1947 CanLII 571 (NS CA)

NOVA SCOTIA SUPREME COURT.

[IN BANCO.]

THE KING v. DESMOND.

Before GRAHAM, CARROLL, HALL and DOULL JJ.

1947 CanLII 571 (NS CA)

APPEAL from the decision of Archibald J. refusing a writ of *certiorari* to quash a conviction under The Theatres, Cinematographs and Amusement Act, c. 162, R.S.N.S. 1923.

The following is the decision appealed from:

This is an application for a writ of *certiorari* to remove into this Court the record of conviction made about November 9th, 1946, by R. G. MacKay, Esq., stipendiary magistrate in New Glasgow, in which Viola Irene Desmond was convicted for non-payment of theatre tax as required by s. 8, s-s. 8(a) of The Theatres, Cinematographs and Amusement Act.

When it appeared at the hearing of the application, after examination of the original copy of the information, that said information *did* disclose the commission of an offence within the jurisdiction of the magistrate, counsel for the said Viola Irene Desmond abandoned as a ground for this application the allegation that the information was defective in failing to state the commission of an offence within the magistrate's jurisdiction.

It is necessary therefore to consider only whether or not a writ of *certiorari* should issue on an application alleging want of jurisdiction of the convicting magistrate for the reason that the evidence did not support the conviction.

This point has been before this Court in several other cases. It is clear from the affidavits and documents presented to me that the magistrate had jurisdiction to enter upon his inquiry. This Court will therefore not review on *certiorari* the decision of the magistrate as to whether or not there was evidence to support the conviction: see *R. v. Walsh* (1897), 29 N.S.R. 521;

R. v. Hoare (1915), 49 N.S.R. 119; *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *R. v. Dwyer* (1935), 13 M.P.R. 89.

It was apparent at the argument that the purpose of this application was to seek by means of *certiorari* proceedings a review of the evidence taken before the convicting magistrate. It is obvious that the proper procedure to have had such evidence reviewed was by way of an appeal. Now, long after the time for appeal has passed, it is sought to review the magistrate's decision by means of *certiorari* proceedings. For the reasons I have already given, this procedure is not available to the applicant.

The application will therefore be dismissed.

1947. March 13. *F. W. Bissett,* for the appellant.
E. M. Macdonald, K.C., for the respondent.

F. W. Bissett, for the appellant. The appellant relies on two main points: (1) There is no evidence disclosed to support the conviction, and (2) There is nothing in the evidence to show that the offence occurred within the territorial jurisdiction of the magistrate.

The decision *Rex v. Nat Bell Liquors Limited,* [1922] 2 A.C. 128 is of no application here.

The appellant was improperly convicted and it is therefore proper to examine the record. The Court can look at the evidence to see if there is *any* evidence and to quash the conviction if there is none: *Re McDonald* (1936), 11 M.P.R. 91.

Section 8 of c. 231 Of Securing the Liberty of the Subject gives the Court the right to look at the evidence where there is a "*certiorari* in aid" in order to ascertain if there is *any* evidence and to discharge the prisoner if there is none. Chapter 74 of the Statutes of Nova Scotia for 1925 gives the Court the same power when the application is for a *certiorari* to quash.

The appellant is entitled to the writ, whether she appealed or not, if there has been a denial of natural justice. This is different from where there is an excess or want of jurisdiction:

1947 CanLII 571 (NS CA)

Rex v. Wandsworth, [1942] 1 All E.R. 56; *Re Richards* (1945), 83 Can. C.C. 394.

There is a denial of justice where a person is convicted without evidence and the Court will grant the writ where an obvious injustice has been done, even though an appeal could have been taken. Every case depends on its own facts and exceptional circumstances should be shown: *Re Maritime Fish Company Limited* (1919), 53 N.S.R. 15, 34 C.C.C. 64; *Ex parte Boehner* (1929), 52 C.C.C. 412; *Re Ruggles* (1902), 35 N.S.R. 57.

1947 CanLII 571 (NS CA)

The writ of *certiorari* is a common law writ and is discretionary and the Court can either refuse or grant the application: *Re Ruggles, supra.*

The appellant is entitled to have an affidavit showing such denial received: *Rex v. Wandsworth, supra; Re Edlund and Scott* (1944), 82 Can. C.C. 203; *Goff v. Peasley* (1942), 78 Can. C.C. 237.

E. M. Macdonald, K.C., for the respondent.

The preliminary objection is raised that this appeal is not properly before the Court as the provisions of Order 58 of the Rules of the Supreme Court have not been complied with. The respondent has been deprived of the right of having certain documents and admissions made part of the printed case. The original information contained the words "at the said Town of New Glasgow" setting out the jurisdiction of the magistrate and this objection has since been abandoned by counsel for the appellant. Counsel for the appellant has also admitted that five days following the conviction of the appellant an action for damages was instituted against the respondent and that the action has since been discontinued. Due to these omissions, this Court is in no position to consider whether the decision appealed from should be reversed or confirmed.

Objection is taken to the affidavit of the appellant as an attempted contradiction of the evidence of prosecution witnesses, and the manner in which the trial was conducted, as revealed by the record. The magistrate having jurisdiction, tried the case

on the evidence before him. It is a dangerous practice to admit *ex parte* affidavits: *Re Paris* (1931), 3 M.P.R. 461.

If the jurisdiction is admitted, that is all that can be dealt with on this appeal: *Re Dwyer* (1938), 13 M.P.R. 89; *Rex v. Nat Bell Liquors Limited,* [1922] 2 A.C. 128; *Rex v. Orde* (1935), 9 M.P.R. 373; *Re Davison* (1935), 9 M.P.R. 497; *Re Claim of Peter Carter* (1933), 6 M.P.R. 182; *Rex v. Limerick* (1932), 5 M.P.R. 430.

The contention of the appellant that the ten days in which an appeal should have been asserted have inadvertently slipped by is not sufficient reason to permit this Court to review the evidence. The appellant had full benefit of legal advice before the expiry of the delays for appeal. The sole objection remaining to the appellant is that the evidence does not support a conviction. The proper remedy therefore is by way of appeal.

F. W. Bissett, in reply. Criminal proceedings on *certiorari* are governed by Order 57 of the Rules of the Supreme Court in so far as they are applicable.

1947. May 17. GRAHAM J.:—This is an appeal from the judgment of Mr. Justice Archibald dismissing an application for a writ of *certiorari* to quash a conviction made by R. G. MacKay, Esq., stipendiary magistrate for the town of New Glasgow against Viola Irene Desmond for that:

"She at the said town of New Glasgow on or about the 8th day of November, A.D. 1946, unlawfully did enter a theatre to wit The Roseland Theatre, the same being a place where a tax is imposed by the Theatres, Cinematographs and Amusement Act without paying the said tax contrary to the said Theatres, Cinematographs and Amusement Act, s. 8(8)(a)."

Upon that charge she was convicted on the following day, and fined the minimum penalty fixed for a violation of the Act. On the 30th of December, 1946, she gave notice of an application to be made on the 10th of January, 1947, for a writ of *certiorari* upon the following grounds:

1947 CanLII 571 (NS CA)

"(1) That there was no evidence to support the aforesaid conviction;

(2) That there is evidence to show that the aforesaid Viola Irene Desmond did not commit the offence hereinbefore recited; and

(3) That the information or evidence did not disclose any offence to have been committed within the jurisdiction of the convicting magistrate."

1947 CanLII 571 (NS CA)

Her counsel had been erroneously instructed that the conviction did not show that the offence had been committed at New Glasgow, but having later discovered that it did, abandoned the third ground before Mr. Justice Archibald. He also admitted there that on November 12th, 1946, more than five days before the expiration of the time for appeal, the applicant had brought an action in the Supreme Court for assault, false arrest, false imprisonment and malicious prosecution.

The learned judge dismissed the application because the magistrate had jurisdiction and therefore the evidence was not reviewable; and because in any event the appellant's proper course in the circumstances was to have appealed.

The Theatres, Cinematographs and Amusement Act, c. 162, R.S.N.S. 1923, as amended by c. 39 of the Acts of 1934 by its various sections, provides as follows:

Section 2(b): "The word 'theatre' means any building, tent, enclosure or place in which any performance is given in respect to which an admission fee is charged."

Section 7(1): "Every person attending a performance at a theatre shall upon each admission thereto pay to His Majesty for the use of Nova Scotia, a tax to be collected as in this Chapter provided and according to such scale as from time to time the Governor-in-Council prescribes."

Section 8(3): "The taxes aforesaid shall be collected by the theatre or amusement owner respectively and where in respect of any particular theatre or place of amusement, or any particular amusement or recreation the Board decrees it expedient, the tax shall be so collected by means of tickets issued by the Board."

1947 CanLII 571 (NS CA)

"(6) Where the tax is to be collected by means of tickets, every theatre owner and amusement owner shall place at the entrance to the theatre or place of amusement, or in a prominent position at the place where the amusement or recreation is participated or indulged in respectively, a receptacle in which shall be deposited as in this Chapter provided the tickets sold under this Chapter."

"(8) No person shall, where the tax imposed by this Chapter is payable by him—

(a) enter a theatre; . . .

unless and until such person has paid the said tax, and where the tax is to be collected by means of tickets, has deposited in the said receptacle a ticket representing the amount of said tax."

On this application no question was raised, and none so far as I can see, could be raised as to the jurisdiction of the stipendiary magistrate. His conviction is good on its face and regular in form. The applicant seeks to have it quashed, because the evidence was insufficient for conviction and actually shows that she did not violate the Act. That contention insofar at least as it depends on the correctness of the decision on the evidence is disposed of by *R. v. Nat Bell Liquors, Ltd.,* [1922] 2 A.C. 128. In that case at pp. 153-4 Lord Sumner cited and accepted the law as laid down in *R. v. Bolton* (1841), 1 Q.B. 66, as follows:

"Where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the enquiry. . . . evidence being offered for and against the charge, the proper or *it may be the irresistible* conclusion to be drawn may be that the offence had not been committed and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirm the charge and not to show that he acted without jurisdiction. The question of jurisdiction does not depend on the truth or falsehood of the charge but upon its nature; it is determinable on the commencement, not at the conclusion of the enquiry and affidavits, to be receivable must be directed

to what appears at the former stage and not to the facts disclosed in the progress of the enquiry."

See also Halsbury, vol. 9 (Hailsham ed.), pp. 888-9.

In *Re Claim of Peter Carter* (1933), 6 M.P.R. 182, at p. 193, the learned Chief Justice who delivered the judgment of this Court dealing with the contention that there was no evidence to support the finding, said:

"The decision of the judicial committee of the Privy Council in the *Nat Bell* case closes the door against any argument on that ground."

1947 CanLII 571 (NS CA)

It was argued however that s. 8 of The Liberty of the Subject Act as amended by c. 74 of the Acts of 1925, was applicable in *certiorari* proceedings and gave the Court the right to view the evidence to see whether there was any evidence to support the conviction, but whatever its effect may be in Liberty of the Subject cases, the amendment does not help the applicant in the circumstances of this case because the purposes for which the evidence may be viewed under s. 8 are not present here and therefore its provisions cannot be applied.

It was further urged that there had been a denial of natural justice, and that therefore the writ should issue. On that point the applicant relied on *R. v. Wandsworth,* [1942] 1 All E.R. 56. In that case the defendant had been admittedly convicted without being given an opportunity to defend though he "contended that he had a good answer to the summons on which he was convicted", and Viscount Caldicott said:

"The only way in which that denial of justice could come before the Court in these proceedings is by way of affidavit and the Court is entitled—indeed, is bound if justice is to be done, to look at the affidavit just as it would look at the affidavit in any ordinary case of excess of jurisdiction. . . . I am clearly of opinion that in such a case an affidavit can be looked at and also in this case which is not a case of want of jurisdiction but is analogous to it, the Court will look at the affidavit to see what the facts are and if there has been a denial of natural justice,

then I think that the Court is in a position to interfere and say that the conviction in those circumstances cannot stand."

In this case it appears that a downstairs ticket costs 40 cents and an upstairs one thirty cents; that the price in each case included a Federal and a Provincial tax, the latter imposed by the Theatres, Cinematographs and Amusement Act, is three cents for a downstairs ticket, and two cents for an upstairs one; that the applicant purchased an upstairs ticket and attempted to enter downstairs; that the ticket-taker at the downstairs entrance told her to go upstairs; that she went to the cashier and offered to pay the difference in the price of the tickets; but came back with only the upstairs ticket and disregarding the ticket-taker, went downstairs and refused to go upstairs.

It is argued that this proved that the applicant had purchased an upstairs ticket before entering the theatre, and so had paid the tax; and that therefore the conviction was against evidence, and a denial of justice; but apart from the fact that she knew that the ticket she purchased was not for downstairs and so that she had not paid the full tax, I am unable to differentiate the circumstances of the case from those dealt with by Lord Sumner in the *Nat Bell* case in the well known excerpt from his judgment which I have quoted above.

Indeed Viscount Caldicott quoted and accepted the law as so expressed in the following excerpt from Lord Sumner's judgment, in the *Nat Bell* case, *supra,* at p. 151, viz.:

> "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."

and he commented upon it as follows:

> "That passage as I understand it has nothing to say about a case such as this where there has been a denial of natural justice to a party who has been convicted."

1947 CanLII 571 (NS CA)

The conclusion must be that he did not regard a decision against the evidence to be such a denial of justice as justified a review of evidence.

1947 CanLII 571 (NS CA)

It may seem that a conviction made against all the evidence is in its result as much a denial of justice as one made without calling on the accused to put in his evidence. However that may seem to be, the law is fixed that in the former case *certiorari* does not lie.

That disposes of this case, but I also agree with Mr. Justice Archibald that the application should be dismissed because no reason except inadvertance was given to explain why the open remedy of appeal was not taken. The applicant had consulted her solicitor and brought action long before the time for appeal had elapsed. It is true that in *R.* v. *Wandsworth, supra,* Humphrey J. said:

"There is no reason why a person who has been wrongly convicted without evidence should assist the prosecution to go to some other tribunal at which it may be the necessary evidence will be adduced."

But what he said must be considered in light of the fact that he was dealing with a case of an applicant who had a defence to the charge on which he was convicted and had not been allowed to prove it; and where in consequence, he thought that there was such a denial of justice as could be recognized on *certiorari.* He cannot have intended to hold that an applicant for the writ could by-pass appeal, merely because on appeal, he might be convicted. In any event, in the circumstances of this case, the dictum of the learned Justice goes beyond decisions governing the practice in this Court.

I would dismiss the appeal with costs.

CARROLL J.:—I am of opinion that the charge that the accused appellant did "enter a theatre without paying the tax" has not been substantiated by the evidence given before the magistrate because the accused did actually pay the tax required

1947 CanLII 571 (NS CA)

by one purchasing such a ticket as she was sold. That, however, does not assist the accused on an application of this kind unless she can bring herself within the purview of s. 8, c. 231, R.S.N.S. 1923, as amended by s. 1, subs. 2 of c. 74, Acts of 1925. Only one in "confinement or restraint" may take advantage of that legislation. She was not in that position when the application was launched and is not now. I therefore agree that the appeal be dismissed.

HALL J.:—I concur with my brother Carroll.

Had the matter reached the Court by some method other than *certiorari,* there might have been opportunity to right the wrong done this unfortunate woman.

One wonders if the manager of the theatre who laid the complaint was so zealous because of a *bona fide* belief there had been an attempt to defraud the Province of Nova Scotia of the sum of one cent, or was it a surreptitious endeavour to enforce a Jim Crow rule by misuse of a public statute.

DOULL J.:—I agree with the conclusion reached by my brother Graham.

The ordinary grounds of *certiorari* are want of jurisdiction in the tribunal which acted, informality on the face of the proceedings, error in law appearing on the face of the proceedings. Not so common are the cases were *certiorari* may be granted on the grounds of collusion, corruption or fraud, and I presume that is the same category as what is called by the English Court of Appeal in *R.* v. *Wandsworth,* [1942] 2 All E.R. 56 "a denial of justice". A denial of justice apparently means that before the tribunal, the applicant was not given an opportunity of setting up and proving his case. (The words "natural justice" were used in some of the opinions of the judges but I doubt whether that is a good term.) At any rate a denial of the right to be heard is a denial of a right which is so fundamental in our legal practice that a denial of it vitiates a proceeding in which such denial occurs.

In the present case the jurisdiction of the magistrate is not attacked, nor is there any argument based upon informality in the proceedings or error in law appearing on the face of the proceedings.

The conviction is attacked upon two grounds, (1) that there was no evidence to support the aforesaid conviction, and (2) that there was evidence to show that the aforesaid Viola Irene Desmond did not commit the offence hereinbefore recited.

The second ground, apart from the first, can not be a ground as this Court is not weighing evidence.

The serious question is whether it is ground for *certiorari* to quash a conviction that there was no evidence before the tribunal which made the conviction and which is assumed to have all necessary jurisdiction.

Whatever the *Nat Bell Liquors, Ltd.,* [1922] 2 A.C. 128 decides is binding upon us. What I understand it to decide is that the depositions in the lower court are not part of the record and that provisions like our s. 65 of the Summary Convictions Act or even s. 63 do not make the depositions part of the record for the purpose of *certiorari,* and that

"the evidence, thus forming no part of the record, is not available material on which the superior Court can enter on an examination of the proceedings below for the purpose of quashing the conviction, the jurisdiction of the magistrate having been once established, and that it is not competent to the superior Court, under the guise of examining whether such jurisdiction was established, to consider whether or not some evidence was forthcoming before the magistrate of every fact which had to be sworn to in order to render a conviction a right exercise of his jurisdiction." (*Nat Bell Liquors, Ltd., supra,* at 165.)

This Court had arrived at the same conclusion in the case of *R.* v. *Walsh* (1897), 29 N.S.R. 521 and has since applied the same principles in several cases, the last of these being *R.* v. *Dwyer* (1938), 13 M.P.R. 89.

I agree with Mr. Justice Graham that c. 74 of the Acts of 1925 can not be read with s. 8, s-s. 1 of The Liberty of the Sub-

1947 CanLII 571 (NS CA)

ject Act as providing that on *certiorari* to quash the sufficiency of the evidence can be inquired into.

If there were any defect in the proceedings apparent on their face or if there were any want of jurisdiction, or if affidavits showed fraud or bias or denial of justice, I would not think that the fact that an appeal has been provided would be any bar to the granting of the writ, but certainly if, as seems to be this case, a review of the evidence is what is sought, it should have been obtained by way of appeal.

Appeal dismissed.

1947 CanLII 571 (NS CA)