1967

*Feb. 21, 22
Mar. 2

ARNOLD GLENN SHINGOOSE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal Law—Charge of non-capital murder against a juvenile—Application to have trial held in ordinary courts—Juvenile Delinquents Act, R.S.C. 1952, c. 160, s. 9.

The appellant, a 15 year old juvenile, was charged under the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160, with non-capital murder. The Crown applied under s. 9 of the *Juvenile Delinquents Act* to have the juvenile proceeded against by indictment in the ordinary courts. The Juvenile Court judge made the order asked after hearing evidence of a psychiatrist and from the probation officer, some of which was unsworn. The appellant then applied for a writ of *habeas corpus* with *certiorari* in aid. This application was dismissed. The Court of Appeal upheld the dismissal. The appellant applied to this Court for leave to appeal. Such leave in respect of *habeas corpus* was not required by virtue of s. 691(3) of the *Criminal Code*, but it was granted in so far as it related to the request for *certiorari* in aid.

Held: The appeal should be dismissed.

On the merits of this case, and without deciding the question of the jurisdiction of this Court, the order made by the Juvenile Court judge should not be disturbed. It was a discretionary order which he had jurisdiction to make. There is no rule of law, nor any authority, to compel a magistrate or a Juvenile Court judge when making an order under s. 9(1) of the *Juvenile Delinquents Act* to base his opinion solely on sworn testimony.

Droit criminel—Accusation de meurtre non qualifié contre un enfant —Requête pour avoir le procès devant les cours ordinaires—Loi sur les Jeunes Délinquants, S.R.C. 1952, c. 160, s. 9.

L'appelant, un enfant de 15 ans, a été accusé sous le régime de la *Loi sur les Jeunes Délinquants*, S.R.C. 1952, c. 160, d'un meurtre non qualifié. La Couronne a présenté une requête en vertu de l'art. 9 de la *Loi sur les Jeunes Délinquants* pour qu'il soit ordonné que l'enfant soit poursuivi par voie de mise en accusation dans les cours ordinaires. Le juge de la Cour pour jeunes délinquants a accordé cette demande après avoir entendu les témoignages d'un psychiatre et d'un agent de surveillance. Une partie de ces témoignages n'a pas été prise sous serment. L'appelant a alors présenté une requête pour obtenir un bref d'*habeas corpus* avec *certiorari* à l'appui. La Cour d'Appel a confirmé le jugement rejetant cette requête. L'appelant a présenté une requête devant cette Cour pour permission d'appeler. Quant au bref d'*habeas*

---

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott, Martland, Ritchie and Hall JJ.

The question for decision is whether profits of $703,636 realized in 1957 and $63,932 realized in 1958 on the acquisition and sale by the respondent of shares in Trans-Canada Pipe Lines Limited and Quebec Natural Gas Corporation were income from a business within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*, as is contended by the appellant, or were realization of an enhancement in the value of investments held by the appellant, as found by the learned trial judge.

It is not questioned that the primary activities of the respondent are those of a bona fide investment company but counsel for the appellant argues that the particular transactions, out of which the profit sought to be taxed arose, were speculations constituting adventures in the nature of a trade.

The question is essentially one of fact depending on the intention with which the respondent acquired the shares.

The learned trial judge has set out the relevant facts in detail and has made reference to several passages in the evidence. I do not find it necessary to repeat these. I am satisfied that the learned trial judge gave full consideration to all the circumstances relied upon by the appellant and having done so he reached the conclusion that the shares in question were acquired by the respondent as investments to be held as a source of income in the ordinary course of its business as an investment company and that the reason it decided to realize these investments after a comparatively short period of time was that, in the opinion of its responsible officers, the shares had reached a price which was unrealistically high.

If this finding of fact is accepted, no question of law arises. A perusal of the record in the light of the full and able arguments addressed to us satisfies me that this finding was right.

For the reasons given by Noël J. and those briefly stated above, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Duquet, MacKay, Weldon, Bronstetter, Willis & Johnston, Montreal.

corpus, cette permission n'était pas requise en vertu de l'art. 691(3) du *Code Criminel*, mais permission a été accordée en autant que la requête se rapportait au bref de *certiorari*.

Arrêt: L'appel doit être rejeté.

Sur les mérites de la cause, et sans décider la question de la juridiction de cette Cour, il n'y a pas lieu de changer l'ordonnance du juge de la Cour pour jeunes délinquants. Cette ordonnance était discrétionnaire et relevait de sa compétence. Il n'y a aucune règle de droit, ni aucune autorité, contraignant un magistrat ou un juge de la Cour pour les jeunes délinquants de baser son opinion seulement sur des témoignages assermentés lorsqu'il rend une ordonnance sous l'art. 9(1) de la *Loi sur les Jeunes Délinquants*.

APPEL d'un jugement de la Cour d'Appel du Manitoba concernant une ordonnance en vertu de l'art. 9 de la *Loi sur les Jeunes Délinquants*. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Manitoba with respect to an order made under s. 9 of the *Juvenile Delinquents Act*. Appeal dismissed.

Murray Tapper, for the appellant.

A. A. Sarchuk, for the respondent.

The judgment of the Court was delivered by

HALL J.:—The appellant, Arnold Glenn Shingoose, a juvenile 15 years of age at the time of commission of the alleged offence, was charged under an information dated April 10, 1966, in Juvenile Court under the *Juvenile Delinquents Act* as follows:

...that Arnold Glenn Shingoose a child did on or about the 9th day of April, 1966, at the Lizard Point Indian Reserve in the said Province, commit a delinquency in that he did unlawfully murder George Clearsky and thereby committed non-capital murder contrary to the form of the statute in such case made and provided Section 206 (2) C.C. & J.D. Act.

Upon being apprehended, he was brought before His Honour F. W. Coward, a judge under the *Juvenile Delinquents Act*. On May 2, 1966, an application was made to the Juvenile Court judge under s. 9 of the *Juvenile Delinquents Act* to order that the child be proceeded against by indictment in the ordinary courts in accordance with the provisions of the *Criminal Code* in that behalf. Section 9 reads as follows:

9.(1) Where the act complained of is, under the provisions of the Criminal Code or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the Court may, in

1967

SHINGOOSE v. THE QUEEN

Hall J.

its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of the *Criminal Code* in that behalf; but such course shall in no case be followed unless the Court is of the opinion that the good of the child and the interest of the community demand it.

(2) The Court may, in its discretion, at any time before any proceeding has been initiated against the child in the ordinary criminal courts, rescind an order so made.

On the hearing of this application, the Juvenile Court judge received sworn testimony as to the age of the juvenile which established that he was born January 5, 1951, and he was, accordingly, over the age of 14 years. He also heard representations from Crown counsel in which he was referred to a number of decisions relating to s. 9 aforesaid. Following that, he asked for a psychiatric report and a psychological report. He then proceeded to hear representations from the Probation Officer, Mr. Korzeniowski, who was cross-examined by counsel for the juvenile. Mr. Korzeniowski was not sworn. The Juvenile Court judge then adjourned the proceedings until Tuesday, May 24, 1966, at which time the psychiatric and psychological reports were received. Counsel for the juvenile objected that these were not given under oath. The Juvenile Court judge then made the Order complained of.

The appellant applied for a writ of *habeas corpus* with certiorari in aid. The application was heard by Bastin J. and dismissed by him. The appellant appealed to the Court of Appeal of Manitoba and that Court, after a full hearing on the merits, upheld the judgment of Bastin J. The appellant thereupon applied to this Court for leave to appeal from the judgment of the Court of Appeal of Manitoba. Leave to appeal in respect of *habeas corpus* was not required by virtue of s. 691(3) of the *Criminal Code*. Leave to appeal insofar as the application related to the request for certiorari in aid was granted.

On the hearing in this Court, the jurisdiction of the Court to interfere with the order made by the learned Juvenile Court judge in *habeas corpus* proceedings was questioned, and upon consideration the Court stated:

Mr. Tapper and Mr. Sarchuk:—We think the best course is to hear the argument on the merits reserving the question whether the proceedings taken by the appellant are such that we can deal with the merits. It goes without saying, Mr. Sarchuk, that you will be entitled to argue as fully as you please that in view of the form of the proceedings we cannot deal with the merits.

Apart altogether from the procedural difficulties and without passing upon them, I am of the view that on the merits the order made by the learned Juvenile Court judge should not be disturbed. It was a discretionary order which he had jurisdiction to make. The appellant's contention is that on the hearing preceding the making of the order in question the Juvenile Court judge heard representations of counsel for the Crown as well as reports from the Probation officer and from a psychologist and a psychiatrist which were not given under oath.

In the Court of Appeal, Monnin J.A., speaking for the Court, said:

> The issue before Bastin J., involved the question whether the juvenile had been properly dealt with by Coward J.C.J. Reviewing the record in this matter it is apparent that Coward J.C.J. entered into an extensive enquiry for the purpose of determining whether or not to grant the Crown's application for transfer. It is plain that he addressed his mind both to the facts and to the governing law. He gave specific consideration to the requirements of sec. 9(1) of *The Juvenile Delinquents Act, supra,* requiring that no order of transfer to the adult Court be made "unless the Court is of the opinion that the good of the child and the interest of the community demand it".

Monnin J.A., without referring to the case by name, was following the decision of the Court of Appeal of Manitoba in *Regina v. Pagee*[1], in which he had participated. In that case, Miller C.J.M., speaking for the Court, said:

> In my opinion if Crown counsel outlines to the Juvenile Court Judge reasons which indicate that it is for the good of the child and in the interest of the community that the transfer be made, then the Juvenile Court Judge, after considering any representation on behalf of the juvenile, can, in his discretion, act upon such information and material as is before him. I do not say that sworn evidence could not be given if desired either by the Crown or the defence or by both in support of or in opposition to the transfer, but what I want to make clear is that there is no rule of law, nor any authority, to compel the Magistrate when making an order under s. 9(1) of the *Juvenile Delinquents Act,* to base his opinion solely on sworn testimony.

With this I agree.

The appeal should, accordingly, be dismissed.

Appeal dismissed.

Solicitors for the appellant: Walsh, Micay & Company, Winnipeg.

Solicitor for the respondent: G. E. Pilkey, Winnipeg.

[1] [1964] 1 C.C.C. 173, 39 C.R. 329.