ADOLPHE KARCHESKY .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1967

*Jan. 16
Mar. 2

WRIT OF HABEAS CORPUS

Criminal law—Habeas corpus—Warrant of committal—Validity—Conditional licence to be at large—Validity of procedures for recommittal—Ticket of Leave Act, R.S.C. 1952, c. 264.

The applicant was imprisoned for armed robbery and conspiracy to commit armed robbery. Several years later he was granted a conditional licence to be at large pursuant to s. 3(1) of the *Ticket of Leave Act*, R.S.C. 1952, c. 264. While at large, he committed an armed robbery for which he was convicted and sentenced to imprisonment. This conviction caused the forfeiture of his conditional licence by the sole operation of s. 6 of the *Ticket of Leave Act*. Procedures authorized for the apprehension and committal of a licensee who has lost his licence were adopted and a warrant for his committal was issued by a justice of the peace. The applicant escaped but was recaptured and returned to the prison where he was detained.

The applicant made an informal written application to this Court for the issuance of a writ of *habeas corpus*. He argued that the only possible authority for his present detention were his very first convictions by the first judge, and that all the other terms of imprisonment—including the term imposed upon him for escape—had been fully satisfied. He challenged (a) the validity of the charges and procedures before the first judge and contended that the latter had failed to issue a warrant of committal in the form prescribed by the law, and challenged also (b) the validity of the procedures leading to his recommittal after he had lost his conditional licence, especially the warrant of committal issued by the justice of the peace.

Held: The application should be dismissed.

As to grounds raised in (a). None of the points raised with respect to the charges and procedures before the first judge had any relevancy on an application for the issue of a writ of *habeas corpus*. It has been repeatedly held that such a writ could not be converted into a writ of error or an appeal. The warrant of committal complied with the law and was valid and effective.

As to the grounds raised in (b). Everyone of the steps prescribed for the apprehension and committal of one who has lost his licence has been taken. There was no necessity, in this case, to formally proceed with the apprehension and recommittal of the applicant who was already validly confined. While the term of imprisonment, to which the applicant was sentenced for the offence in consequence of which his licence was forfeited, may now be said to have been satisfied, he must, according to s. 9 of the *Ticket of Leave Act*, further undergo a term of imprisonment equal to the portion to which he was originally sentenced and which remained unexpired at the time his licence was granted.

*PRESENT: Fauteux J. in Chambers.

1967

KARCHESKY
v.
THE QUEEN

Droit criminel—Habeas corpus—Mandat de dépôt—Validité—Permis conditionnel d'être en liberté—Validité des procédures pour réincarcération—Loi sur les Libérations conditionnelles, S.R.C. 1952, c. 264.

Le requérant fut emprisonné pour vols à main armée et pour conspiration pour commettre ces vols. Plusieurs années plus tard, il a obtenu un permis conditionnel d'être en liberté en vertu de l'art. 3(1) de la *Loi sur les Libérations conditionnelles*, S.R.C. 1952, c. 264. Alors qu'il était en liberté, il a commis un vol à main armée pour lequel il a été trouvé coupable et condamné à l'emprisonnement. Cette condamnation lui a fait perdre son permis conditionnel en vertu de l'art. 6 de la *Loi sur les Libérations conditionnelles*. Les procédures autorisées pour l'appréhension et l'incarcération du porteur qui a perdu son permis ont été adoptées, et un mandat pour son incarcération a été émis par un juge de paix. Le requérant s'est évadé mais a été recapturé et retourné à la prison où il est détenu présentement.

Le requérant a présenté à cette Cour une requête non formelle, par écrit, pour obtenir l'émission d'un bref d'*habeas corpus*. Il soutient que la seule autorité possible pour sa détention présente se trouve dans la première condamnation qu'il a reçue du premier juge, et que tous les autres termes d'emprisonnement—y inclus celui imposé pour son évasion—ont été complètement purgés. Il met en question (a) la validité des actes d'accusation et des procédures devant le premier juge et prétend que ce dernier n'a pas émis un mandat de dépôt dans la forme prescrite par la loi, et met aussi en question (b) la validité des procédures en vertu desquelles il a été réincarcéré après avoir perdu son permis conditionnel, et spécifiquement le mandat de dépôt émis par le juge de paix.

Arrêt: La requête doit être rejetée.

Pour ce qui est des griefs soulevés dans (a). Aucun des points soulevés relativement aux actes d'accusation et aux procédures devant le premier juge n'a de pertinence en regard d'une requête pour l'émission d'un bref d'*habeas corpus*. Il a été maintes fois décidé qu'un tel bref ne peut pas être changé en un recours pour cause d'erreur ou en appel. Le mandat de dépôt est conforme à la loi et est valide et effectif.

Pour ce qui est des griefs soulevés dans (b). Toutes les mesures prescrites pour l'appréhension et l'incarcération de celui qui a perdu son permis ont été prises. Il n'y avait aucune nécessité, dans ce cas, de procéder formellement à l'appréhension et à l'incarcération du requérant qui était déjà validement en prison. Quoi qu'on puisse dire que le terme d'emprisonnement, auquel le requérant a été condamné pour l'offense qui eu comme résultat de lui faire perdre son permis, peut maintenant être considéré comme ayant été purgé, il doit, selon l'art. 9 de la *Loi sur les Libérations conditionnelles*, subir en outre un emprisonnement d'une durée égale à ce qui restait encore à courir de sa première peine le jour où il a obtenu son permis.

REQUÊTE devant le Juge Fauteux en chambre pour obtenir l'émission d'un bref d'*habeas corpus*. Requête rejetée.

1967

KARCHESKY v. THE QUEEN

APPLICATION before Fauteux J. in Chambers for the issuance of a writ of *habeas corpus*. Application dismissed.

No one appearing for the applicant.

D. H. Christie, Q.C., for the Attorney General for Canada.

André Chaloux for the Attorney General for Quebec.

The following judgment was delivered by

FAUTEUX J.:—This is one of these prisoners' informal applications for the issuance of a writ of habeas corpus made, in this case, by one Adolphe Karchesky, presently detained in the penitentiary of Kingston, in the province of Ontario. The applicant did not appear nor was he represented at the hearing, the date of which had been fixed when it appeared, from the correspondence he exchanged with the Registrar of this Court, that he had exhaustively stated his grounds and arguments and also indicated his willingness to submit his application, even if contested, on the basis of his written presentation. Representatives of the Attorney General for Canada and of the Attorney General for the province of Quebec appeared at the hearing to contest this application. The material filed by the latter and the material submitted by the applicant show the following facts:—(i) on March 29, 1946, at the city of Montreal, the applicant appeared and pleaded guilty, before Judge Maurice Tétreau, a judge of the Sessions of the Peace for the district of Montreal, to seventeen charges of armed robbery and seventeen charges of conspiracy to commit those armed robberies, for which he was sentenced, on April 4, 1946, to life imprisonment and seven years respectively on each charge of armed robbery and conspiracy; (ii) on the same day, to wit on March 29, 1946, at the same place and before the same Judge, the applicant also pleaded guilty to two charges of attempting to commit an armed robbery and two additional charges of conspiracy to commit an armed robbery, for which he was sentenced, on April 4, 1946, to seven years' imprisonment on each count; (iii) on December 13, 1948, the Commissioner of Penitentiaries issued a Removal Warrant, pursuant to s. 52 of the *Penitentiary Act* (1939), Statutes of Canada 1939, c. 6, for the

1967

KARCHESKY v. THE QUEEN

Fauteux J.

transfer of the applicant from St. Vincent de Paul Penitentiary—where he had been committed by Judge Tétreau to serve the above sentences—to the Manitoba Penitentiary; (iv) several years later, pursuant to subs. 1 of s. 3 of the *Ticket of Leave Act,* R.S.C. 1952, c. 264, a conditional license to be at large, effective May 1, 1957, was granted to the applicant, notice of which, dated April 11, 1957, was addressed by the Deputy Minister of Justice to the Warden of the Manitoba Penitentiary; (v) while being lawfully at large by virtue of this conditional license, the applicant committed, on November 28, 1958, at the city of Montreal, an indictable offence, to wit an armed robbery, for which he was arrested, charged and found guilty on December 1, 1958, by Judge Paul Hurteau, a judge of the Sessions of the Peace for the district of Montreal, and for which he was sentenced and committed on December 9, 1958, to five years' imprisonment in the penitentiary of St. Vincent de Paul; (vi) consequent upon the latter conviction, applicant's conditional license to be at large was *forfeited forthwith* by the sole operation of s. 6 of the *Ticket of Leave Act.* Procedures authorized for the apprehension and committal of a licensee whose license has been forfeited or revoked were then adopted by the various authorities concerned and on February 5, 1959, pursuant to a warrant of apprehension issued on January 16, 1959, by the Commissioner of the Royal Canadian Mounted Police, as provided in subs. 1 of s. 8 of the *Ticket of Leave Act,* the applicant, who was then actually incarcerated in the St. Vincent de Paul Penitentiary, where he had been committed by Judge Hurteau, was brought before Jean-Eudes Blanchard, a Justice of the Peace for the district of Montreal. The Justice of the Peace then issued a warrant of committal pursuant to subs. 3 of s. 8 of the *Ticket of Leave Act;* (vii) on August 12, 1959, the Commissioner of Penitentiaries, under the authority of s. 52 of the *Penitentiary Act,* R.S.C. 1952, c. 206, ordered the transfer of the applicant from St. Vincent de Paul Penitentiary to the Kingston Penitentiary; (viii) on August 14, 1959, the applicant was again transferred from the Kingston Penitentiary to the Joyceville Institution from which he escaped on August 18, 1964; and

upon being recaptured on August 27, 1964, the applicant was returned to the Kingston Penitentiary where he is, since then, presently detained.

In support of his application, the prisoner submitted, in the first place, that the only possible authority for his present detention must be the convictions registered against him on April 4, 1946, at Montreal, before Judge Maurice Tétreau,—cf. (i) and (ii) above,—all the other terms of imprisonment,—including the term imposed upon him for escape,—having been fully satisfied. He then challenged (a) the validity of the charges and procedures before Judge Tétreau and contended moreover that the latter had failed to issue a warrant of committal in the form prescribed by law, and he also challenged (b) the validity of the procedures leading to a recommittal after the forfeiture or revocation of a conditional license to be at large, and more specifically the warrant of committal issued by the Justice of the Peace, Jean-Eudes Blanchard.

Dealing with grounds mentioned in (a):—It is unnecessary to recite and deal here with the various points raised by the applicant with respect to the charges and procedures before Judge Tétreau; for assuming that, contrary to the opinion I formed after considering them, anyone of these points would have any merits, none of them has any relevancy on an application for the issuance of a writ of habeas corpus. Indeed, it has been repeatedly held that a writ of habeas corpus cannot be converted into a writ of error or an appeal and that its functions do not extend beyond an enquiry into the jurisdiction of the Court by which process a subject is held in custody and into the validity of the process upon its face. Bearing that in mind, it is sufficient to say that as a Judge of the Sessions of the Peace for the district of Montreal, Judge Maurice Tétreau had clearly jurisdiction in the matter and that the warrant of committal he then issued is valid on its face. The contention that this warrant is not in the form prescribed by law has no foundation. The applicant has vainly attempted to support this submission on some of the provisions of the new Criminal Code, assented to on April 1, 1955, for, at all

1967

KARCHESKY v. THE QUEEN

Fauteux J.

relevant time, the law governing in the matter was to be found in the *Criminal Code*, R.S.C. 1927, c. 36. Section 799 of this Code provides that a conviction on a plea of guilty, under Part XVI, relating to the summary trial of indictable offences, may be in the form 56 or the forms appearing in Part XXV, or to the like effect; and s. 794 provides that a copy of such conviction, certified by the proper officer of the Court or proved to be a true copy shall be, in any legal proceedings, sufficient evidence of such conviction. The conviction or the warrant of committal issued by Judge Tétreau, of which a true copy has been filed before me, fully complies with these provisions of the law and this warrant is today as valid and effective a warrant as it was at the time of its issuance.

Dealing with grounds raised in (b):—The various steps of the procedure related to the apprehension and committal of a licensee, whose license has been forfeited or revoked, are set forth in s. 8(1), (2) and (3) of the *Ticket of Leave Act* and, subject to what is hereafter said with respect to the warrant of committal issued by Justice of the Peace Blanchard, I must say that a close examination of the various documents and affidavits filed on behalf of the Attorney General for Canada and of the Attorney General for the province of Quebec, has satisfied me that everyone of the steps prescribed for such an apprehension and committal has been taken in the present case.

Applicant questioned Blanchard's authority to issue a warrant of committal, suggesting, in fact, that he may not have been a Justice of the Peace, but merely a Commissioner of Oaths. This suggestion has no foundation. Indeed a certificate, under the signature and seal of a Clerk of the Peace and of the Crown for the district of Montreal, establishes that Blanchard was sworn in, as a Justice of the Peace, on June 10, 1958, and the affidavit of Crown Attorney André Chaloux indicates that this appointment has not been revoked. Furthermore and as stated by Lord Coleridge C.J., in *R. v. Morris Roberts*[1]:

> It is laid down in all the text books as a recognised principle that a person acting in the capacity of a public officer is prima facie to be taken to be so, . . .

[1] (1878), 38 L.T.R. 690 at 691.

As to the substance of the warrant, the representative of the Attorney General for Canada pointed out that blank spaces which, in the form of such warrants, are intended to be used for the designation of the person to whom the prisoner is to be conveyed and the penitentiary to which he is to be committed, were not, in this case, completed by Blanchard after the applicant had appeared before him at the St. Vincent de Paul Penitentiary where, again, he was already incarcerated pursuant to the warrant of committal issued by Judge Hurteau—cf. (v). The Crown, having considered that these omissions might be said to constitute a defect on the face of the warrant, secured, two days before the hearing of the present application, a new warrant from Justice of the Peace Blanchard. In this new warrant, these omissions were remedied and a direction was given to the Warden of the St. Vincent de Paul Penitentiary, to whom such warrant was addressed, to substitute it to the original one. Needless to say that the new, as well as the original warrant, contains a recital of the facts referred to in (i), (ii), (iv), (v) and (vi) above.

As to the law respecting the issuance of a substituted warrant of committal for a defective one, the Crown relied on the authorities collected in *Tremeear's Annotated Criminal Code*, 6th ed., 1964, p. 1373, and in *Crankshaw's Criminal Code of Canada*, 7th ed., p. 1167, and alternatively placed reliance upon s. 688 of the *Criminal Code* (1955) which provides that:

> 688. No warrant of committal shall, on certiorari or habeas corpus, be held to be void by reason only of any defect therein where
>
> (*a*) it is alleged in the warrant that the defendant was convicted, and
>
> (*b*) there is a valid conviction to sustain the warrant.

Whatever view might be taken as to the validity or effectiveness of the original warrant issued by Justice of the Peace Blanchard or the corrected warrant he substituted thereto, in my opinion, there was no necessity, under all the circumstances of this case, to formally proceed with the apprehension and recommittal of the applicant who, at the time he was brought before the Justice of the Peace at the St. Vincent de Paul Penitentiary and even before any of the procedures set forth in s. 8(1), (2) and (3) of the

1967

KARCHESKY v. THE QUEEN

Fauteux J.

Ticket of Leave Act had been resorted to, was then already validly confined by force of the unimpeached and unimpeachable warrant of committal issued by Judge Hurteau, as well as by force of the following provisions of s. 6 of the *Ticket of Leave Act* which were set in action consequent to and upon the conviction of the applicant by Judge Hurteau.

> 6. If any holder of a license under this Act is convicted of any indictable offence his license shall be forthwith forfeited. R.S., c. 150, s. 5.

While the term of imprisonment, to which the applicant was sentenced for the offence in consequence of which his license was forfeited, may now be said to have been satisfied, he must, according to s. 9 of the *Ticket of Leave Act, further undergo a term of imprisonment equal to the portion to which he was originally sentenced and which remained unexpired at the time his license was granted.* And, as indicated above in (i) and (ii), the term of the original sentence in his case is life imprisonment.

Having fully considered the material filed and all the points raised by the applicant, I have satisfied myself that he is lawfully detained. His application must therefore be and is dismissed.

Application dismissed.