HER MAJESTY THE QUEEN .....APPELLANT;

AND

FRANK RAYMOND LARSON .....RESPONDENT.

1958

*May 6, 7
Jun. 26

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Summary convictions—Jurisdiction of magistrates—When waiver of jurisdiction required—"Commencement" of proceedings—The Criminal Code, 1952-53 (Can.), c. 51, ss. 695, 697, 698—The Municipalities Act, R.S.B.C. 1948, c. 232, ss. 417, 418.

The respondent was arrested without warrant on a charge of "driving while impaired". He was taken the following morning before P, a deputy magistrate appointed for the district under s. 418 of the *Municipalities Act* with power to act "only in the absence or during the illness of the salaried Police Magistrate". P took an information, released the accused on bail, and adjourned the hearing. The accused was subsequently tried and convicted by H, the regular magistrate for the district, who had returned in the meantime. The accused moved by way of *certiorari* and the conviction was quashed on the ground that H, in the circumstances, lacked jurisdiction. This judgment was affirmed by a majority of the Court of Appeal. The Crown appealed by leave.

Held: The appeal should be allowed.

Per Taschereau, Abbott and Martland JJ.: The word "trial", as used in ss. 697(4) and 698, is synonymous with the word "hearing", as used in s. 697(3). In enacting these provisions, Parliament has provided for three distinct periods of time during the course of proceedings under Part XXIV within which jurisdiction of an individual justice or justices may be different. These three periods are as follows: (1) after the laying of an information but prior to plea being taken, when no justice or summary conviction Court is vested with exclusive jurisdiction to hear and determine the matter; (2) after a plea is taken but before hearing has commenced, when the summary conviction Court that has received the plea is vested with exclusive jurisdiction to hear and determine the matter, but such jurisdiction may be waived under s. 697(4); (3) after the hearing has commenced, when no other justice has jurisdiction except in the circumstances set out in s. 698. Since no plea had been entered when H assumed to exercise jurisdiction, the proceedings had not been "commenced" and he had full jurisdiction to enter upon the hearing and to make the conviction.

Per Rand J.: The proceedings were "commenced" by the laying of the information before P and no other magistrate could then exercise jurisdiction under the provisions of the *Criminal Code* unless P signed the waiver under s. 697(4). P's jurisdiction, however, existed only in the absence of H, since he had not taken a plea. He was accordingly superseded when H returned to the district and H was fully clothed with jurisdiction.

*PRESENT: Taschereau, Rand, Locke, Abbott and Martland JJ.

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Per Locke J.: The proceedings were not "commenced" before P within the meaning of s. 697(4) and since no plea was taken by him he did not acquire exclusive jurisdiction to deal with the charge. In these circumstances, no question of waiver arose and the proceedings before H were regularly taken.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Whittaker J.[2] quashing a conviction. Appeal allowed.

John J. Urie, for the appellant.

J. S. P. Johnson, for the respondent.

The judgment of Taschereau, Abbott and Martland JJ. was delivered by

ABBOTT J.:—The respondent was convicted before Magistrate Harris of the District of Powell River in British Columbia, for "driving while impaired". The jurisdiction of the magistrate was questioned in *certiorari* proceedings issued in aid of a writ of *habeas corpus,* in which proceedings an order was made quashing the conviction, and that judgment was affirmed in the Court below, Davey J.A. dissenting.

The charge was laid before Magistrate W. L. Parkin, also of the District of Powell River, who took the information against the accused and later granted bail to the accused and adjourned the hearing. The trial was held on May 10, 1957, before Magistrate Harris. At that time respondent refused to plead and objected to the jurisdiction of the magistrate but his objection was overruled. The magistrate directed a plea of not guilty to be entered, and proceeded with the hearing.

Magistrate Harris was appointed as police magistrate for the Corporation of the District of Powell River by order in council dated April 17, 1956, "with power to exercise the jurisdiction conferred on a Magistrate by Part XVI of the Criminal Code". Magistrate Parkin was on the same date appointed police magistrate for the same district "to act only in the absence or during the illness of Magistrate Harris". Magistrate Harris was absent from the district when the information was laid and the other proceedings were taken as above set out. On his return to the district on May 3, Magistrate Harris assumed

[1] (1957), 24 W.W.R. 215, 120 C.C.C. 24, 27 C.R. 280.
[2] (1957), 23 W.W.R. 47, 119 C.C.C. 225, 26 C.R. 340.

jurisdiction over the proceedings and conducted the trial. Magistrate Parkin had not waived jurisdiction in favour of Magistrate Harris.

The question in issue in this appeal turns primarily upon the interpretation to be given to s. 697 of the *Criminal Code* and in arriving at such interpretation, it is necessary, I think, to consider as well the provisions of ss. 695 and 698.

These three sections are as follows:

695. (1) Proceedings under this Part shall be commenced by laying an information in Form 2.

(2) Notwithstanding any other law that requires an information to be laid before or to be tried by two or more justices, one justice may

(*a*) receive the information,

(*b*) issue a summons or warrant with respect to the information, and

(*c*) do all other things preliminary to the trial.

697. (1) Nothing in this Act or any other law shall be deemed to require a justice before whom proceedings are commenced or who issues process before or after the trial, to be the justice or one of the justices before whom the trial is held.

(2) Where two or more justices have jurisdiction with respect to proceedings they shall be present and act together at the trial, but one justice may thereafter do anything that is required or is authorized to be done in connection with the proceedings.

(3) Subject to section 698, in proceedings under this Part no summary conviction court other than the summary conviction court by which the plea of an accused is taken has jurisdiction for the purposes of the hearing and adjudication, but any justice may

(*a*) adjourn the proceedings at any time before the plea of the accused is taken, or

(*b*) adjourn the proceedings at any time after the plea of the accused is taken for the purpose of enabling the proceedings to be continued before the summary conviction court by which the plea was taken.

(4) A summary conviction court before which proceedings under this Part are commenced may, at any time before the trial, waive jurisdiction over the proceedings in favour of another summary conviction court that has jurisdiction to try the accused under this Part.

(5) A summary conviction court that waives jurisdiction in accordance with subsection (4) shall name the summary conviction court in favour of which jurisdiction is waived, except where, in the province of Quebec, the summary conviction court that waives jurisdiction is a judge of the sessions of the peace.

698.(1) Where a trial under this Part is commenced before a summary conviction court and a justice who is or is a member of that summary conviction court dies or is, for any reason, unable to continue the trial, another justice who is authorized to be, or to be a member of, a summary conviction court for the same territorial division may act in the place of the justice before whom the trial was commenced.

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(2) A justice who pursuant to subsection (1), acts in the place of a justice before whom a trial was commenced

(*a*) shall, if an adjudication has been made by the summary conviction court, impose the punishment or make the order that, in the circumstances, is authorized by law, or

(*b*) shall, if an adjudication has not been made by the summary conviction court, commence the trial again as a trial *de novo*.

I am of opinion that the word "trial" as used in s. 697(4) and in s. 698 is synonymous with the word "hearing" as used in s. 697(3) and that in enacting these sections Parliament has provided for three distinct periods of time during the course of proceedings taken under Part XXIV, within each of which periods the jurisdiction of an individual justice or justices may be different. These three periods are as follows: (1) after the laying of an information but prior to plea being taken; during which period no justice or summary conviction Court is vested with exclusive jurisdiction to hear and determine the matter; (2) after a plea is taken but before hearing has commenced; during which period the summary conviction Court which has received the plea is vested with exclusive jurisdiction to hear and determine the matter, but such jurisdiction may be waived under s. 697(4); (3) after the hearing has commenced, when s. 698 comes into play.

No plea had been entered when Magistrate Harris assumed to exercise jurisdiction and for the reasons which I have given, as well as for those of Davey J.A., with which I am in substantial agreement, I am of the opinion that Magistrate Harris had jurisdiction to enter upon the hearing.

I would therefore allow the appeal and restore the conviction.

RAND J:—In the face of the specific language of s. 697(4) of the *Criminal Code*, "A summary conviction court before which proceedings under this part are commenced", of s. 697(1), "Nothing in this Act . . . shall be deemed to require a justice before whom proceedings are commenced", and of s. 695, "Proceedings under this Part shall be commenced by laying an information", I am unable to agree that where the information, as here, has been taken by a police magistrate as such, the proceedings were not then "commenced" by a Court so as to require a waiver of jurisdiction under s. 697(4). The contrary

view involves a distinction between the jurisdiction contemplated by subs. (4) and that by subs. (3); it gives to the word "jurisdiction" in subs. (4) the meaning of "exclusive jurisdiction" as that is taken to be provided by subs. (3): in other words, that "commencing proceedings" within subs. (4) means taking the plea, that taking the plea vests the only jurisdiction that can be and is required to be waived, and that up to that point no jurisdiction as at common law is or can be acquired by any summary conviction Court. All acts preliminary to the plea are thus conceived to be merely authorized but not affecting or vesting jurisdiction. That may be the case where a single justice, as distinguished from a summary conviction Court, takes the information and some other act by a Court is required to attach jurisdiction. But once a Court is seized by taking the information or doing that further act, technical jurisdiction thereupon arises. If anything else was intended by Parliament the language used does not appear to me to be apt to the purpose.

The other view requires us to introduce a conclusive presumption that up to the taking of the plea, a magistrate acts in the capacity of a functionary with the jurisdiction of one justice only, a view which breaks down where a summary conviction Court is one with the jurisdiction of a single justice, and a presumption for which I find no warrant in the relevant sections of the Code.

On this ground I am against the Crown.

But a further submission by Mr. Urie remains to be examined. By s. 417 of the *Municipalities Act,* R.S.B.C. 1948, c. 232, police magistrates are appointed by the Lieutenant-Governor in council. Where an appointment carries a salary, s. 418 permits the appointment of another magistrate "who shall act only in the absence or during the illness of the salaried Police Magistrate". The magistrate was a salaried justice and the deputy was appointed under the power so given. Is the limitation of jurisdiction that he may act "only in the absence or during the illness" of the magistrate significant to the circumstances before us?

The Court of Appeal took the view that once the deputy entered upon a matter, his authority, unless waived under subs. (4), continued to the end notwithstanding that the

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regular magistrate had returned to the district. I am forced to disagree with this. The rule that a justice seized of jurisdiction retains it to the exclusion of others unless he voluntarily waives it, assumes that as between two or more justices there is equality of status, that the jurisdiction of each is independent of the presence or absence of the other; and to avoid the impropriety of an unseemly competition between them the rule was laid down. But that is not the relation between the two magistrates here. The intention is that primarily the regular magistrate shall act, and for that purpose a substantial salary is paid him. The deputy may or may not be paid and in this case the allowance to him was $12.50 a month. This indicates that the deputy acts for and in the stead of the regular magistrate; that, sitting in the same seat of justice, he maintains a continuity of authority; but that the primary jurisdiction, where a particular act undertaken by the deputy is finished, may at any time be resumed unless a statute forbids it. If the deputy had taken the plea he would be obliged, by s. 697(3), subject to waiver, to continue to the conclusion of the trial. Short of taking the plea I see nothing to limit the language of s. 418; the provisions the Code mentioned point to the propriety and desirability of preliminary action by justices up to the plea; and since the stage reached by the deputy did not go beyond the adjournment he could be and was, by the intervention of the regular magistrate, superseded.

That was evidently the understanding of the deputy. His adjournment to Friday, and his not being then available to continue the proceeding, indicates that he did not consider himself bound to do anything further. The adjudication was, therefore, by a magistrate who was authorized to make it.

I would allow the appeal and restore the conviction.

LOCKE J.:—For the reasons given by Mr. Justice Davey, it is my opinion that the proceedings in this matter were not "commenced" before Magistrate Parkin within the meaning of subs. (4) of s. 697 of the *Criminal Code* and as no plea was taken by him he did not acquire exclusive

jurisdiction to deal with the charge. In these circumstances, no question of waiver arises and the proceedings before Magistrate Harris were regularly taken.

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I would allow the appeal.

Appeal allowed.

Solicitors for the appellant: Paine, Edmonds, Mercer & Williams, Vancouver.

Solicitor for the respondent: J. S. P. Johnson, Powell River.