
IN RE JOHN HENDERSON
IN RE JAMES STEWART
IN RE GEORGE BRODER
IN RE JOE GO GET

1929

*June 4.
*June 5.
**June 13.
**June 14.

Criminal law—Habeas corpus—Excise Act, R.S.C. [1927], c. 60, ss. 127, 128, 176—Opium and Narcotic Drug Act, R.S.C. [1927], c. 144, s. 4—Information—Sufficiency as to description of informant—Whether informant authorized to act—Lack of evidence at trial—Order for imprisonment and fine—Conviction invalid in part—Order imposing less than minimum fine—Severance—Cost of conveying prisoner not mentioned in warrant—Criminal Code, ss. 654, 735, 754, 1135.

Per Rinfret J.—Under section 654 of the Criminal Code, any person, upon reasonable or probable grounds, may make a complaint or lay an information against an accused person in respect of the offences, relating to illicit distilling, mentioned in section 176 of the *Excise Act;* but even if it should be inferred from the provisions of that Act taken as a whole that officers of excise alone were competent to lay such information, it would not be necessary, though perhaps desirable, to specify particulars of the informant in the warrant of commitment. Moreover, the information laid against some of the applicants, which describes the informant, as a customs and excise officer acting "on behalf of His Majesty the King" was quite sufficient to justify the magistrate in proceeding with the trial. *R.* v. *Limerick* (37 C.C.C. 344) and *R.* v. *Ed.* (47 C.C.C. 196) dist.

Per Rinfret J.—On an application for *habeas corpus,* a contention by the petitioner that no proof of the authority of the informant was adduced at the trial does not raise a question of jurisdiction: if the judge before whom the application is made is right in his view that the magistrate had the right to enter on, and proceed with, the case, he had not to consider the sufficiency of the evidence on which the former was convicted. *R.* v. *Nat Bell Liquors* ([1922] 2 A.C. 128, at pp. 151, 152) foll.

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*Rinfret J. in chambers.
**Mignault, Newcombe, Lamont and Smith JJ.

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Per Rinfret J. Under sections 127 and 128 of the *Excise Act*, a magistrate has the power both to imprison and fine the accused by summary conviction and is not restricted to impose one penalty to the exclusion of the other.

Per Rinfret J.—When the order of imprisonment is absolute for a term and a further term is imposed in default of payment of a fine and costs, the conviction and commitment of the inferior tribunal are severable. Therefore, when a petitioner urges, as a ground for the issue of a writ of *habeas corpus*, the illegality of the part dealing with the further imprisonment, such application is premature before the expiration of the term for which the conviction imposed an absolute order of imprisonment; up to that time, the applicant cannot complain that he is illegally restrained of his liberty.

Per Rinfret J.—Where a warrant of commitment contains a valid order of imprisonment and also an order imposing a lighter fine than the minimum imposed by the statute, this order being illegal, the portion providing for imprisonment is nevertheless valid; and the illegal order can still be remedied by applying the provisions of sections 754 and 1125 of the Criminal Code.

Per Rinfret J.—A warrant of commitment requiring the payment of the costs of conveying the accused to jail is not invalid for failure to state the amount of these costs.

Per Rinfret J.—The word "penalties" in par. 2 of s. 4 of the *Opium and Narcotic Drugs Act* means the imprisonment and the fine and does not include the costs. Therefore, a condemnation to a fine of "two hundred dollars" will not be invalid as being a lighter fine than the minimum ($200 and costs), imposed by section 4, par. (*d*) (*b*)[2] of that section. Moreover, nothing in the Act compels the magistrate to award costs; and in such a case, section 735 of the Criminal Code, under which the costs are in the discretion of the magistrate, would apply.

The judgments of Rinfret J., in chambers, rendered upon these four applications for *habeas corpus*, were, on appeal, affirmed by the Court,

Held, that, in the cases of Henderson, Broder and Joe Go Get, the warrant of commitment shewed a valid conviction, and even assuming it to be defective because the amount of the costs is not stated, that would not be a ground for discharging the prisoners on *habeas corpus*: Section 1121, Criminal Code.

Held, also, that, in the Stewart case, assuming the defects alleged on behalf of the prisoner, he is not at present held under any of the defective clauses, and the application is at best premature.

APPEAL from the judgments of Rinfret J. dismissing petitions for a writ of *habeas corpus*.

The material facts, and the grounds of the petitions are sufficiently set out in the judgments of Rinfret J. now reported.

The appeal from the judgments was dismissed.

The petitions were heard by Rinfret J. on June 4, 1929.

Stuart Henderson for the applicants.

E. F. Newcombe K.C. for the Attorney-General for British Columbia.

P. D. Wilson, for the Minister of Justice and the Minister of National Revenue.

On June 5, 1929, Rinfret J. gave judgment as follows:

RINFRET J.:—

In re John Henderson.

In re John George Broder.

The applicant Henderson complains that he is illegally detained in custody in Oakalla Prison Farm, a common gaol for the county of Vancouver, and prays for the issue of a writ of *habeas corpus* directed to W. G. McMynn, the warden of the prison, and for his subsequent discharge.

The same relief has already been refused by the late Chief Justice of the Supreme Court of British Columbia and by Mr. Justice W. A. Macdonald, a judge of the same province (1).

According to the warrant of commitment by reason of which he is held prisoner, Henderson was convicted before H. O. Alexander, a stipendiary magistrate in and for the county of Vancouver, for that he,

on December 5, 1928, at Pocahontas Bay, in the county of Vancouver, unlawfully, without having a licence under the *Excise Act* then in force, did have in his possession a still suitable for the manufacture of spirits, without having given notice thereof as required by the *Excise Act,* such still not having been a duly registered chemical still of capacity not exceeding three gallons, as provided for in the *Excise Act,* contrary to the form of statute in such case made and provided

and he was adjudged

to be imprisoned in the common gaol for the said county of Vancouver at Oakalla Prison farm, Burnaby, in the county of Westminster, in the province of British Columbia, for the term of twelve months,

and also that he shall

forfeit and pay the sum of five hundred dollars ($500) to be paid and applied according to law and, in default of payment of the said sum of $500, that he should be imprisoned in the said common gaol for the county of Vancouver in the county of Westminster for a further term of six months unless the said sum of $500 and the costs and charges of conveying (him) to the said common gaol should be sooner paid.

(1) [1929] 2 W.W.R. 209.

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The warrant commanded the constables or peace officers in the county of Vancouver to take and convey Henderson

to the common gaol at Oakalla Prison Farm aforesaid and there to deliver him to the said keeper thereof, together with this precept;

and commanded the keeper to receive Henderson

into (his) custody in the said common gaol and there to imprison him for the term of twelve months.

The warrant further commanded the keeper to imprison Henderson

for the further term of six months to commence at the expiration of the said term of twelve months awarded by the sentence above set out unless the said sum of $500 and the costs and charges of the commitment and of the conveying of the said Henderson * * * to the said gaol are sooner paid unto the said keeper or until he shall be otherwise discharged in due course of law.

The application is based on a number of grounds and I will endeavour to consider and determine them in the order in which they are submitted to me:

1. The trial magistrate is alleged to have been

without jurisdiction to try the case and to take proceedings on the information sworn or to act thereon

because the informer

did not swear that he was an excise officer or acting under instructions from the Minister of National Revenue, and the proceedings were void *ab initio*, as no averment is sufficient in excise cases.

There is authority in this court for the proposition that, on the return of a writ of *habeas corpus*, the only consideration which can be entered upon by a judge of the Supreme Court of Canada is the sufficiency of the commitment. (*In re Trépanier* (1); *In re Sproule* (2); *Ex parte McDonald* (3).)

In this case, however, the applicant further complains that the magistrate neglected

to show in the warrant and conviction that the proceeding by summary conviction was by virtue of the authority of the Minister of National Revenue, Department of Excise, ss. 133 and 134 of the *Excise Act*.

And, in addition to a copy of the warrant of commitment, the petitioner has filed before me, without objection from the Crown, copies of the conviction, of the information and other papers accompanied by an affidavit, to show the alleged want of jurisdiction.

(1) (1885) 12 Can. S.C.R. 111. (2) (1886) 12 Can. S.C.R. 140.
(3) (1896) 27 Can. S.C.R. 683.

I find nothing in sections 133 and 134 of the *Excise Act* to the effect that the commitment must show the proceedings to have been held

by virtue of the authority of the Minister of National Revenue, Department of Excise.

The offence, of which Henderson is stated in the warrant to have been convicted, is covered by s. 176 (*e*) of the *Excise Act* where it is declared to be an indictable offence, (although by force of section 127 of the Act, the penalty or forfeiture and the punishment may be sued for and recovered or imposed by summary conviction). The offence is not in terms one which is only cognizable upon the information of a specified class of persons. All provisions of the criminal code relating to indictable offences apply to it (see *Interpretation Act,* c. 1 of R.S.C. 1927). It may therefore be argued with great force that anyone, upon reasonable or probable grounds, may make a complaint or lay an information against an accused person in respect of such offence. (Crim. Code, s. 654). There are sections of the *Excise Act* giving special powers to inspectors and officers appointed under it for the purposes of entry into buildings, or into the premises of any dealer, of inspection and examination of apparatus, works, stills, etc.; also, under the authority of a writ of assistance, for the purpose of searching for, seizing and securing goods or things liable to forfeiture under the Act and of arresting and detaining any person whom they detect in the commission of any offence against the provisions of the Act. No powers are stated to be required to lay an information in respect of an offence under s. 176; and counsel for the petitioner was unable to point to any section of the Act having that effect.

Should we, however, infer from the provisions of the *Excise Act* taken as a whole that officers of excise alone are competent to lay informations concerning offences against section 176, even then it is not necessary, though perhaps desirable, to specify particulars of the informant in the warrant of commitment (Paley on Summary Convictions, 9th ed. p. 470). This would dispose of the argument that the authority of the informant is not shown in the warrant of commitment.

Assuming however that " for the purpose of an inquiry into the case of commitment " (which is the extent of my

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jurisdiction under s. 62 of the *Supreme Court Act*) I should go behind the warrant, I find in the information laid against Henderson, and of which he himself filed a copy before me, that the informant is therein described as a customs and excise officer acting " on behalf of His Majesty the King ". The information was taken and sworn before the stipendiary magistrate and, in my view, the oath of the informant covered the particulars relating to his capacity and authority to act. This was quite sufficient (Crim. Code 1128) to justify the magistrate in proceeding with the trial, even if it be true that only an officer of excise could lay the information.

I will say nothing of the fact that, admittedly, this point was not taken at the trial.

I am not overlooking the decisions in *Rex* v. *Limerick* (1), and *Rex* v. *Ed.* (2). In addition to what I have already said upon the points which they cover, I may add that neither case was an application for *habeas corpus*. *Rex* v. *Limerick* (1) was a proceeding for the enforcement of the *Inland Revenue Act* and was before the court on an order for *certiorari*. It was there made to appear that the informant was not an officer of the department of Inland Revenue and, at the hearing, the magistrate's jurisdiction had been challenged. In *Rex* v. *Ed* (2), a case was stated for the opinion of the court after the appellant was found guilty in a prosecution under the *Income War Tax Act*, and as stated by the magistrate, it was not alleged in the information or shown in the evidence before him that (the informant) was authorized by the Finance Department or any other department of the Government to lay the information or otherwise to enforce the provisions of the *Income War Tax Act* (*Rex* v. *Ed.* (3)).

Both cases are distinguishable from the present one.

As to the contention that no proof of the authority of the informant was adduced at the trial, I would say that it does not raise the question of jurisdiction. If I am right in my view that the magistrate had the right to enter on the case, I am not to consider the sufficiency of the evidence on which he convicted. (*In re Trépanier* (4). In the words of Lord Sumner, *re Rex* v. *Nat. Bell Liquors* (5),

(1) (1921) 37 Can. Cr. Cas. 344.

(2) (1926) 47 Can. Cr. Cas. 196.

(3) 47 Can. Cr. Cas. 196, at p. 200.

(4) (1885) 12 Can. S.C.R. 111.

(5) [1922] 2 A.C. 128, at pp. 151-152.

A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not * * *. To say that there is no jurisdiction to convict without evidence is the same as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was jurisdiction.

For all these reasons the petitioner fails on the first ground of his application.

2. The second ground may be stated as follows: The information was first laid before P. C. Parker, stipendiary magistrate. It was afterwards withdrawn and a new information was laid before H. O. Alexander, another stipendiary magistrate whose jurisdiction, so it is contended, was barred by sections 85 (4) and 129 of the *Excise Act*.

Section 85 must be disregarded. It has no application to this case, which is not a prosecution under its provisions, but, as already stated, a proceeding by summary conviction under sections 176 and 127 of the Act (as amended by c. 24 of 18-19 Geo. V).

Section 129 reads as follows:

129. If any prosecution in respect of an offence against any provision of this Act is brought before a judge of a county court, or before a police or stipendiary magistrate, or before any two justices of the peace, no other justice of the peace shall sit or take part therein: Provided, however, that in any city or district in which there are more than one judge of a county court, or more than one police or stipendiary magistrate, such prosecution may be tried before any one of such judges or police or stipendiary magistrates.

It is not disputed that Alexander, the stipendiary magistrate who tried the case, found the conviction and signed the commitment, had jurisdiction territorially and otherwise to try a case of this kind, but it is contended that he could "not sit or take part therein", because the prosecution was brought first before P. C. Parker.

On the facts as stated, section 129 does not apply. The information laid before Parker having been withdrawn, Alexander cannot be said to have sat or taken part in a prosecution brought before Parker. But whatever the facts may have been, they are not apparent on the face of the warrant of commitment and, under the well settled jurisprudence of this court referred to in *Ex parte McDonald* (1)

(1) 27 Can. S.C.R. 683.

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my jurisdiction in the present case "is limited to an inquiry into the cause of commitment, that is, as disclosed by the warrant of commitment".

The second ground of attack cannot therefore be entertained by me.

3. As a third ground for the application, it is contended that the magistrate

had no power to imprison and fine by summary conviction, but that he could only do one or the other.

Sections 127 and 128 of the *Excise Act* afford a complete answer to this contention. The offence of Henderson must be taken to have been his first offence, inasmuch as the commitment does not shew otherwise. Under section 176, the penalty for a first offence is

a penalty not exceeding $2,000 and not less than $200 and to imprisonment, with or without hard labour, for a term not exceeding twelve months and not less than one month, and, in default of payment of the penalty, to a further term of imprisonment not exceeding twelve months and not less than six months.

Section 127 (as amended by c. 24 of 18-19 Geo. V.) reads in part as follows:

127. (1) Every penalty or forfeiture incurred and any punishment for any offence against the provisions of this Act, or any other law relating to excise, may be sued for and recovered, or may be imposed (*a*) before the Exchequer Court of Canada or any court of record having jurisdiction in the premises; or (*b*) if the amount or value of such penalty or forfeiture does not exceed five thousand dollars and such punishment does not exceed twelve months imprisonment with hard labour, whether the offence in respect of which it has been incurred is declared by this Act to be an indictable offence or not, by summary conviction, under the provisions of the Criminal Code relating thereto, before a judge of a county court, or before a police or stipendiary magistrate, or any two justices of the peace having jurisdiction in the place where the cause of prosecution arises, or wherein the defendant is served with process.

* * * * *

(3) Any such pecuniary penalty may, if not forthwith paid, be levied by distress and sale of goods and chattels of the offender, under the warrant of the court, judge, magistrate, or justices having cognizance of the case; or the said court, judge, magistrate, or justices may, in its or their discretion, commit the offender to the common gaol for a period not exceeding twelve months, unless the penalty and costs, including those of conveying the offender to such gaol and stated in the warrant of committal, are sooner paid.

Section 128 reads:

128. Any term of imprisonment imposed for any offence against the provisions of this Act, whether in conjunction with a pecuniary penalty or not, may be adjudged and ordered

(*a*) by the Exchequer Court of Canada, or any court of record having jurisdiction in the premises; or

(*b*) if such term of imprisonment does not exceed twelve months, exclusive of any term of imprisonment which may be adjudged or ordered for non-payment of any pecuniary penalty, whether the offence in respect of which the liability to imprisonment has been incurred is declared by this Act to be an indictable offence or not, by summary conviction under the provisions of the Criminal Code relating thereto by a judge of a county court, or by a police or stipendiary magistrate, or any two justices of the peace having jurisdiction in the place where the cause of prosecution arises, or wherein the defendant is served with process.

As will have been noticed, section 127 alone was sufficient in this case to found jurisdiction in the stipendiary magistrate; and section 128 applies when the term of imprisonment is imposed "whether in conjunction with a pecuniary penalty or not."

4. The next contention in support of the application is that the warrant of commitment is bad

in neglecting to state where the defendant was found or the cause of prosecution arises.

The warrant states

that the said John Henderson * * * on December 5, 1928, at Pocahontas Bay, in the county of Vancouver, unlawfully * * * did have in his possession a still, etc.

H. O. Alexander, before whom Henderson was found guilty and was convicted, is "a stipendiary magistrate in and for the said county of Vancouver." The jurisdiction appears on the face of the proceedings. Moreover, courts would take judicial notice of the "local divisions of their country." (Taylor on Evidence, 10th ed., 17; *Sleeth* v. *Hurlbert* (1).)

Nor was it necessary, as urged by counsel, that, at the time of the arrest, Henderson should have the still in his own actual possession at Pocahontas Bay. Having possession includes as well having in the custody of any other person or having in any place for the benefit or use of one's self or of any other person (Criminal Code, s. 5).

5. Then it is contended that the warrant is bad, "by neglecting to show to whom the fine is to be paid," the words used being: "to be paid and applied according to law."

The warrant shews that Henderson is condemned to an imprisonment of twelve months and also to a fine of $500, and to a further imprisonment of six months unless the said sum of $500 "should be sooner paid." The further term of six months is

(1) (1895) 25 Can. S.C.R. 620, at p. 626.

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to commence at the expiration of the said term of twelve months awarded by the sentence above set out unless the said sum of $500 and the costs and charges of the commitment and of the conveying * * * to the said jail are sooner paid unto * * * the said keeper.

To avoid further imprisonment, Henderson knows from the warrant that he must pay to the keeper. Assuming that he is concerned with the subsequent appropriation of the fine, s.s. 133 and 134 of the *Excise Act* make a complete and determinate disposal of it. If they did not, art. 1036 of the Criminal Code would apply. So that the judgment can be unequivocally carried into effect by reference to the Act alone (*R.* v. *Seal* (1)).

6. The last objection taken by the petitioner is as to the question of costs. It is urged by him

that the conviction and warrant do not comply with the statutes in regard to "costs of conveying to gaol" or costs of "commitment."

Under s. 127 of the *Excise Act*, the magistrate could

commit the offender to the common gaol for a period not exceeding 12 months, unless the penalty and costs, including those of conveying the offender to such gaol and stated in the warrant of committal are sooner paid.

The adjudication in the warrant now before me, in default of payment of the fine of $500, is that Henderson should be imprisoned

for a further term of six months unless the said sum of $500 and the costs and charges of conveying (him) to the said common gaol should be sooner paid.

Then, in the operative part of the warrant, the keeper is commanded to imprison him for the further term of six months * * * unless the said sum of $500 and the costs of the commitment and of the conveying * * * to the said gaol are sooner paid unto * * * the said keeper. But the further term of six months is to commence (only) at the expiration of the said term of twelve months awarded by the sentence.

Henderson complains that:

(*a*) The costs of commitment were not adjudged against him and that yet, under the warrant, he will have to remain six months in prison, unless he pays them.

(*b*) The amount of the costs which he must pay is not stated in the commitment.

Henderson was validly convicted on the 5th January, 1929. It was then validly adjudged, for the offence of which he was legally found guilty, that he should be im-

(1) (1807) 8 East 569, at p. 573.

prisoned for the term of twelve months. It is not disputed that the punishment is perfectly good under the statute. The term of twelve months will expire only on the 5th day of January, 1930. Until then he cannot complain that he is illegally restrained of his liberty, nor kept in illegal confinement. The warrant of commitment is sufficient for the keeper to retain him in gaol until the expiration of the term of twelve months for which the conviction imposed an absolute order of imprisonment.

Where the order of imprisonment is absolute for a term and a further term is imposed in default of payment of a fine and costs, the conviction and commitment of an inferior tribunal are severable. This proposition has now been accepted by our courts. The court of appeal for Ontario in *The King* v. *Carlisle* (1); the Court of King's Bench (appeal side) of Quebec in *La Commission des Liqueurs de Québec* v. *Forcade* (2); and the Court of Appeal for British Columbia in *Rex* v. *Fox* (3); to which may be added the opinion of Mr. Justice Beck of the Court of Appeal for Alberta in *Rex* v. *Miller* (4). I see no reason to differ from these judgments.

Paley on Summary convictions (8th ed. at p. 201) admits that an order is divisible and "may be quashed in part", and, as said in *Rex* v. *Robinson* (5), quoted by Mr. Justice W. A. Macdonald in his judgment on a similar application (6),

> there is no reason worthy of the name to be found in the books why there should be any distinction in this respect between an order and a conviction.

I therefore think that, so far as concerns that portion of the warrant of commitment dealing with further imprisonment in default of payment of fine and costs, the application is premature. I do not want however to be understood as meaning that that part of the commitment is invalid. The writ of *habeas corpus* is a prerogative process available when "there is a deprivation of personal liberty without legal justification" (Halsbury, Laws of England, vol. 10, p. 48). Courts should not permit the use of this great writ to free criminals on mere technicalities. It is

(1) (1903) 7 Can. Crim. C. 470.
(2) (1923) 29 R.L.n.s. 294.
(3) [1929] 1 W.W.R. 542, at p. 544.
(4) (1913) 25 Can. Crim. Cas. 151.
(5) (1851) 17 Q.B. 466.
(6) [1929] 2 W.W.R. 209.

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the spirit of our Criminal Laws and more particularly of our law on summary convictions that defects and informalities be corrected so as "to prevent a denial of justice" (Crim. Code 723, 753, 754, 1120, 1124, 1125 and 1129).

I have been referred to a number of judgments holding a warrant of commitment invalid because it required payment of conveyance to gaol and it did not state the amount of those costs. I have noticed that none of the learned judges who have so decided took the trouble of telling us at the same time how the magistrate, so as to insert the amount in the warrant, could determine in advance the costs of conveyance. I fully agree with what is said on that point by Murphy J. in *Rex* v. *Wong* (1). A proper method—and there should be others—for the determination of those costs is set out in *Poulin* v. *City of Quebec* (2) where Sir François Lemieux, at page 392, decides as follows:

> By this petition for *habeas corpus* (the petitioner) demands to be discharged on two main grounds, * * *;
> secondly, because the conviction should have stated the amount of conveying the petitioner to gaol.
>
> This last ground is without foundation.
>
> The condemnation for the costs includes the cost of conveyance, and these expenses, contrary to the claim of the petitioner, should not, and could not, be included in the conviction.
>
> When the law permits conviction for costs, it includes, not only the costs of the prosecution but also those of carrying out the judgment of the conviction.
>
> It is impossible for the magistrate or the Recorder's Court, and it is not in a position to fix and determine in advance the cost of conveyance. These costs are, or should be, stated or certified by the officer who executes the commitment upon the back of the commitment, which is the general practice and which was done in this very case. The certificate authorizes the jailer to require payment of the amount if the offender desires to be discharged from gaol.

In this case, I have, for the above reasons, come to the conclusion that the objections fail to support the application for the prisoner's release and the said application will therefore be dismissed.

In the case of George Broder, the conviction and the warrant of commitment are identical and for a similar offence; the application is based on exactly the same grounds as that of John Henderson and it will accordingly be dismissed for the same reasons.

(1) (1925) 44 Can. Crim. C. 343. (2) (1907) 13 Can. Crim. C. 391.

In re James Stewart

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This is an application for *habeas corpus* by James Stewart, formerly of the city of Vancouver and at present imprisoned at Oakalla Prison Farm, Burnaby, county of Westminster, province of British Columbia.

The offence for which Stewart was convicted, the conviction and the warrant of commitment are similar to those in the cases of John Henderson and George Broder. The grounds of the application are the same, except one which I shall state presently. For the reasons already given in dismissing the petitions of Henderson and Broder, to which I refer the parties and their counsel, I think the similar objections raised in this case fail to support the application for Stewart's release.

The other ground, which was available neither to Henderson, nor to Broder, consists in the following:

It was adjudged by the conviction, as appears by the warrant of commitment, that Stewart should be imprisoned for the term of six months, and it was also adjudged that he should forfeit and pay the sum of $100 to be paid and applied according to law; and it was further adjudged that, in default of payment of the said sum, Stewart should be imprisoned

for a further term of two months, unless the said sum of $100 and the costs and charges of conveying (him) to the said common gaol should be sooner paid.

The operative part of the warrant of commitment is in the same terms, except that the keeper is commanded also to exact "the costs and charges of the commitment", in addition to those "of the conveying", before he discharges the prisoner.

Under section 176 (d) of the *Excise Act,* the offence of which Stewart was found guilty is an indictable offence (though triable by summary conviction—s. 127) and made him liable to a penalty

not exceeding $2,000, and not less than two hundred dollars, and to imprisonment, with or without hard labour, for a term not exceeding twelve months and not less than one month, and, in default of payment of the penalty, to a further term of imprisonment not exceeding twelve months and not less than six months.

As will have been perceived, the absolute order of imprisonment for a term of six months is within the limitation contained in the enactment. Stewart is now detained in

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gaol under a perfectly good award of imprisonment and the commitment, as well as the conviction, is a legal and sufficient warrant for the gaoler to keep him in prison.

There seems to be no doubt however that the magistrate had no power to impose less than the minimum fine or to order imprisonment, in default of payment of fine and costs, for a term shorter than prescribed by the statute.

According to the *Interpretation Act* (c. 1 of R.S.C. 1927, s. 28)

> Every Act shall be read and construed as if any offence for which the offender may be
>
> (*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence;
>
> (*b*) punishable on summary conviction, were described or referred to as an offence; and
>
> all provisions of the Criminal Code relating to indictable offence, or offences, as the case may be, shall apply to every such offence.

By force of sections 1028 and 1029 of the Criminal Code the magistrate had no discretion to inflict a punishment or to award a fine or a penalty outside the limitations contained in s. 176 (*e*) of the *Excise Act*. And section 1054 of the same code provides

> that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted.

I think therefore that the conviction for a fine of $100 and the adjudication of imprisonment for a further term of two months, in default of payment of the fine and costs, were bad and illegal.

Had Stewart, at the present time, been kept in gaol because of his failure to pay the fine of $100 and costs, I would not however have maintained the writ of *habeas corpus*. Applying section 1120 of the Criminal Code, I would have made an order for the further detention of Stewart and have directed the magistrate, under whose warrant he is in custody,

> to do such further act as * * * may best further the ends of justice.

And it may not be out of place to draw the attention of the petitioner to the fact that by s. 1125 of the Criminal Code,

> the punishment imposed being less than the punishment by law assigned to the offence stated in the conviction or order

is treated as an irregularity which may be dealt with in all respects as the court may do upon appeal under section

754 of the Code. Section 1125 has reference to convictions removed by *certiorari,* but there is no apparent reason why an order to a similar effect could not be made on *habeas corpus* under s. 1120 of the code.

I am not however so deciding. In my reasons for judgment on the similar petitions of John Henderson and George Broder, I have explained why I thought that the conviction as made in this case was severable. It consists first in an absolute order for the payment of a fine. By the terms of the conviction and of the warrant, the term of two months, in default of payment of the fine, is "to commence (only) at the expiration of" the absolute term of imprisonment of six months. The conviction and warrant are dated the 5th day of January, 1929. The six months will expire only on the 5th day of July. In the meantime and at present a valid case of detention is shewn, the petitioner is legally in gaol and he cannot succeed in his present application. The application is therefore dismissed.

In re Joe Go Get

Joe Go Get, was, on the 23rd January, 1929, convicted before Thos. McClymont, a police magistrate, for that he did have in his possession a drug, to wit prepared opium, without lawful authority, contrary to the provisions of section 4 (*d*) of the *Opium and Narcotic Drug Act,* 1923, and amendments thereto.

He was adjudged to be imprisoned for the term of six months. He was also adjudged to forfeit and pay the sum of $200, and he was further adjudged, if the said sum was not sooner paid, to be imprisoned

for the additional space of three months to commence at and from the expiration of the term of imprisonment aforesaid.

Joe Go Get was imprisoned under a warrant of commitment reciting the above conviction and now applies for his release from custody by *habeas corpus.* He says his conviction, as appears by the commitment, is incomplete and in improper form and contrary to the *Opium and Narcotic Act* because:

1. The penalty imposed is less than the minimum penalty which may be awarded under the Act.

2. There is no adjudication as to costs, which is necessary in such an offence.

3. The conviction and warrant of commitment do not "provide for costs and charges of commitment."

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In re HENDERSON, STEWART, BRODER & JOE GO GET.

Rinfret J.

The offence of which Joe Go Get was found guilty is covered by section 4 (*d*) of the *Opium and Narcotic Drug Act*, which made him liable

upon summary conviction, to imprisonment with or without hard labour for any term not exceeding eighteen months and not less than six months, and to a fine not exceeding one thousand dollars and costs and not less than two hundred dollars and coss.

Then paragraph 2 of section 4 says:

2. Notwithstanding the provisions of the Criminal Code, or of any other statute or law, the court shall have no power to impose less than the minimum penalties herein prescribed, and shall, in all cases of conviction, impose both fine and imprisonment; * * *

In the present case, no objection is taken to the absolute term of imprisonment imposed, but the sum ordered to be forfeited and paid as a fine is only two hundred dollars, and it is argued that this was illegal and outside the jurisdiction of the magistrate because, under the Act, the fine may not be less than two hundred dollars and costs. The conclusion would be that either a fine for the minimum amount without costs is below the penalty imperatively prescribed or that the conviction is bad because it contains no adjudication as to costs.

I do not so understand the statute, and I read it as Murphy J. did in *Rex* v. *Wong Yet* (1).

Section 4 (2) of the *Opium and Narcotic Drug Act* must be applied

notwithstanding the provision of the Criminal Code, or of any other statute or law.

For the determination of this objection, I must therefore look only to the provisions of the Act. The Act says that

the court shall have no power to impose less than the minimum penalties herein prescribed.

I think the word "penalties" means the fine and the imprisonment and does not include the costs. The magistrate

shall, in all cases of conviction, impose both fine and imprisonment.

He may not impose a fine alone, or an imprisonment alone. He must not impose a term of imprisonment or a fine outside the limitations contained in the enactment, but the costs remain in his discretion. Applying this interpretation to the wording of the relevant section 4d (*b*), I would say that the magistrate could, as he has done in this case, impose a fine of $200, without speaking of the costs. The

(1) 44 Can. Crim. C. 343.

words " not less than " in the section apply to the " fine " only; and the " fine " does not comprise " the costs." This is shown by section twelve of the Act, whereby when " the conviction adjudges payment of *a fine,*" the sentence may direct that in default of payment of the fine

and costs, the person so convicted shall be imprisoned until such fine *and costs* are paid, etc.

The limitation in s. 4 applies therefore to the penalties, being the imprisonment and the fine, but not to the total amount of fine and costs. The object of the enactment " according to its true intent, meaning and spirit " is that the minimum fine may be imposed, outside of the costs.

Nor do I think that an adjudication as to costs is necessary for such an offence. There is no provision making it so. The effect of section 4d (*b*) even were I to put upon it the construction suggested by counsel for the petitioner, would not be that costs must be ordered to be paid by the person found guilty, it would be that the combined amounts of fine and costs may not be less than $200, a result which to my mind only goes to strengthen the view I have expressed on the first ground of this application.

Outside of section 4d (*b*), no other sections of the *Opium and Narcotic Drug Act* were pointed to me compelling the magistrate to award costs. In such a case the provisions of the Criminal Code apply (*Interpretation Act,* s. 28, c. 1 of R.S.C., 1927).

In summary matters under the Criminal Code, costs are in the discretion of the magistrate (s. 735) and, as said by my brother Mr. Justice Duff in the *Marino* case (22nd August, 1927, not reported), I cannot

assume that the police magistrate did not judicially consider and pass upon that question.

What I have just said also applies to the costs and charges of commitment. I may add that I fail to see what interest the petitioner may have of complaining on *habeas corpus* that the warrant of commitment makes no mention whatever of those costs. The only effect is that he will not have to pay them in order to escape restraint of liberty.

The application is dismissed without costs.

The appeal from the above judgments was heard by the court, composed of four judges (s. 28 (2), *Supreme Court Act*), on June 13, 1929.

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In re HENDERSON, STEWART, BRODER & JOE GO GET.

Stuart Henderson for the appellants.

J. A. Ritchie K.C. for the Attorney General for British Columbia.

P. D. Wilson for the Minister of Justice and the Minister of National Revenue.

On June 14, 1929, the court delivered its judgment affirming the judgments of Rinfret J.

THE COURT.—In the cases of Henderson, Broder and Joe Go Get, the warrant of commitment shews a valid conviction, and even assuming it to be defective because the amount of the costs is not stated, that would not be a ground for discharging the prisoners on *habeas corpus*: Section 1121, Criminal Code. It is not necessary to express any opinion on the question of severance. The appeals are dismissed.

In the Stewart case, assuming the defects alleged on behalf of the prisoner, he is not at present held under any of the defective clauses. The statute clearly contemplates that the proceedings are not wholly void, for there are curative provisions which, in the meantime, may be invoked. If these are not available to this court, they may nevertheless conveniently be resorted to elsewhere, and, in the interests of justice, it seems right that the Crown should not be deprived of its judicial remedies.

We think therefore that this application is at best premature, and should be dismissed.

Appeals dismissed.