1950

*Oct. 23
*Nov. 20

PAUL MAJOR ..... APPLICANT;

AND

THE TOWN OF BEAUPORT *et al*..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF QUEBEC ..... } MIS-EN-CAUSE.

MOTION FOR SPECIAL LEAVE TO APPEAL.

Appeal—Special Leave to Appeal within Court's discretion—Where validity of Provincial law questioned, leave refused until opinion of highest Provincial Court obtained—"Final judgment of court of highest resort in Province"—"Question of law or jurisdiction"—The Supreme Court Act, R.S.C. 1927, c. 35, s. 41 (1), (3) as amended by 1949 (Can.) 2nd Sess., c. 37, s. 2.

This appeal deals with a provincial criminal offence. (*Saumur* v. *Recorder's Court of Quebec* [1947] S.C.R. 492). If, therefore, this Court has jurisdiction to grant leave, it is only by virtue of s. 41(1) and (3) of the *Supreme Court Act* as amended. The proper remedy where the validity of a provincial law (the Quebec *Cities and Towns Act*), and a municipal by-law authorized thereby is questioned, is by way of writ of Prohibition (art. 1003 C.P.), or by way of writ of *Certiorari* (arts. 1392, 1393), and since when a case is submitted to this Court for final determination it is desirable that it should have the opinion of the highest court of the Province from which the appeal is taken, this Court, in the exercise of the discretion vested in it under s. 41, should refuse leave to appeal until such opinion has been obtained.

Under s. 41(3) the Court may grant special leave to appeal on a question of law or jurisdiction, but the question of law raised must be a question of law alone and not a mixed question of law and fact. *The King* v. *Decary* [1942] S.C.R. 80.

Application for special leave to appeal dismissed.

MOTION for special leave to appeal under s. 41 of the *Supreme Court Act,* R.S.C. 1927, c. 35 as amended by 1949 (Can.) 2nd Sess., c. 37, s. 2.

The applicant, a witness of Jehovah, was convicted by a District Magistrate under the *Quebec Summary Convictions Act* of distributing a pamphlet contrary to a by-law of the Town of Beauport which prohibits the distribution of circulars etc., until a permit has been obtained and a license fee paid as therein provided.

W. G. How for the motion.

Paul Miquelon K.C. contra.

*PRESENT: Rinfret C.J., and Taschereau, Rand, Estey, Locke, Cartwright and Fauteux JJ.

The judgment of the Court was delivered by:

TASCHEREAU J.:—The petitioner has applied to this Court for special leave to appeal under s. 41 of the *Supreme Court Act*, R.S.C. 1927, c. 35, as amended by 13 Geo. VI, 1949, 2nd Sess., c. 37, s. 2.

The Town of Beauport has enacted a by-law bearing No. 120, prohibiting the distribution of circulars, and was authorized to do so by virtue of a provision of the *Cities and Towns Act*, c. 233, 1941, as amended by 11 Geo. VI, c. 59, s. 7, sub-sec. (*b*). This amendment reads as follows:

> 15*a*. To prohibit the distribution of circulars, advertisements, prospectuses or other similar printed matters, on the streets, avenues, lanes, sidewalks, public lands and places as well as in private dwellings, or to authorize such distribution, upon conditions determined by the by-law and on issuance of a permit for which a fee may be exigible;

On or about the 21st of April, 1950, the petitioner distributed circulars in the streets of the Town of Beauport, in violation of the by-law, as no copy was deposited at the office of the Council of the Town, and approved by the Secretary-Treasurer of the Council. The petitioner was therefore charged under the *Cities and Towns Act* (sections 610 and 617), which state that the fines imposed by the by-laws are recoverable before a District Magistrate, or before a Justice of the Peace, and that all prosecutions shall be decided by either of them, according to the rules contained in Part I of the *Quebec Summary Convictions Act*, c. 29, R.S.Q., 1941.

District Magistrate André Régnier who heard the case found the petitioner guilty, and condemned him to a fine of $40 and costs, and in default of payment to a period of two months imprisonment. The petitioner admitted having distributed the circulars without having obtained the prior authorization required by by-law No. 120, but submitted that the by-law was *ultra vires* as well as the provincial law authorizing the Town of Beauport to enact such a by-law. He alternatively contended that, if the by-law and the provincial statute were *intra vires* of the powers of the City of Beauport and of the Provincial Parliament, he did not fall within the scope of such by-law for various reasons, and particularly for the reason that in distributing such pamphlet, being a Witness of Jehovah,

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he was lawfully exercising his rights of freedom of worship as guaranteed by the *Freedom of Worship Act.* (R.S.Q. 1941, c. 307).

Under the Summary Convictions Act, there is no appeal from the judgment rendered by Magistrate Régnier to any provincial court. No appeal lies unless the statute creating the offence declares that there is an appeal, and in such a case, it is lodged under Part 2 of the Act. Counsel for the petitioner submitted that by virtue of section 41 of the *Supreme Court Act* as amended, the Supreme Court of Canada may grant leave to appeal on the ground that the judgment rendered by Magistrate Régnier is "a final judgment of the highest court of final resort in a province, in which judgment can be had in the case sought to be appealed to this Court." He further submitted that under section 41, para. 3, there is an appeal to this Court with special leave on a *"question of law or jurisdiction"*, as the petitioner has been convicted of an offence *"other than an indictable offence."* He finally argued that as the validity of a provincial law of the Province of Quebec and the validity of a by-law of the Town of Beauport were challenged, as well as the application of the by-law to the petitioner, important questions of law of general application arose, and that special leave to appeal should be granted.

Dealing with the first point, namely the validity of the by-law and of the provincial law, I believe that leave to appeal to this Court should not be granted.

We are dealing here with a provincial criminal offence (*Saumur* v. *Recorder's Court of Quebec* (1)). If, therefore, this Court has jurisdiction to grant leave, it is only by virtue of section 41 (1) and (3) of the *Supreme Court Act* of Canada.

The proper remedy available to the appellant, who raises the question of validity of a provincial law and of a municipal by-law, is by way of prohibition (C.P. 1003) to restrain the Magistrate from proceeding on the matter, or by way of certiorari (1392-1393), to have the judgment revised.

(1) [1945] S.C.R. 526.

I do not find it necessary to determine whether or not the judgment of Magistrate Régnier is that of the highest court of final resort in which judgment can be had in this particular case within the meaning of section 41 of the *Supreme Court Act,* or if the writs of prohibition and *certiorari* are procedural or not, as further remedies were available to the appellant (*vide Storgoff* (1)). If the judgment was not that of the highest court in which judgment could be had in this case, this Court has obviously no power to grant leave and if it was, I am of opinion that the remedies afforded where the offence is alleged to have been committed should be resorted to. It is, I think, desirable that we should have the opinions of the highest courts of a province, when a case is submitted to this Court for final determination. The section of the Act authorizing us to grant leave is only *permissive,* and this is a case, I think, where our discretion may be exercised. I have not overlooked Mr. How's argument that in other cases in the Province of Quebec in which similar by-laws were brought before the courts on motions for prohibition, decisions were rendered adverse to his contention. The judgments to which he referred us were not uniform and it is my view that an application should be made to the Superior Court to obtain a decision on one of the remedies available in this case, before we decide whether or not leave should be granted.

The second point raised by the petitioner is that even if the by-law should be held to be valid he does not fall within its scope. Two arguments are submitted on this point. First, that the by-law should be construed so as not to conflict with the *Freedom of Worship Act,* R.S.Q. 1947, c. 307; and secondly, that the pamphlet in question was a religious pamphlet and that its distribution was part of the exercise of the religious profession of the petitioner, and so expressly allowed to him by the last mentioned Act.

Under section 41, para. 3, we may grant leave on a *question of law or jurisdiction,* but it is clear that the question of law raised must be a question of law alone and not a mixed question of law and fact (*The King* v. *Decary,* (2)). This second point would arise for determi-

(1) [1947] S.C.R. 492.

(2) [1942] S.C.R. 80.

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nation only in the event of the by-law having been held to be valid and, as, for the reasons set out above, I do not think we should now grant leave on the first point, I do not think we should, at this time, grant leave on the second point. If and when a further application is made to us after the remedies in the province have been resorted to on the first point, it will be necessary to consider whether we have any jurisdiction to grant leave on the second point, or whether its determination must not inevitably depend, in part at least, upon questions of fact.

The application should be dismissed.

Motion for leave to appeal dismissed.