VERN GLEN DENNIS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1958

*May 7
Jun. 26

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Summary convictions—Parties to proceedings—Appeal—Service of notice of appeal—Who is "respondent"—Information laid by police officer—Service on informant's superior—The Criminal Code, 1953-54 (Can.), c. 51, s. 722.

The appellant was convicted by a magistrate on an information laid by a constable of the Royal Canadian Mounted Police. He served a notice of appeal from his conviction on the corporal in charge of the detachment to which the informant was attached. The County Court Judge dismissed the appeal for want of jurisdiction because the notice of appeal had not been served on the informant. This judgment was affirmed by the Court of Appeal. A further appeal was taken by leave.

Held (Kerwin C.J. and Martland J. dissenting): The appeal should be dismissed.

Per Taschereau, Locke and Fauteux JJ.: In proceedings under Part XXIV of the *Criminal Code*, at least if the Attorney General does not intervene, the parties to the proceedings are the informant and the accused. If the accused, having been convicted, appeals, the "respondent" on whom the notice of appeal must be served under s. 722(1)(*b*)(ii) is the informant. Section 722(3) makes it clear by implication that the informant may be a person other than one engaged in enforcement of the law, but it also makes it clear that, unless an order is obtained from the appeal Court, the notice of appeal must be served on the informant personally. The fact that the informant in laying the information describes himself as doing so "on behalf of Her Majesty the Queen" does not change the position, nor does the style given to the proceedings before the magistrate and the County Court Judge.

Per Kerwin C.J. and Martland J., *dissenting*: The "respondent" mentioned in s. 722(1)(*b*)(ii) is not necessarily in all cases the person who laid the information. Where, as in the present case, the information is laid by a police officer, the Crown is in name and substance the respondent, and service of the notice of appeal on the informant's superior officer is sufficient service within the meaning of the subsection.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Fraser Co. Ct. J. Appeal dismissed, Kerwin C.J. and Martland J. dissenting.

E. Patrick Hartt, for the appellant.

Lee A. Kelley, Q.C., for the respondent.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Martland JJ.

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The judgment of Kerwin C.J. and Martland J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—Vern Glen Dennis appeals by leave against the judgment of the Court of Appeal for British Columbia[1]. That Court had dismissed his appeal from a finding by Judge Fraser that his Honour had no jurisdiction to hear his appeal from his conviction by Magistrate Krell on a charge under s. 223 of the *Criminal Code* of driving a motor vehicle while his ability so to do was impaired by alcohol. The information was sworn to by Laurence Martin, a constable of the Royal Canadian Mounted Police stationed at Haney, "on behalf of Her Majesty the Queen". At the hearing before the magistrate, Corporal A. Calvert, in charge of the Haney detachment, appeared as prosecutor and Constable Martin testified. Notice of appeal from the magistrate's decision, which was given July 31, 1956, was duly served upon the magistrate and upon Corporal Calvert but not on Constable Martin. The reason given for this was that Constable Martin had left on his vacation for three or four weeks from August 1, 1956, and hence it was impracticable, if not impossible, to serve him.

The matter came before the learned County Judge on March 12, 1957, and, as we are advised, counsel appeared for the Crown and stated that the preliminary matters were in order. However, it appeared to the judge that this was not so and the hearing was adjourned to March 26, 1957, in order to enable counsel for Dennis to submit written argument. This was done on March 22, 1957, and on March 26, 1957, the judge indicated that he proposed to dismiss the appeal for reasons then given. Formal dismissal of the appeal was withheld until May 28, 1957, in order to permit Dennis to file a notice of appeal, perfect his appeal and apply for bail pending its disposition. The reasons of the judge and of the Court of Appeal proceed upon the basis that Constable Martin was the "respondent" and as he had not been served with notice of the appeal there was no jurisdiction.

The term "respondent" is not defined in Part XXIV of the *Criminal Code*, "Summary Convictions", with which we are concerned. By s. 719(*f*) "appeal court" means in

[1] (1957), 24 W.W.R. 88, 120 C.C.C. 39, 27 C.R. 231.

British Columbia the County Court of the county in which the cause of the proceedings arose and by s. 720 the defendant in proceedings under Part XXIV may appeal to the appeal court from a conviction made against him. Section 722 reads in part as follows:

722. (1) Where an appeal is taken under section 720, the appellant shall

(*a*) prepare a notice of appeal in writing setting forth
(i) with reasonable certainty the conviction or order appealed from or the sentence appealed against, and
(ii) the grounds of appeal;

(*b*) cause the notice of appeal to be served upon
(i) the summary conviction court that made the conviction or order or imposed the sentence, and
(ii) the respondent,

within thirty days after the conviction or order was made or the sentence was imposed; and

(*c*) file in the office of the clerk of the appeal court
(i) the notice of appeal referred to in paragraph (*a*), and
(ii) an affidavit of service of the notice of appeal,

not later than seven days after the last day for service of the notice of appeal upon the respondent and the summary conviction court. . . .

(3) Where the respondent is a person engaged in enforcement of the law under which the conviction or order was made or the sentence was imposed, the appeal court may direct that a copy of the notice of appeal referred to in subsection (1) be served upon a person other than the respondent, and where the appeal court so directs, that service shall, for the purposes of this section and section 723, be deemed to be service upon the respondent.

Under s. 727 the appellant would have the right to a trial *de novo* before the County Court Judge and by the orders under review he is deprived of that right. Undoubtedly the general rule is that there is no appeal unless expressly given by statute and that any conditions imposed thereby must be strictly complied with. An appeal is given by s. 720 and the sole question is whether the service of the notice thereof upon Corporal Calvert was service upon the "respondent". I have examined the numerous decisions upon the point referred to by counsel, most of which are mentioned in the decision of the Court of Appeal for Ontario in *Regina ex rel. Payne v. Feron*[1], and in the reasons for judgment delivered by Mr. Justice Bird on behalf of the Court of Appeal in the present matter[2]. To the list might be added the recent decision of the Ontario Court of Appeal in *Desaulnier v. Desaulnier*[3].

[1] [1955] O.R. 686, 112 C.C.C. 337, 22 C.R. 52.
[2] (1957), 24 W.W.R. 88, 120 C.C.C. 39, 27 C.R. 231.
[3] [1958] O.W.N. 205, 120 C.C.C. 161.

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It is quite true that some were decided before the enactment of the new Code, when subs. (3) of s. 722 was added, although it may be mentioned, as Mr. Justice Bird noted, that s. 750(*b*) of the old Code gave power to a judge of the Court appealed to to direct that service be made upon a person other than the respondent. It was argued on behalf of the Crown and so found in the Courts below that subs. (3) of s. 720 left no room for any decision other than that the informant was the respondent. With respect, my view is that the "respondent" mentioned in s. 722(1)(*b*)(ii) is not confined in all cases to the person who laid the information. In the present case we are not dealing with circumstances where a private individual laid an information or where at the latter's request a police officer did so, and the proceedings were carried on without the intervention of the Crown authorities. In such cases the subsection may have its operation to prevent an appeal being heard unless the informant is served with notice thereof or an order obtained. I agree with the submission of counsel for Dennis that the subsection does not apply where, as here, the Crown is in name and substance the respondent and it is a matter of public order. The charge was laid by Constable Martin "on behalf of Her Majesty the Queen" and the proceedings before the magistrate are intituled:

The reasons of the County Judge are headed:

REGINA

vs.

VERN GLEN DENNIS

His final order is headed:

REGINA

Complainant
(Respondent)

VERN GLEN DENNIS

Defendant
(Appellant)

and his report to the Court of Appeal:

HER MAJESTY THE QUEEN

Respondent

against

VERN GLEN DENNIS

Appellant

Corporal Calvert, the officer in charge of the Haney detachment, conducted the proceedings before the magistrate and counsel for the Crown appeared before the County Judge, before the Court of Appeal and before this Court. The notice of appeal to the County Court was headed:

REGINA

Complainant
(Respondent)

VERN GLEN DENNIS

Defendant
(Appellant)

The latter, by itself, might be taken as being self-serving but the others indicate that in the minds of all concerned the Queen was the real respondent. Service of the notice of appeal upon Corporal Calvert was, within the meaning of s. 722(1)(*b*)(ii), service upon the respondent.

The appeal should be allowed, the orders below set aside and the matter remitted to the County Court of New Westminster to be heard upon the merits.

The judgment of Taschereau, Locke and Fauteux JJ. was delivered by

FAUTEUX J.:—On the information of Constable Martin, of the Haney detachment of the Royal Canadian Mounted Police, in British Columbia, the appellant was tried by way of summary conviction and found guilty under s. 223 of the *Criminal Code*. An appeal lodged against this conviction, to the County Court of Westminster, was quashed for lack of jurisdiction, for the reason that the notice of appeal had not been served on the informant. In fact, the notice was served on Corporal A. Calvert, a superior officer at the detachment who had conducted the case at trial.

A further appeal to the Court of Appeal for British Columbia was likewise and for the same reason dismissed by a unanimous judgment[1].

Hence, pursuant to s. 41 of the *Supreme Court Act*, R.S.C. 1952, c. 259, the appellant sought and obtained leave to appeal to this Court on the following grounds of law:

(1) Was the Court of Appeal for British Columbia right in holding that "the respondent" mentioned in section 722(1)(*b*)(ii) of the *Criminal Code* means the informant in cases where the defendant is the Appellant.

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(2) Was the Court of Appeal for British Columbia right in holding that service on Corporal A. Calvert who conducted the prosecution before the convicting Court was not proper service on the Respondent within the meaning of section 722(1)(*b*)(ii) of the *Criminal Code*.

(3) Was the Court of Appeal for British Columbia right in holding that service must be made on the informant in all cases where an order for substitutional service has not been obtained pursuant to section 722(3) in order to perfect an appeal by the defendant pursuant to section 722 of the *Criminal Code*.

Reduced to proper dimensions, the real questions to be determined in this appeal are (i) whether, in the circumstances of this case, the informant Constable Martin was the respondent within the meaning of s. 722(1)(*b*)(ii) of the *Criminal Code,* upon whom notice of appeal should have been served and, if so, (ii) whether the failure to serve the notice of appeal upon him goes to the jurisdiction of the Court appealed to.

Dealing with the first question: As there is no definition of the term "respondent", it may be expedient to examine the status of the informant under Part XXIV, both in proceedings at first instance as well as on an appeal to the County Court.

Sections 701 to 719 of Part XXIV are related to proceedings at first instance. That the informant, whether a law-enforcement officer or not, is at that stage a party to the case, cannot be doubted. He is the person at whose initiative the proceedings are commenced by the laying of the information: ss. 692(*a*) and 695(1). For the conduct of the proceedings, he is also given the status of prosecutor and, as such, is entitled to conduct the case, examine and cross-examine witnesses, personally or by counsel or agent: ss. 692(*e*) and 709. While the Attorney General of the Province is also given a similar status, *i.e.*, the status of prosecutor, the latter is not, *qua* prosecutor and within the definition of the latter term, a party to the case. The failure of the informant or the Attorney General or their respective counsel or agents to appear for the trial permits the summary conviction Court to either dismiss the information or adjourn the trial to some other time: ss. 706 and 710(4). Upon adjudication of the case, the Court may, in its discretion, award and order costs to be paid to the *informant* by the defendant, in the case of a conviction or

an order against the latter, or to be paid by the *informant* to the respondent in the case of a dismissal of the information: s. 716.

Sections 719 to 733 deal with the appeal to the County Court from the conviction, order or sentence terminating the proceedings at first instance. That the informant may also be a party to this appeal is clear. Under s. 720, the right of appeal is given, namely, (i) to the defendant from the conviction or order made against him or the sentence passed upon him and (ii) to the *informant* or the Attorney General of the Province or, in certain cases, to the Attorney General of Canada, from an order dismissing the information or against the sentence passed upon the defendant.

In the case of an appeal entered by the defendant, as in the present instance, there is nothing, either expressed or implied, in these provisions, suggesting that the Attorney General of the Province, *qua* prosecutor, or the Attorney General of Canada, may be a party to the appeal as respondent; and if this is a true view of the provisions relating to such an appeal, it follows that the only possible respondent, for purposes of service of the notice of appeal, is the *informant* himself.

That this is the situation flows from the nature and the form of this appeal as well as from the provisions of s. 722.

Indeed, and under s. 727, the appeal is heard and determined as a trial *de novo* in conformity with ss. 701 to 716, in so far as they are not inconsistent with ss. 720 to 732. This so-called appeal is not really an appeal, but a trial; and in the case of an appeal by the defendant, the judge presiding over the Court appealed to must himself find him guilty before affirming the conviction. The *informant* and the defendant, the parties in first instance, are thus the parties in such proceedings and, for their purpose, are designated as respondent and appellant, respectively.

The conditions precedent to the exercise of this right of appeal are set forth in s. 722 enacting:

> 722. (1) Where an appeal is taken under section 720, the appellant shall
>
> (*a*) prepare a notice of appeal in writing setting forth
>
> (i) with reasonable certainty the conviction or order appealed from or the sentence appealed against, and
>
> (ii) the grounds of appeal;

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(b) cause the notice of appeal to be served upon

(i) the summary conviction court that made the conviction or order or imposed the sentence, and

(ii) the respondent,

within thirty days after the conviction or order was made or the sentence was imposed; and

(c) file in the office of the clerk of the appeal court

(i) the notice of appeal referred to in paragraph (a), and

(ii) an affidavit of service of the notice of appeal,

not later than seven days after the last day for service of the notice of appeal upon the respondent and the summary conviction court.

(2) In the Northwest Territories, the appeal court may fix, before or after the expiration of the periods fixed by paragraphs (b) and (c) of subsection (1), a further period not exceeding thirty days within which service and filing may be effected.

(3) Where the respondent is a person engaged in enforcement of the law under which the conviction or order was made or the sentence was imposed, the appeal court may direct that a copy of the notice of appeal referred to in subsection (1) be served upon a person other than the respondent, and where the appeal court so directs, that service shall, for the purposes of this section and section 723, be deemed to be service upon the respondent.

The provisions of the last subsection of this section are specially and exclusively applicable in the case of an appeal entered by the defendant, who then becomes the appellant. In express terms, these provisions show that the respondent in such an appeal may be a person engaged in enforcement of the law or, as they also show by necessary implication, a person other than one engaged in enforcement of the law. In either case, such respondent must of necessity be the informant himself for—with the exception of a party intervening in the first instance, if this be legally possible—who else but the informant could, under the provisions related to such an appeal, and at least in a case such as the present, be suggested as respondent? In the case under consideration, and this is all that needs to be decided, there is no doubt, in my view, that Constable Martin, the informant in this case, was the respondent and, as such, the person upon whom the notice of appeal had to be served.

The provisions of s. 722(3) are clear and call for no construction; they must be given effect to.

The fact that, in laying the information, Constable Martin alleged that he was doing so "on behalf of Her Majesty the Queen", adds nothing to the other allegation

that he was laying it as a constable of the Royal Canadian Mounted Police, *i.e.*, as a person engaged in enforcement of the law; as such, he was indeed acting on behalf of the Crown for the enforcement of criminal law; and the case, for the purpose of the service of the notice of appeal to the County Court, was clearly one to which the special provisions of subs. (3) were applicable.

Nor can the style given to the proceedings, before the Magistrate and the County Court Judge, to wit: "REGINA v. VERN GLEN DENNIS", affect the operation of the subsection, in this case.

With respect, I am unable to accept the submission that service on Corporal Calvert amounted to a substantial compliance with s. 722. The impossibility of serving the notice upon Constable Martin was precisely one of the grounds which would, had an application been made under subs. (3) of s. 722, have permitted the Court appealed to to direct copy of the notice of appeal to be served upon a person other than Constable Martin, such service, if so directed, then availing as service upon the latter. The provisions of subs. (3) would be absolutely nugatory were appellant's submission accepted. Furthermore, referring to the exceptional nature of a right of appeal, this Court in *Welch v. The King*[1], said at p. 428:

> That all the substantive and procedural provisions relating to it must be regarded as exhaustive and exclusive, need not be expressly stated in the statute. That necessarily flows from the exceptional nature of the right.

Dealing with the second question: I am also in respectful agreement with the unanimous conclusion of the Court of Appeal that the County Court Judge was right in deciding he had no jurisdiction in the matter, in view of the failure of appellant to comply with the requirements of s. 722, and I did not understand counsel for appellant to challenge the suggestion that non-compliance with the provisions of s. 722 fatally affected the jurisdiction of the County Court.

In *Wills & Sons v. McSherry et al.*[2], where circumstances as to facts and law were different, it was held that notwithstanding the want of service, the Court, in that particular case, had jurisdiction to hear the appeal. An examination

[1] [1950] S.C.R. 412, 97 C.C.C. 117, 10 C.R. 97, [1950] 3 D.L.R. 641.
[2] [1913] 1 K.B. 20.

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of this qualified decision shows that it rested on an application of the maxim *lex non cogit ad impossibilia aut inutilia.* The general principles were stated as follows by Channell J. at pp. 25-6:

> The statute gives this Court jurisdiction to hear appeals from justices by way of case stated subject to certain conditions. The law applicable to the point is clearly stated in Maxwell on the Interpretation of Statutes (5th ed.) at p. 621: "Enactments which impose duties on conditions are, when there are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that lex non cogit ad impossibilia aut inutilia. They are understood as dispensing with the performance of what is prescribed, when performance is idle or impossible . . In such cases, the provision or condition is dispensed with, when compliance is impossible in the nature of things. It would seem to be sometimes equally so where compliance was, though not impossible in this sense, yet impracticable, without any default on the part of the person on whom the duty was thrown." The author then refers to *Morgan v. Edwards,* 5 H. & N. 415, *Woodhouse v. Woods,* 29 L.J.(M.C.) 149, and *Syred v. Carruthers,* E.B. & E. 469, and says: "If the respondent in an appeal kept out of the way to avoid service of the notice of appeal, or at all events could not be found after due diligence in searching for him, the service required by the statute would probably be dispensed with . . . Where, however, the act or thing required by the statute is a condition precedent *to the jurisdiction* of the tribunal, compliance cannot be dispensed with; and if it be impossible, the jurisdiction fails." That last passage shews that there is a difficulty in holding that the Court has power to dispense with the performance of the conditions precedent laid down in this statute. If the point is put in that way I think the Court clearly cannot do so. But that is not quite the question which we have to decide. *The question is whether the statute has been sufficiently complied with if the party has done everything in his power to effect service and it is clearly impossible for him to do so.*

(The last phrase has been italized by myself.)

The provisions of the *Summary Jurisdiction Act,* 1857, which were considered in the case just quoted, are, as well as the facts to which they were applied, different from those here under consideration. Under s. 723(1) of our Code, it is only "where an appellant has complied with section 722" that arises the duty of the Court appealed to to set down the appeal for hearing. Under s. 727(1), it is also only "where an appeal has been lodged in accordance with this Part" that there arises the duty of the Court appealed to, to hear and determine the appeal. These enactments impose duties on conditions which are precedent to the exercise of the jurisdiction and compliance cannot be dispensed with. It is, however, quite unnecessary to decide the case upon that basis, for even if the conditions prescribed in these enactments were not conditions precedent to the exercise of jurisdiction, the maxim *lex non cogit ad*

impossibilia aut inutilia could have no application in the circumstances of this case. Indeed, the record does not show, nor was it ever suggested at the hearing, that it was impossible for appellant to resort to the relief specially provided by Parliament under subs. (3) of s. 722. I find it impossible to ignore the latter provisions.

I would therefore dismiss the appeal.

Appeal dismissed, KERWIN C.J. *and* MARTLAND J. *dissenting.*

Solicitor for the appellant: E. P. Hartt, Toronto.

Solicitor for the respondent: A. Miles Nottingham, New Westminster.