1961

*Sept. 18, 26, 27
Sept. 27

IN RE MORRIS C. SHUMIATCHER

Criminal law—Habeas corpus—Counselling to commit perjury before Registrar of Saskatchewan Securities Commission—Whether examination by Registrar a judicial proceeding—Registrar's power to examine on oath—Solemn declaration—Perjury—Powers of Court on habeas corpus—The Securities Act, 1954 (Sask.), c. 89, s. 13—The Saskatchewan Evidence Act, R.S.S. 1953, c. 73, s. 41—Criminal Code, 1953-54 (Can.), c. 51, ss. 22, 112, 114.

The petitioner, a barrister and solicitor, was committed for trial in Saskatchewan on an indictment of ten charges. Seven charges were that the petitioner counselled seven named individuals to commit perjury in their examination before the Registrar of the Saskatchewan Securities Commission held pursuant to s. 13 of *The Securities Act*, 1954 (Sask.), and thereby became a party to the said perjury by reason of s. 22(1) of the *Criminal Code*. The other charges were that he counselled and procured one L to make a false declaration on oath before an authorized person and thereby became a party to an offence under s. 114 of the *Criminal Code*. The plaintiff applied to the Supreme Court of Canada for a writ of *habeas corpus* on two grounds: (1) that there was no offence at law shown in the first seven charges because the examination of the individuals before the Registrar was not a judicial proceeding within the meaning of s. 112 of the *Criminal Code*; and (2) that L was not a person permitted, authorized or required by law to make the said declaration within the meaning of s. 114 of the *Criminal Code*, and that there existed no authorization at law for the taking or receiving of these solemn declarations.

Held: The application was dismissed.

Under s. 13 of *The Securities Act*, 1954, the Registrar had by law authority to examine under oath. He also had the power to administer the oath if not under that section then under s. 41 of *The Saskatchewan Evidence Act*. Consequently, counts one to seven disclosed offences known *to the law and for which the accused was properly committed for trial.*

The jurisdiction of this Court in a writ of *habeas corpus* was limited to a consideration of the warrant of committal and other germane order, and if they were regular on their face, that was the end of the matter. The Court in such a writ has no more power to look at the solemn declarations alleged to have been made than it has to look at the evidence given on a preliminary hearing. No distinction can be drawn between a warrant of committal before and one after conviction.

APPLICATION before Judson J. in chambers for a writ of *habeas corpus*. Application dismissed.

A. W. Embury, Q.C., and *P. H. Gordon, Q.C.*, for the petitioner.

N. L. Mathews, Q.C., and *J. P. Nelligan*, contra.

*PRESENT: Judson J. in Chambers.

The following judgment was delivered

JUDSON J. (orally):—This is an application for habeas corpus. Before I can deal intelligibly with the issues raised on the application, I think I should set out in chronological order the steps that have been taken in this prosecution before the application was launched.

The accused came before the magistrate on a summons containing eleven charges on which the magistrate conducted a preliminary hearing lasting seven days. He committed the accused for trial on all charges except number nine, in which he made an amendment to reduce it to "counselling, procuring or inciting the commission of an offence" which was not committed, under s. 407(*a*) of the *Criminal Code*.

I should say at this point that the magistrate on that date, that is, the 30th November 1960, signed no warrant of committal. He admitted the accused to bail immediately on his own recognizance.

On January 23, 1961, an indictment containing eleven counts was preferred against the accused in the Court of Queen's Bench presided over by Mr. Justice Disbery. Without analyzing the counts in the indictment in detail, it is accurate, I think, to say that they are substantially in the same form as the charges contained in the summons before the magistrate, as amended.

I can make this rough classification at this point, that the first seven counts in the indictment have to do with counselling seven named individuals to commit perjury before the Registrar under *The Securities Act* of Saskatchewan and an allegation that that offence of perjury was afterwards committed. The charge, therefore, on the first seven counts was that of perjury.

Count number eight charged an attempt to obstruct and defeat the course of justice by attempting to induce the seven named individuals in the first seven counts to give false evidence in a judicial proceeding, namely, an examination before the Registrar under *The Securities Act*.

Counts nine, ten and eleven have to do with procuring or inciting two named individuals to make a solemn declaration.

I will deal with all these counts in more detail later.

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Counsel for the accused moved to quash all counts in the indictment. The application was dismissed by the trial judge, with the exception of count number eight on which the accused had elected a non-jury trial and on which the Crown had no right of election before a judge and jury. Count number eight, therefore, requires no further consideration here.

The remaining counts were then severed and the accused was arraigned on counts nine, ten and eleven. He pleaded not guilty.

At the conclusion of the evidence there was a motion for a directed verdict, which was rejected by the trial judge. The jury found the accused not guilty on count eleven and disagreed on counts nine and ten.

The trial judge then adjourned the trial on counts nine and ten and the remaining seven counts, counts one to seven, to the next sittings of the Court to be held in May 1961; and continued the bail.

The next step was a motion by the accused before the Saskatchewan Court of Appeal for a Writ of Certiorari to quash the committal for trial on counts one to seven and counts nine and ten and to quash the indictments corresponding to those counts. Judgment was given dismissing this application on August 16, 1961, and on September 15, 1961, the accused launched this application for habeas corpus.

On September 15, 1961, the accused was still at liberty on bail, but on Monday, September 18, he appeared before Judge Hogarth and, according to the order made by Judge Hogarth on that day, surrendered himself into the custody of the judge for the purpose of satisfying the conditions of the recognizance; and applied to be relieved of his obligations under the terms of the recognizance and no longer acknowledged himself to be bound by its terms.

The order recites that the accused was so relieved of his obligations and then commands W. H. Williams, Sheriff of the Judicial Centre of Regina, to take the accused into custody and convey him to Regina Gaol.

On the same day, an order was made by a Judge of this Court directing the issue of a Writ of Habeas Corpus to W. H. Williams, the Sheriff, and to the Keeper of the Regina

Gaol, to have the body of the accused before the judge making the order on September 25, 1961. At that time the accused was admitted to bail. The writ was served but no formal return to the writ has been made.

I have before me, first of all, the recognizance entered into by the accused on November 30, 1960; a copy of the order of Judge Hogarth; and a certified copy of a warrant of committal dated November 30, 1960. I have already mentioned that this warrant was not signed on that day because the accused was immediately admitted to bail.

There is evidence before me that this warrant was not signed until September 21, or possibly September 22. In any event, I am not in any doubt how the accused came to be in custody and I assume that if any formal return had been made it would recite the facts that I have recited.

The application for habeas corpus is made on two grounds—the first ground having reference to the first seven counts and the second ground having reference to counts nine and ten. The first seven counts have been referred to throughout these proceedings as the "registrar charges" and counts nine and then have been referred to as "Leier charges".

I will set out now count number one, the first of the registrar charges. The others are in exactly the same terms but with a different name. I am quoting not from the indictment but from the summons.

The first charge is that the accused, during the month of January 1958, at the City of Regina, did counsel another person, to wit, one Edward Joseph Leier to commit the offence of perjury, which offence was afterwards committed by the said Edward Joseph Leier at the examination before the Registrar of the Saskatchewan Securities Commission held pursuant to s. 13 of *The Securities Act*, 1954, on the 23rd day of January, A.D. 1958, by swearing falsely to the following effect:

(a) that he did not make certain representations to prospective purchasers of shares in Columbia Metals Exploration Co. Ltd., including statements regarding the listing of the shares, the resultant increase in the price of the shares, the financial position of the said Company, and its association with other companies, including the Ford Motor Company, and

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(b) that the information contained in the said representations was not given to him by Walter Luboff, and

(c) that he could not remember certain facts which he did actually remember,

while knowing the same to be false and with intent to mislead the said Registrar contrary to the *Criminal Code,* and did thereby become a party to the said perjury by virtue of 22(1) of the *Criminal Code.*

When the Registrar charges became the first seven counts in the indictment the application to quash was based on the same argument that has been addressed to me on this motion for habeas corpus. Its outlines are set out in the Notice of the application.

The argument is that there is no offence at law shown in these counts, because the examination before the Registrar of the Saskatchewan Securities Commission which he is said to have held under s. 13 of *The Securities Act,* 1954, is not a judicial proceeding within s. 112 of the *Criminal Code.* Section 112 of the *Criminal Code* reads:

> Every one commits perjury who, being a witness in a judicial proceeding, with intent to mislead gives false evidence, knowing that the evidence is false.

"Judicial proceeding" is defined in s. 99 of the Code. I think the only subsection that I am concerned with is para. (iv) of subs. (*c*), which reads:

> (*c*) "judicial proceeding" means a proceeding
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> * * *
>
> (iv) before an arbitrator or umpire, or a person or body of persons authorized by law to make an inquiry and take evidence therein under oath,
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> * * *

I next set out s. 13 of *The Saskatchewan Securities Act,* which reads:

> 13. The registrar may and shall when so directed by the commission require any further information or material to be submitted by any applicant or any registered person or company within a specified time and may require verification by affidavit or otherwise of any information or material then or previously submitted or may require the applicant or the registered person or any partner, officer, director or employee of the registered person or company to submit to examination under oath.

Counsel for the applicant submits that this section does not authorize the registrar to make an inquiry or examination. His argument is that if it did so authorize the registrar the concluding words of the section would be, not "to submit to examination under oath" but "to submit to examination under oath before him".

That is reducing the argument to its simplest elements. The answer that is made by the Crown to it is that the plain meaning of the section is that the registrar has this power to require the named person, in this case, to submit to examination under oath and that the section cannot mean anything else but submit to examination under oath before him.

Two other parts of the Act are referred to in support of that argument. The first is s. 2(5)(*f*), which defines "fraud", in part, as

> the making of a material false statement in any application, information, material or evidence submitted or given to the commission or the registrar under the provisions of this Act or the regulations, or in any prospectus or return filed with the commission;

The subsection that I have just read, it is argued, contemplates the giving of information, material or evidence to the registrar.

Section 65(1)(*c*) is also relevant. It provides:

> 65.(1) Every person, including any officer, director, official or employee of a company, who is knowingly responsible for
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> * * *
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> (*c*) the making of any material false statement in any application, information, statement, material or evidence submitted or given under this Act or the regulations to the commission, its representative, the registrar or any person appointed to make an investigation or audit under this Act;

I have no doubt, after listening to the two arguments and the reading of the sections that I have already mentioned, that the registrar has the power under s. 13 to take evidence and to take evidence under oath.

That was Mr. Justice Disbery's opinion when he dismissed the motion to quash, and it is also my opinion.

I think it is the plain meaning of s. 13 that the registrar may require this particular person to give this information under oath, to submit to examination under oath and before the registrar. To what other possible place or person could he send the man for examination?

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If the person to conduct the examination is the registrar, I think it is implicit in the terms of the section too that the registrar can administer the oath. In any event, there is s. 41 of *The Saskatchewan Evidence Act* which I had better set out in full:

> 41. Every court, judge, police magistrate, justice of the peace, arbitrator or other person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence may administer an oath to any witness who is legally called before such court, judge, police magistrate, justice of the peace, arbitrator or other person respectively.

In my opinion the registrar, under s. 13, has by law authority to examine under oath. I think he has, by s. 13, also the power to administer the oath, but if he has not got that power by s. 13 of *The Securities Act,* I think he has it by s. 41 of the *Evidence Act.*

I am therefore holding that counts one to seven do disclose offences known to the law and that the accused was properly committed for trial on those charges and that to that extent the motion to quash the committal on those charges fails.

I turn now to counts nine and ten, referred to as the Leier charges. I set out count nine in full:

> 9. And further, that you during the month of August A.D. 1958 at the said City of Regina unlawfully did counsel or procure one Edward Joseph Leier who, not being a witness in a judicial proceeding but being permitted or authorized by law to make a statement by solemn declaration, to make in such statement before a person who is authorized by law to permit it to be made before her, assertions with respect to matters of fact, opinion, belief or knowledge knowing the said assertions to be false, and thereby to be a party to an offence against the Criminal Code section 114, which offence was afterwards committed by the said Edward Joseph Leier by solemn declaration declared at the said City of Regina on the 14th day of August A.D. 1958, and you did thereby become a party to the said offence against section 114 of the Criminal Code by virtue of section 22(1) of the Criminal Code.

Count number ten is in the same terms, with this exception, that the solemn declaration referred to was simply dated "in the month of August 1958". Section 114 of the *Criminal Code* reads:

> 114. Every one who, not being a witness in a judicial proceeding but being permitted, authorized or required by law to make a statement by affidavit, by solemn declaration or orally under oath, makes in such a statement, before a person who is authorized by law to permit it to be made before him, an assertion with respect to a matter of fact, opinion, belief or knowledge, knowing that the assertion is false, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

The attack on these two counts is made on these grounds—that Leier was not a person permitted, authorized or required by law to make the solemn declarations referred to in counts nine and ten and that there exists no authorization at law for the taking or receiving of these solemn declarations.

The argument is that the phrase "permitted, authorized or required by law" to make a statement, means permitted, authorized or required by some substantive law; that the Crown must point to some statute which permits, authorizes or requires Leier to make these solemn declarations, and that there is no such statutory authorization.

The Crown's submission in answer to that is that Leier is permitted by s. 37 of the *Canada Evidence Act* to make this declaration if Part I of the *Canada Evidence Act* is applicable and, if it is not so applicable, he is permitted under provincial law to make the declaration; and that the purpose of the declaration may very well determine which law is applicable and the determination of the purpose is a matter of evidence for the jury.

All that I have before me is the declaration itself. The declaration does refer to a statement of claim in an action brought by a plaintiff, whose name I cannot read, against Columbia Metals Exploration Co. Ltd., Western Bond and Share Corporation Limited, William Luboff, John J. Abbott, Edward Leier and Laurence Tetrault.

This brings me to the question of what use may be made of this material on a motion for habeas corpus before a judge of this Court.

The Crown's submission is that I am limited to looking at the warrant of committal and that I cannot look at these declarations and the statement of claim any more than I can look at the evidence—seven or eight volumes of it—given on the preliminary hearing.

The basis for that submission is to be found in a number of cases decided in this Court going back to *In re Trepanier*[1]. This and the other cases to which I propose to refer in a moment have to do with motions for habeas corpus after a conviction. The present application is brought in a case

[1] (1885), 12 S.C.R. 111.

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where there has been no conviction but only a committal for trial and a bill of indictment preferred. It is suggested that that makes a difference and I will deal with that later.

In *Re Trepanier* an application was made to a judge of this Court on behalf of a person arrested on a warrant issued on a conviction, for a writ of habeas corpus with certiorari in aid. The application was dismissed. Chief Justice Ritchie said, at p. 113:

> The jurisdiction of the magistrate being unquestionable over the subject-matter of complaint and the person of the prisoner, and there being no ground for alleging that the magistrate acted irregularly or beyond his jurisdiction, and the conviction and warrant being admitted to be regular, the only objection being that the magistrate erred on the facts and that the evidence did not justify the conclusion as to the guilt of the prisoner arrived at by the magistrate, I have not the slightest hesitation in saying that we cannot go behind the conviction and inquire into the merits of the case by the use of the writ of habeas corpus.

It was also pointed out that there is no jurisdiction in this Court to issue a writ of certiorari in aid of habeas corpus. The certiorari provisions in the *Supreme Court Act* have to do with appellate jurisdiction and not with jurisdiction in matters of habeas corpus which is concurrent with that of jurisdiction of the judges of the Superior Courts of the provinces.

The next case I refer to is *Ex parte Macdonald*[1]. That was also an application for habeas corpus after there had been a conviction. At p. 687, the judgment reads:

> I believe therefore that the jurisdiction of a judge of the Supreme Court in matters of habeas corpus in any criminal case, is limited to an inquiry into the cause of commitment, that is, as disclosed by the warrant of commitment, under any Act of the Parliament of Canada.

Finally on that point, in the case of *In re Goldhar*[2], the principle to be found in the previous cases reported in the court is reaffirmed in the plainest terms. For example, Chief Justice Kerwin, at p. 435, says:

> The Calendar is a certificate regular on its face that the appellant was convicted by a court of competent criminal jurisdiction and therefore it is impossible to go behind it on an application for habeas corpus; *Re Trepanier* (1885) 12 S.C.R. 111; *Re Sproule* (1886) 12 S.C.R. 140; *In re Henderson* (1930) S.C.R. 45, 1 D.L.R. 420. 52 C.C.C. 95.

[1] (1896), 27 S.C.R. 683.

[2] [1960] S.C.R. 431, 33 C.R. 71, 126 C.C.C. 337, 25 D.L.R. (2d) 401.

And to the same effect in the judgment of Mr. Justice Fauteux, at p. 439:

> The question, which counsel for the appellant admittedly sought to be determined by way of habeas corpus proceedings, is stated in the reasons for judgment of other members of the Court. In my view, it is one which would require the consideration of the evidence at trial and which, in this particular case, extends beyond the scope of matters to be inquired under a similar process. To hold otherwise would be tantamount to convert the writ of habeas corpus into a writ of error or an appeal and to confer, upon every one having authority to issue the writ of habeas corpus, an appellate jurisdiction over the orders and judgments of even the highest Courts. It is well settled that the functions of such a writ do not extend beyond an inquiry into the jurisdiction of the Court by which process the subject is held in custody and into the validity of the process upon its face.

In my opinion the jurisdiction of this Court is similarly limited in an inquiry into a committal for trial. In the absence of power to issue a writ of certiorari in aid of habeas corpus, a judge of this Court has no power to look at the evidence at the preliminary hearing or to receive affidavit evidence relating to it.

My jurisdiction is limited to a consideration of the warrant of committal and the other material that I have referred to—the recognizances and the order of Judge Hogarth. I cannot look at evidence, whether a transcript of the evidence at the preliminary hearing or evidence sought to be introduced by way of affidavit identifying a portion of such evidence.

I am founding my reasons on this branch of the case entirely on that principle and I am expressing no opinion on the point on which I heard full argument—whether there does exist, by virtue of provincial legislation, permission to take a declaration of this kind.

It was suggested that that power is to be found in 1835 legislation enacted in the United Kingdom and that that legislation is still in force in some way in the Province of Saskatchewan. The applicant, on the other hand, says that that legislation cannot have been in force after the year 1907 when *The Saskatchewan Evidence Act* was enacted. If that is so, any statutory declaration made in Saskatchewan before the 1959 amendment to the *Evidence Act* is invalid unless it comes within Part I of the *Canada Evidence Act*. I am expressing no opinion on that point, but founding my judgment on the lack of jurisdiction in this Court to do more

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than examine the warrant of committal, and to find that, if it is regular on its face, that is the end of the matter. I am drawing no distinction between a warrant of committal after conviction. I see no distinction in principle between the two.

The application will therefore be dismissed.

The judgment will issue on the 10th October, 1961, to afford the applicant an opportunity to apply to the full Court on that date for bail and, in the meantime, I continue the bail.

Application dismissed.