PETER E. R. BALCOMBE .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1954

*May 13
*May 19

MOTION FOR LEAVE TO APPEAL

Appeal—Leave—Criminal law—Conviction for murder—Jurisdiction—Situs of crime, question of law—Publication and distribution of written articles prior to trial—Prejudice.

The situs of a crime, in so far as it is related to the question of jurisdiction of a Superior Court of Criminal jurisdiction to try an accused, is a question of law exclusively for the Court to decide—even if, to its determination, consideration of the evidence is needed. It is not a question within the domain of the jury whose lawful fulfilment of duties rests on the assumed existence of the jurisdiction of the Court to try, at the place where the trial is held, the accused for the crime charged. The jury is concerned with the facts as they may be related to guilt or innocence but not to jurisdiction.

On an application for leave to appeal to this Court from the judgment of the Court of Appeal for Ontario affirming the conviction of the applicant for murder.

Held: The application must be dismissed.

1. The Lower Courts have pronounced that the Court sitting at the County of Dundas, in the Province of Ontario, and which tried the applicant, had the jurisdiction to try him, and, in this respect, the latter has failed to rebut the presumption *Omnia presumuntur esse rite acta* which applies to a Superior Court of Criminal jurisdiction.
2. The applicant has failed to show that there should be disagreement with the conclusion of the Court of Appeal that the publication and distribution, prior to the trial, of written reports and articles having reference to the case, did not in fact prevent him from having a fair trial.
3. The argument submitted by the applicant with respect to the alleged failure of the trial judge to direct the jury on the theory of the defence or as to an alleged lack of motive, does not justify leave to be granted.

*PRESENT: Fauteux J. in Chambers.

1954

BALCOMBE v. THE QUEEN

MOTION by the applicant before Mr. Justice Fauteux in Chambers for leave to appeal from the judgment of the Court of Appeal for Ontario, affirming the applicant's conviction on a charge of murder.

J. M. P. Kelly for the motion.

W. B. Common Q.C. contra.

FAUTEUX J.:—This is an application for leave to appeal, under s. 1025(1) of the *Criminal Code,* on points of law, to the Supreme Court of Canada, from a unanimous judgment of the Court of Appeal of Ontario dismissing the appeal of Balcombe against his conviction by the Chief Justice of the High Court and a jury, at the city of Cornwall, that he did, at the County of Dundas in the province of Ontario, on or about the 15th day of October 1953, murder one Marie Annie Carrier.

The first ground as to which leave to appeal is sought is:—

> That the evidence does not substantiate nor prove that the offence alleged was committed within the province of Ontario and therefore there is no jurisdiction in any Ontario Court to try the accused on the said charge.

This point was first raised in the form of an objection made at trial, at the close of the case for the prosecution. Counsel rested his submission on the following part of the provisions of s. 888 of the *Criminal Code*:—

> Nothing in this Act authorizes any Court in one province of Canada to try any person for any offence committed entirely in another province . . .

Overruling the objection, the presiding Judge said:—

> If the death took place in Ontario, it would be sufficient to give Ontario Courts jurisdiction because there could be no murder until the death took place, so the offence would be partly here anyway.
>
> .....
>
> I see no evidence before the Court, except possibly the hypothesis you suggest, which might be a very extreme one, that there may have been a fatal blow outside of Ontario. The evidence is all one way as to where the death occurred.

The point having been urged again in the Court of Appeal, the Chief Justice of Ontario, delivering orally the unanimous judgment of the Court, stated:—

> We are of the opinion that having regard to time factors, location and condition of the body, and other evidence in this case, the Crown has proved that the crime was committed in the Province of Ontario and within the jurisdiction of the Supreme Court of Ontario.

To these judicial pronouncements, it may be added that on the hearing of the present application, counsel for the applicant conceded at least that on the evidence, there were two possible views in the matter: the first one being that the crime was committed in Ontario and the second—the one contended for but not substantiated by counsel—that it was committed in the province of Quebec. If the situs of the crime, in so far as it is related to the question of jurisdiction, was a question exclusively for the Court to determine, it has not been shown that the above judicial pronouncements on the matter were wrong. The maxim *Omnia presumuntur esse rite acta* applies to a Superior Court of criminal jurisdiction. It was then for the applicant to show that on the record the presumption had been rebutted. This he has failed to do.

But, pursues counsel for the applicant, the question was one for the jury to decide and the trial Judge should have directed them that they had to be satisfied beyond a reasonable doubt that the offence alleged was committed within the province of Ontario.

That Marie Annie Carrier was murdered is not open to question. And so far as the situs, where the fatal blows were inflicted or where the death actually occurred, was material to determine whether or not the accused was the author of the crime, the jury were sufficiently directed. The submission is simply that they should have been instructed to determine, as a matter related to jurisdiction and not as a matter related to guilt or innocence, whether, upon the view taken by them of the evidence, they were satisfied beyond a reasonable doubt that either the wounds were inflicted or the death occurred within the province of Ontario.

The question of jurisdiction is a question of law—consequently, for the presiding Judge—even if, to its determination, consideration of the evidence is needed. It is a question strictly beyond the field of these matters which under the law and particularly under the terms of their oath, the jury have to consider. They are concerned only with the guilt or innocence of the prisoner at the bar. Indeed the lawful fulfilment of their duties rests on the assumed existence of the jurisdiction of the Court to try, at the place where it is held, the accused for the crime charged.

1954

BALCOMBE
v.
THE QUEEN

Fauteux J.

They are concerned with facts as they may be related to guilt or innocence but not to jurisdiction. There is nothing under the law entitling them, through the whole course of the execution of their duties, to legally make any other pronouncements but those as to which a general or special verdict is authorized by law.

The applicant also raised the point that the evidence failed to establish that the offence charged was committed at the County of Dundas as alleged in the indictment. This ground was also related to the jurisdiction of the Court and as such must be disposed of in the same manner as the preceding ones.

In another submission, it is alleged that a fair trial of the accused was irremediably prejudiced by the extensive publication and distribution, prior to the trial, throughout the province of Ontario and in particular in the united counties of Stormont, Dundas and Glengarry from whence the Jury men were selected, of written reports and articles having reference to the case at bar. The record shows that the accused challenged only four jurors for cause and, in each instance, the triers found that the challenged juror was indifferent. All the twelve Jury men having been selected and sworn, counsel for the accused, in the absence of the jury, informed the Court of such publicity and contented himself to ask, for sole relief, that special instructions be given to the jury in this respect. This the trial Judge did, not only in his address to the jury, but, before one single witness was heard, he instructed them, in the clearest and strongest possible terms, as to what their duty was in the matter. On this point, the Court of Appeal expressed the opinion that they were unable to perceive any ground for holding that, in fact, the accused was prejudiced by the publicity he complained of. Nothing was advanced to suggest that I should disagree with that opinion.

As to the last two grounds alleged, i.e., that the learned trial Judge failed to direct the jury on the theory of the defence, or as to an alleged lack of motive, it is sufficient to say that the argument heard in this respect does not justify leave to be granted.

The application is refused.

Leave refused.