991 revised edition. St. Paul, Minn.: West Publishing Co., 1991.

Uniform Law Conference of Canada. Proceedings of the Seventieth Annual Meeting. Toronto: 1988.

APPEAL from a judgment of the Ontario Court of Appeal (1991), 2 O.R. (3d) 1, 62 C.C.C. (3d) 551, 4 C.R. (4th) 217, 44 O.A.C. 34, dismissing an appeal from conviction by Seneshen Prov. Ct. J. Appeal dismissed.

Anthony H. Little, Q.C., and N. Andrew Robinson, for the appellant.

Beverly A. Brown, for the respondent.

//Lamer C.J.//

The judgment of the Court was delivered by

Lamer C.J. -- In *R. v. Kennedy*, [1971] 2 O.R. 445, Kelly J.A. made the following pronouncement at pp. 447-48:

In my view, one vital objective of criminal procedure is to ensure that no person exposed to prosecution shall be found guilty otherwise than by the instrumentality of a trial conducted in a manner which will not prejudice him in making his full answer and defence to the charge against him; accordingly, the gravity of any alleged procedural deviation is to be assessed in relation to the extent to which that objective may thereby be impeded.

While I would not countenance any departure from the rigidity with which I believe that this principle should be applied in favour of the accused, I am firmly of the opinion that the importance of departures from the traditional form of procedure from which no prejudice arises should not be so escalated as to result in the invalidity of the proceedings where a Court is satisfied that the result would have been the same had the trial proceeded in the manner in which it is alleged it should have.

In the case of *In re Clayton*, [1983] 2 W.L.R. 555, Lord Roskill said at pp. 562-63:

Magistrates' courts today try the vast majority of criminal cases that arise for hearing in this country as well as many civil cases. Any rule of practice or procedure which makes their task more difficult or demands subservience to technicalities is to be deprecated and your Lordships may think that this House should now encourage the adoption of rules of procedure and practice which encourage the better attainment of justice, which includes the interests of the prosecution as well as of defendants, so long as the necessary safeguards are maintained to prevent any risk of injustice to defendants.

I share this approach to criminal procedure and therefore welcome the opportunity afforded us in this appeal to reconsider this Court's decision in *Phillips and Phillips v. The Queen*, [1983] 2 S.C.R. 161, and *Khan v. The Queen*, [1984] 2 S.C.R. 62.

Introduction

This is an appeal from a decision of the Ontario Court of Appeal, dismissing Clunas' appeal from a conviction for assault causing bodily harm entered by a provincial court judge of Ontario.

The facts need not be entered into at any great length, as we are here concerned with procedure rather than evidence. On September 9, 1988, the appellant and his former girlfriend became involved in an argument which culminated in a physical fight in which two of the woman's fingers were broken. As a result of this, the appellant was charged with assault causing bodily harm, an indictable offence. In the early morning of September 11, 1988, they became involved in another argument which culminated in the appellant's being charged with assault. The charges were contained in separate informations.

On December 9, 1988, the appellant appeared on the assault charge, which the Crown elected to proceed with summarily. He pleaded not guilty and a trial date was set for April 20, 1989. On January 31, 1989, the appellant appeared on the assault causing bodily harm charge, an indictable offence, and elected trial before a provincial court judge, that is, foregoing the holding of a preliminary inquiry. He indicated he would be pleading not guilty, and the matter was put over to April 20, 1989.

On April 20, 1989, the appellant appeared before the court. Crown counsel advised the judge

There are two charges before the court.... One is a charge of assault causing bodily harm upon one Margaret Gray on the 9th day of September of 1988; second is a charge of common assault upon the same person two days later. I don't know how Your Honour wishes to deal with it. If Your Honour does not want to hear both of them I'm prepared to deal with the first and more serious charge at this time which is a charge of assault causing bodily harm.

The judge indicated he would take the pleas. Defence counsel then spoke:

Your Honour, these two charges, I appreciate that they're on separate informations, but there are a couple of witnesses that Mr. Clunas has brought to court today whose evidence is really one story that flows through from the Saturday night incident to the Sunday morning incident, which is actually Saturday night at a bar. Unless you want to have the witnesses coming up and stepping down again, it's my suggestion it might be more efficient to deal with them both at once.
[Emphasis added.]

In response to the trial judge's question, the Crown indicated that it consented to this procedure. The matter then proceeded.

The appellant was convicted of both charges. He appealed his conviction for assault causing bodily harm to the Court of Appeal for Ontario which, as I said, dismissed his appeal. Goodman J.A. dissenting, would have set aside the conviction and ordered a new trial.

The appellant appealed his conviction on the assault charge to the Summary Conviction Appeal Court. That appeal had not been resolved as of the date of the Court of Appeal hearing on the assault causing bodily harm charge.

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Referring to Phillips, *supra*, and Khan, *supra*, Doherty J.A. agreed that the appellant was on "solid jurisprudential footing". After reviewing the sequence of events, Doherty J.A. concluded that there had not been a single trial on separate charges. He understood defence counsel's remarks to mean that "all of the evidence would be relevant to both charges". He distinguished this case from *R v. Pottinger* (1990), 54 C.C.C. (3d) 246 (Ont. C.A.), as defence counsel here was quite aware of the fact that the charges were on separate informations, which was not the case in *Pottinger*.

Doherty J.A. acknowledged that the transcript was capable of a different interpretation, but preferred his interpretation to "one which would depict counsel as unknowingly or, worse yet, deliberately embarking on a course that yielded a nullity". He expressed no opinion as to the assault charge or the applicability of the curative provision of the Criminal Code .

Goodman J.A. reviewed the evidence and concluded that there was no indication that the trial judge had reviewed and considered the evidence separately as it related to both charges. Further, Goodman J.A. noted at p. 11 that the two charges related to separate incidents which occurred more than 24 hours apart. Although he could see how the evidence relating to the first charge would be relevant to the second, he could not see how the evidence relating to the latter charge would be relevant to the first. Goodman J.A. was of the view, at p. 12, that "the statements made by the trial judge and counsel for the parties, and the manner in which the trial was conducted and judgment given, clearly indicate that the two informations were tried together." He concluded that the statements by the trial judge and counsel were not sufficient to indicate an awareness of the consequences, on the reasoning in Phillips and Khan, of trying the matters together. He could not distinguish this situation from Phillips. He distinguished *Matheson v. The Queen*, [1981] 2 S.C.R. 214, on the basis that it dealt with evidentiary issues, rather than the issues raised by Phillips and Khan. Goodman J.A. would have held that the trial judge had no jurisdiction to try the matters together. Further, *Pottinger* could not be distinguished and, therefore, the curative provisions of the Criminal Code, R.S.C., 1985, c. C-46 , were not available. He would have ordered a new trial.

Grange J.A. agreed with the reasoning and result reached by Doherty J.A. However, he added that, while he agreed with Goodman J.A. concerning the difficulty in distinguishing *Pottinger* from the case at bar, he found that not applying the curative provisions appeared to be inconsistent with *R. v. Cloutier* (1988), 43 C.C.C. 35 (Ont. C.A.).

The Issues

Given the approach I intend to take in this appeal, the issues that I will be addressing will be as follows:

1. Did the proceedings in this case constitute two separate trials with the evidence in one trial applying in the other trial?
2. Does a court have jurisdiction to try two separate informations in a single trial?

3. Is it proper to join counts of a summary conviction offence and an indictable offence and try them together?

4. Did the proceedings constitute a procedural irregularity? If so, can s. 686(1) (b)(iv) of the Criminal Code be applied to uphold a conviction?

Issue No. 1

After the exchange I have quoted above, the trial judge then asked the following of counsel of the Crown: "Do you wish to deal with both of them at the same time?" Counsel for the Crown responded, "Yes". The trial judge then said, "I'll hear both of them."

The Crown called evidence and some of the witnesses testified as to both alleged assaults. In the course of making objections reference was made to the fact, in support of the question objected to, that the questions objected to related to a defence of self-defence. In that regard, the following exchange took place between the trial judge and defence counsel:

Mr. Dobbie: The evidence is being led in respect of two charges, Your Honour.

The Court: Yes.

Mr. Dobbie: And I've already said that there will be evidence called that relates to a defence of self-defence. I don't know why I'm being asked to repeat that.

The Court: On these two counts.

Mr. Dobbie: At least on the Saturday night incident, yes.

The Court: All right.

The appellant, when called upon to testify, testified concerning both incidents and as to the background relationship to Ms. Gray, the alleged victim. Two other witnesses were called by the defence. One of them testified about the incident on September 9, and the other testified concerning the September 11 altercation. Immediately after the completion of the evidence, the following exchange took place:

The Court: Thank you. Any reply evidence?

Mr. McHugh: No, Your Honour.

The Court: All right. Argument then, please.

Both counsel then argued and then the court concluded as follows:

The Court: Thank you. Stand up, Mr. Clunas. Mr. Clunas, on all the evidence brought before this Court and after weighing all the facts very carefully, there will be a conviction registered against you on both counts. I find you guilty. I attach very little credibility to your evidence or that of your witnesses. I don't know whether they were even there the evidence they gave I accept the Crown's evidence. Any prior record?

It seems to me that, if there had been an agreement to proceed upon one case and to read in the evidence from that case into another case, a motion to that effect would have been made. It is clear to me, with all due respect for contrary views, that we are here facing a situation where a trial was conducted simultaneously as regards two distinct informations. This was done at the suggestion of the defence and, therefore, with the accused's consent. That is also amply clear to me.

Issue No. 2

This, therefore, takes us to the second issue, which is whether a court has jurisdiction to do this. In *Khan*, supra, it was decided that this could not be done. The case in *Khan* was on all fours with the present case. The appellant was charged in separate informations with an indictable offence and with a summary conviction offence. She elected trial by magistrate prior to entering a plea on the indictable offence, was arraigned on both counts, and entered pleas of not guilty. Both informations were tried together and she was convicted on each.

She appealed her conviction and sentences, but the Court of Appeal concluded that there was evidence to sustain the conviction and that the sentences were not inappropriate. This Court, on July 26, 1984 and some nine months after *Phillips*, supra, held that the trial judge in light of the principles pronounced by this Court in *Phillips*, was without jurisdiction to try together the separate informations, and that the *Khan* case was not distinguishable from *Phillips*.

This issue comes back to us now, 7 1/2 years after *Khan* and close to nine years after *Phillips*.

Phillips is a case where two appellants were charged in separate informations with hunting with a light contrary to the New Brunswick Game Act, R.S.N.B. 1973, c. G-1. A third person was also charged in a third information of wilfully obstructing police officers in the execution of their duty, contrary to s. 118(a) of the Criminal Code, R.S.C. 1970, c. C-34. All charges arose out of the same incident.

Counsel all agreed that the defendants be tried together. The appellants' convictions in Provincial Court were upheld by the Court of Queen's Bench and the Court of Appeal. They then appealed to our Court to determine whether the trial judge had jurisdiction to try more than one information at the same time.

This Court (Ritchie, Dickson, McIntyre, Chouinard and Wilson JJ.) held that, even with the consent of counsel of the parties, a trial judge is without jurisdiction to try together separate informations or indictments. The principle applies to charges laid under the Criminal Code or under provincial statutes, unless those statutes expressly provide otherwise.

The first ground relied upon by this Court was the fact that the decision in *Crane v. Director of Public Prosecutions*, [1921] 2 A.C. 299 (a case from the House of Lords handed down in 1921), reflected ancient and current practice at the time of the hearing in *Phillips*. Indeed, the judgment of the Court, at p. 164, quoted Lord Atkinson in that case at p. 321, saying:

When an accused person has pleaded "Not guilty" to the offences charged against him in an indictment, and another accused person has pleaded "Not guilty" to the offence or offences charged against him in another separate and independent indictment it is, I have always understood, elementary in criminal law, that the issues raised by those two pleas cannot be tried together.

Reference was also made to *R. v. Dennis*, [1924] 1 K.B. 867, which followed *Crane*. A series of appellate cases in Canada was then listed where the rule enunciated in *Crane* had been consistently followed, whether in cases of multiple accused or in cases of a single accused charged on one or more than one indictment or information. Cases where the rule applied to summary convictions under provincial statutes were also referred to and the conclusion, at p. 164, was:

The overwhelming weight of authority in Canada, based upon the *Crane* case, *supra*, is against a joint trial of more than one indictment or information.

But the Court did not rest the whole decision on ancient practice (at pp. 169-70, per McIntyre J.):

I would be reluctant to rest my decision in this case solely on the basis of ancient practice. I agree with the Ontario Court of Appeal that there is no reason why we should be required to be bound by authority which serves no real purpose and rests upon no sound principle applicable in a modern society. We must not, however, cast aside rules merely because they are of long standing or because they may seem in certain cases to be inconvenient. Can it be said then that the rule against joint trials of separate indictments or informations serves no purpose and is based on no sound principle?

It then set out a second set of grounds for supporting the principle enunciated in *Crane*. Those grounds are set out in the judgment at pp. 170-71, as follows:

The joinder of two or more indictments or informations for trial raises fundamentally different problems from those which arise in the joint trials of several persons accused under one indictment or information. An elaborate procedure is provided under the Criminal Code covering joint trials but no such procedure is to be found to deal with questions arising upon a joinder of indictments. Consider, for example, the application of the rule that an accused person is not compellable as a witness at his own trial. Where two accused are charged on separate indictments or informations and tried together in one proceeding there is nothing to prevent the Crown from calling one accused as a witness to testify with respect to the indictment or information charging the other accused because, in respect of that indictment, he does not enjoy the protection accorded an accused person. The risk of prejudice is immediately apparent and the Crown would in this way obtain an advantage not permitted or even contemplated by the Code, provisions. It could be argued no doubt that the evidence so given would be admissible only against the co-accused but on what principle it could be so limited may be somewhat obscure. Certainly any protection the witness might claim under s. 5 of the Canada Evidence Act, R.S.C. 1970, c. E-10, would be rendered completely illusory. Such protection against the use of the evidence against him applies only to future proceedings and not to those in progress when the

evidence is given. One may consider as well the case of an accused charged in two separate indictments or informations with different offences. It may be advantageous for him to testify with respect to one charge but not to the other. Such an advantage is lost if both indictments are tried together. This problem to be sure may arise where an accused is charged with separate counts on one indictment or information, but where this occurs he enjoys the protection of the detailed procedural provisions of the Code relating to severance. While in retrospect, that is to say, from the vantage point of the appellate courts, it may be possible in any given case to conclude that no prejudice resulted from a joinder for trial of two indictments or informations, it would be impossible for a trial judge to foresee at the outset of the trial all possible consequences of such a joinder. The dangers then of prejudice and injustice are such that they outweigh any advantage or consideration of efficiency thought to be gained by the joinder.

The Court then found support for this approach in the Criminal Code when it stated, at p. 171:

It should also be pointed out that the common law rule against joint trials of separate indictments or informations has been incorporated by implication into the Criminal Code . Throughout the Code, reference is made to trial on the indictment or the information. Even the provisions in relation to multiple counts and severance indicate that a trial is to proceed on one indictment or information. If it had been contemplated by Parliament that more than one information or indictment could be tried at the same time, these provisions for joinder or severance would have been unnecessary.

Concerning the first set of grounds relied upon by this Court in Phillips, it is to be noted that the practice has, since Crane, supra, been changed in England by the decision of the House of Lords in *In re Clayton*, supra. This, of course, is not conclusive, since this Court is not bound by the decisions of the House of Lords. Therefore, I will proceed to address the second set of grounds referred to in Phillips. With respect, I do not feel that those problems contemplated in Phillips will arise.

While an elaborate procedure is provided under the Criminal Code for joint trials, all that has to be done is that to the extent possible the same procedure be followed when joining indictments. For joint trials, the same procedure could be followed when proceeding simultaneously on multiple informations.

I do not think, furthermore, that accused persons being dealt with in separate informations at the same time should be any more compellable against each other, especially in light of s. 11 (c) of the Canadian Charter of Rights and Freedoms , than when tried on one single information or indictment. When two or more accused in different informations are charged with the same offence or with different offences, if they are proceeded against jointly they will not be compellable one against the other. When the Crown chooses to proceed at the same time, the Crown then waives the right to call one accused against the other, as is the case of proceeding against the two accused on the same document.

I, therefore, with respect for contrary views, do not think that the problem referred to in Phillips arises. As regards the concern for an accused who might wish to testify with respect to only one of the informations, I think that such a problem would not arise, as it is a case where consent by the accused to a joint trial should and would not be given; and, when consent is withheld, under such circumstances it would be inappropriate for the judge to order a joint trial.

As regards the third and fourth concerns alluded to by the Court, counsel for the respondent in his factum said the following:

... the court raised the issue of interpretation of provisions in the Code referring only to a trial on the "Information" or "Indictment", always worded in the singular. Pursuant to the Interpretation Act, R.S.C. 1985, I-21, s. 33(2):

33(2) words in the singular include the plural, and words in the plural include the singular.

Therefore, it is submitted that the provisions in the Code relating to trial can be interpreted as referring to the plural "Information" or "Indictment". The court's fourth concern related to the Code's provision for only one type of joint trial.... [I]t is submitted that the Code provisions as to joinder and severance are not exhaustive, and should not be interpreted so as to exclude a procedure of joint trials permitted by common law. In addition, it is noteworthy that there is no section in the Code prohibiting a joint trial of separate Informations.

I agree with the respondent's argument.

To conclude this portion of the judgment, I would say that when joinder of offences, or of accuseds for that matter, is being considered, the court should seek the consent of both the accused and the prosecution. If consent is withheld, the reasons should be explored. Whether the accused consents or not, joinder should only occur when, in the opinion of the court, it is in the interests of justice and the offences or accuseds could initially have been jointly charged.

I would adopt the American federal Rules of Criminal Procedure formulation, which is as follows:

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

I would also add, quoting from the Law Reform Commission's Working Paper 55, at p. 39, the following:

... any particular aspects of the rule in favour of severance would have to be inapplicable in order for this judicial joinder to occur. This rule would thus reflect the rule for unsuccessful severance on a joint charge.

Issue No. 3

This now takes us to the next issue, which is whether, given the difference in procedure, this can be done between charges for summary convictions and charges for indictable offences.

Khan, *supra*, which was heard and decided in 1984, is a case where that issue arises. Indeed, two informations were jointly heard, one setting out an indictable offence and the other a summary conviction. Khan, it will be recalled, was decided on the basis of Phillips, which stood as a bar to holding joint trials of separate informations whether these informations contained a mix of indictable alone, summary alone, or a mix of summary and indictable.

Applying Phillips, there was no need to address the issue as regards the law as it stood in 1985. Indeed, former s. 520(1) of the Criminal Code (now s. 591(1)) permitted joinder of any number of indictable offences in an indictment. No mention was made as regards joining either summary conviction offences together or joining summary conviction offences with indictable offences.

This section was substantially amended in 1985 (Criminal Law Amendment Act, 1985, S.C. 1985, c. 19, s. 119), to the effect that any number of counts for any number of offences may be joined in the same indictment. I am of the view that the 1985 amendment took away any impediment that might have existed prior to 1985 as regards coupling summary convictions and indictable offences. Therefore, if one can include, in one indictment, summary conviction offences and indictable offences, one should for the reasons I have given previously, be able to proceed jointly when these offences are contained in two distinct informations. Also, it must be noted that s. 795 of the Criminal Code states that s. 591(1) is applicable to summary conviction proceedings. There is nothing wrong with so doing. We must nevertheless keep in mind the difference of the process as regards indictable offences and summary convictions. It is obvious that the fact that indictable offences must on some occasions, and may in others, be tried by a judge and a jury, is an impediment to proceeding jointly when before that court with a summary conviction.

Secondly, the fact that preliminary inquiries are available for most indictable offences is another impediment for the joinder of trials. I would, therefore, adopting the suggestion of the Law Reform Commission in its Working Paper, at p. 39, state the following:

... summary conviction offences should be joined with indictable offences only where the accused has waived the right to be tried in a higher court (either with or without a jury) and has also foregone his right to a preliminary hearing. In other words, joinder may occur only where trial on the indictable offence is to take place before the provincial court.

This will occur only when on the indictable offence the accused either will have chosen a trial by provincial court judge under Part XIX or, having chosen a trial by judge under Part XIX, has waived his preliminary. As suggested by the Law Reform Commission, in the event of any conflict as to the applicable procedure, indictable offence procedures should apply and crimes triable by jury may be joined with those carrying no right to a jury trial (or preliminary inquiry) provided the accused has consented to the trial of both matters in a forum without a jury and without a preliminary inquiry.

I find support in taking this direction from a resolution passed by the Uniform Law Conference of Canada (which is composed of all Deputy Ministers of Justice or Deputy Attorneys General, representatives of the Canadian Bar, and other parties appended to the justice system), in August of 1988 in the course of their proceedings of the 70th annual meeting of that body. It was resolved that the Criminal Code be amended to allow for the joinder of summary convictions and indictable offences, with the indictable procedure to then apply.

There remains the problem of appeals. Of course, in cases where an issue common to both informations has gone to the Summary Conviction Appeal Court and the Court of Appeal, common sense would dictate that the Summary Conviction Appeal Court of should await decision by the higher court.

Issue No. 4

The final question is whether, in this case, proceeding jointly constituted a procedural irregularity. Obviously, no. There is no suggestion on the part of the appellant that there was, understandably so since it was at the appellant's own suggestion that both informations were tried at the same time.

Disposition

For all of these reasons, I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Little, Reeves, Mahoney & Jarrett, London.

Solicitor for the respondent: The Ministry of the Attorney General, Toronto.

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