EX PARTE FONG GOEY JOW ALIAS FONG SHUE ALIAS FONG GOEY SOW

1947

*Dec. 10
*Dec. 22

Habeas Corpus—Criminal law—Alien—Convicted of offence under section 4 of Opium and Narcotic Drug Act, R.S.C. 1929, c. 144—Warrant for commitment not stating reasons—Deportation Order—Amendment to warrant—Immigration Act, R.S.C. 1927, c. 93—Rules 57, 72 and 78 of the Supreme Court of Canada.

In August 1947, Mr. Justice Kellock directed that all parties concerned attend before him to show cause why a writ of habeas corpus should not issue directed to the District Superintendent of Immigration at Vancouver. A return was made, not by the District Superintendent, but by the Commissioner of Immigration, stating that the applicant was held by him for deportation under a warrant of commitment dated September 13, 1945. This warrant was signed by the Commissioner and was directed to the District Superintendent or any Canadian Immigration officer, and it followed form G in the schedule to the Immigration Act with the important exception that it did not recite as the form provides: "And whereas under the provisions of the Immigration Act an order has been issued for the deportation of the said . . . . .".

A copy of a deportation order, dated September 8, 1945, was produced before Mr. Justice Kellock, although objected to by the applicant because it was not made part of the return. Then Mr. Justice Kellock permitted the filing of a new return which was dated September 15, 1945, was signed by the Commissioner and had attached to it a copy of the same warrant of September 13, 1945, and a copy of the same order for deportation of September 8, 1945.

Subsequently the respondent again filed a new return dated September 15, 1947, this time signed by the Acting District Superintendent and which had attached to it a copy of the same warrant of September 13, 1945 and a copy of an order for deportation of September 8, 1945, which contained a statement that the applicant was an alien and had been convicted of an offence under paragraph (*d*) of section 4 of the Opium and Narcotic Drug Act, 1929.

Then Mr. Justice Kellock directed that in view of the statement of facts found, as appears in the order attached to the last return, the application for a writ of habeas corpus should be dismissed.

The present appeal is from the decision of Mr. Justice Kellock.

Held: The appeal to this Court should be dismissed.

Per The Chief Justice, Kerwin, Taschereau and Rand JJ.: The words in section 26 of the Opium and Narcotic Drug Act, 1929, "in accordance with the provisions of the Immigration Act relating to inquiry, detention and deportation", require us to examine the provisions of the Immigration Act relating to inquiry, detention and deportation.

The officer named in the warrant must be able to justify his detention of the accused. It clearly appears that such a warrant depends upon an order for deportation and this is borne out by the fact that the form of warrant in the Schedule to the Act, Form G, provides for the recital of such order. The warrant for commitment and the order for deportation may be read together.

*PRESENT:—Rinfret C.J., Kerwin, Taschereau, Rand and Estey JJ.

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The original order was defective because it did not state the facts upon which the board of Inquiry acted. But a proper order being subsequently produced, effect should be given to it and the applicant detained in custody. The Acting District Superintendent is now able to justify the applicant's detention and the Court will not on a habeas corpus proceeding such as this inquire into any irregularity in his caption.

Per Estey J.: If the warrant is issued without a sufficient reference to the order for deportation, it is to that extent defective or incomplete. It would appear that the requirements of the Statute are satisfied by setting out in the warrant such description or identification of the order for deportation that either the accused or the party detaining him may identify same.

Warrants defective because of omissions both as to substance and to form have been before the Courts and where they have recited a conviction or order which exists in fact, permission to amend the warrants has been granted. Opportunity to amend the warrant should be given in this case.

Neither the provisions of section 43 nor Form G contemplate the setting forth of the term of imprisonment for the offence under section 4 (*d*) of the Opium and Narcotic Drug Act, 1929.

The question as to the right to appeal cannot be dealt with upon an application for habeas corpus where the issue is confined to determining the legality of the applicant's retention in custody, and this right is not affected by the result of such application.

APPEAL from the judgment of Kellock J. dismissing petition for a writ of habeas corpus.

The material facts and the grounds of the petition are stated in the above head-note and in the judgments now reported.

Denis Murphy, for applicant.

R. Forsythe, K.C., for the Commissioner of Immigration.

The judgment of the Chief Justice and of Kerwin, Taschereau and Rand JJ. was delivered by

KERWIN J.: On August 27, 1947, on an application made under section 57 of the *Supreme Court Act,* Mr. Justice Kellock, in accordance with this Court's Rule No. 72, directed that all parties concerned attend before him to show cause why a writ of habeas corpus should not issue directed to the District Superintendent of Immigration at Vancouver, British Columbia, to have the body of the applicant before a judge of this Court forthwith to undergo and receive all and singular such matters and things as

such judge should then and there consider of concerning him in this behalf. A return was made, not by the District Superintendent, but by the Commissioner of Immigration, stating that the applicant was held by him for deportation at the Immigration Building in Vancouver under a warrant dated September 13, 1945, a copy of which was annexed to the return. This warrant was signed by the Commissioner of Immigration and was directed to the District Superintendent of Immigration at Vancouver, or any Canadian immigration officer. It recites that the applicant a subject of China, had become an inmate of Oakalla Prison Farm; that being an alien he had, after his entry to Canada, been convicted on March 27, 1945, of an offence under section 4, paragraph (*d*) of *The Opium and Narcotic Drug Act, 1929,* and was sentenced to imprisonment, and that an application had been made to the Minister of Justice for an order addressed to the Warden of the Oakalla Prison Farm commanding him "to detain and deliver (the applicant) into your custody after expiry of his sentence with a view to his deportation under the provisions of the said Act." The warrant then orders the District Superintendent, or any Canadian immigration officer, to receive the applicant and safely keep and convey him through any part of Canada and deliver him to the transportation company which brought him to Canada, with a view to his deportation to the port from which he came to Canada. This warrant follows Form G in the Schedule to the *Immigration Act, R.S.C. 1927, c. 93,* as amended by *1 Geo. VI, c. 34,* with the important exception that it does not recite as the form provides:—"And whereas under the provisions of the *Immgiration Act* an order has been issued for the deportation of the said.....".

The Opium and Narcotic Drug Act is chapter 49 of the *Statutes of 1929* and the reference in the warrant to paragraph (d) of section 4 thereof is explained by section 26 which reads as follows:—

26. Notwithstanding any provision of the Immigration Act, or any other statute, any alien, whether domiciled in Canada or not, who at any time after his entry into Canada is convicted of an offence under paragraphs (*a*), (*d*), (*e*) or (*f*) of section four of this Act, shall, upon the expiration or sooner determination of the imprisonment imposed on such conviction, be kept in custody and deported in accordance with the provisions of the Immigration Act relating to enquiry, detention and deportation.

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The words "in accordance with the provisions of the *Immigration Act* relating to enquiry, detention and deportation" cannot be neglected as was pointed out by Duff J., as he then was, in *Samejima* v. *The King* (1), in dealing with the phrase "in accordance with the provisions of this Act,—meaning, in connection with the case there under advisement, in accordance with the provisions of the *Immigration Act*. They, therefore, require us to examine the provisions of the *Immigration Act* relating to enquiry, detention and deportation.

Subsections 1 and 2 of section 43 thereof, as enacted by *c. 34, sec. 13,* of *the Statutes of 1937,* provide:—

43. (1) Whenever any person other than a Canadian citizen, or a person having Canadian domicile, has become an inmate of a penitentiary, gaol, reformatory or prison, the Minister of Justice may, upon the request of the Minister of Mines and Resources, issue an order to the warden or governor of such penitentiary, gaol, reformatory or prison, which order may be in the Form F in the Schedule to this Act, commanding him after the sentence or term of imprisonment of such person has expired to detain such person for, and deliver him to, the officer named in the warrant issued by the Director or the Commissioner of Immigration, which warrant may be in the Form G in the Schedule to this Act, with a view to the deportation of such person.

(2) Such order of the Minister of Justice shall be sufficient authority to the warden or governor of the penitentiary, gaol, reformatory or prison, as the case may be, to detain and deliver such person to the officer named in the warrant of the Director or the Commissioner of Immigration as aforesaid, and such warden or governor shall obey such order, and such warrant shall be sufficient authority to the officer named therein to detain such person in his custody, or in custody at any immigrant station, until such person is delivered to the authorized agent of the transportation company which brought such person into Canada, with a view to deportation as herein provided.

It will be seen that the order of the Minister of Justice is addressed to the Warden of a penitentiary, gaol, reformatory or prison in which a person other than a Canadian citizen or a person having Canadian domicile is an inmate, commanding the Warden after the sentence or term of imprisonment of such person has expired to detain such person for and deliver him to the officer named in the warrant issued by the Director or Commissioner of Immigration with a view to the deportation of such person. The Minister of Justice's order is sufficient authority to the Warden to deliver the described person to the officer named in the warrant but when the latter is called upon,

(1) [1932] S.C.R. 640 at 641.

he must justify his detention of such person. It clearly appears from the provisions of the *Immigration Act* that a warrant to such officer depends upon an order for deportation and this is borne out by the fact that the form of warrant in the Schedule to the Act, Form G, provides for the recital of such an order.

If the matter rested there, I would say that the return made by the Commissioner of Immigration was insufficient because there was no such recital in the warrant, which was the only document attached to the return. However, a copy of a deportation order dated September 8, 1945, was apparently produced before Mr. Justice Kellock, although objected to by counsel for the applicant because it was not made part of the return. That order merely recited that the applicant had been examined by an officer acting as a board of inquiry and had been ordered deported to China under section *42, ss. 3, of the Immigration Act,* in accordance with section *26 of The Opium and Narcotic Drug Act, 1929,* and amendments thereto. Mr. Justice Kellock permitted the filing of a new return and the amendment of the order "so that the facts as found by the Board may be specifically set forth." A new return was thereupon made, dated September 15, 1947, again signed by the Commissioner of Immigration, to which was attached a copy of the same warrant of September 13, 1945, and a copy of the same order for deportation of September 8, 1945. Mr. Justice Kellock gave leave for further argument in writing, of which counsel for the applicant availed himself, but no further argument was submitted on behalf of the respondent. Instead, the latter filed a new return, dated September 15, 1947, this time signed by the Acting District Superintendent of Immigration at Vancouver and attached to which was a copy of the same warrant of September 13, 1945, and a copy of an order for deportation of September 8, 1945, which contained a statement that the applicant was an alien and that he had been convicted of an offence under paragraph (*d*) of section *4 of The Opium and Narcotic Drug Act, 1929.* Whether, as contended by counsel for the applicant, no prior authority for the filing of this return had been granted, it must be taken that Mr. Justice Kellock authorized it as he directed that in view of the statement of

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facts found, as appears in the order attached to the last return, the application for a writ of habeas corpus should be dismissed.

Section *43 of the Immigration Act* provides that the warrant "may" be in the Form G in the Schedule and while it is not directly apposite, section 78, providing that no conviction on proceedings under the *Act* shall be quashed for want of form, is not without importance, and the warrant and order may, therefore, be read together. As Lamont J. points out in *Samejima* v. *The King* (1), the *Immigration Act* contemplates that an order for deportation will show the reasons. It is true that the remarks in that case were made in connection with section *33* of the *Immigration Act*, in subsection 5 of which appears a reference to Form C which has a space for the reasons for the rejection of a person seeking entry into Canada, but the same reasoning applies in the present case and the original order was, therefore, defective because it did not state the facts upon which the Board of Inquiry acted. However, the question to be resolved is whether a proper order now being produced, effect should be given to it and the applicant detained in custody. The answer must be in the affirmative because the Acting District Superintendent is now able to justify the applicant's detention and the Court will not on a habeas corpus proceeding such as this inquire into any irregularity in his caption: Anglin J., as he then was, and Osler J. A., speaking for the Ontario Court of Appeal in *Rex* v. *Whitesides* (2).

The appeal must therefore be dismissed but without prejudice to the right of the applicant to appeal under section *19* of the *Immigration Act* to the Minister of Immigration from the order for his deportation.

ESTEY J.: This is an appeal under section *57(2)* of *the Supreme Court Act (1927 R.S.C., c. 35)* from a decision of Mr. Justice Kellock dismissing an application for a writ of *habeas corpus*.

The accused was convicted under section *4 (d)* of *The Opium and Narcotic Drug Act (1929 S. of C., c. 49)* and his consequent term of imprisonment expired September 8, 1945.

(1) [1932] S.C.R. 640 at 646. (2) (1904) 8 O.L.R. 622.

Section *26* of *The Opium and Narcotic Drug Act* provides in part that any alien convicted under section *4 (d)*

> shall, upon the expiration or sooner determination of the imprisonment imposed on such conviction, be kept in custody and deported in accordance with the provisions of the *Immigration Act* relating to enquiry, detention and deportation.

The Minister of Mines and Resources, acting under section *22 (2)* of the *Immigration Act (1927 R.S.C., c. 93, and amendments thereto)* authorized H. Crump, an immigration officer, to hold an enquiry with respect to the accused. The enquiry was held and under date of September 8, 1945, H. Crump issued an order that the accused be deported.

Then the Commissioner of Immigration under section *43 (1) of the Immigration Act* issued his warrant directed to the District Superintendent of Immigration, Vancouver, B.C., authorizing him to receive, hold and deliver the accused to the transportation company which brought him to Canada. This warrant under section 43 (2):

> . . . shall be sufficient authority to the officer named therein to detain such person in his custody, or in custody at any immigrant station, until such person is delivered to the authorized agent of the transportation company which brought such person into Canada, with a view to deportation as herein provided.

The application for the writ of habeas corpus alleges that this warrant is invalid because it fails to disclose (*a*) that a deportation order was made against the accused, and (*b*) the term of imprisonment imposed upon the accused.

Mr. Justice Kellock under Supreme Court Rule 72 directed that a summons issue and upon the hearing thereof objections were taken by counsel for the accused to the return made. The learned Judge under Rule 78 granted leave to amend and in accordance therewith amendments were made to the return and order for deportation, and no objections are now urged as to the contents of these documents as now filed. The warrant of commitment was not amended.

This warrant made no reference to the order for deportation, notwithstanding that Form G, as set out in the Schedule to the Act, contains the following:

> And whereas, under the provisions of the Immigration Act, an order has been issued for the deportation of the said.....

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The statute provides that the warrant may be in Form G and therefore it is not necessary that either the language used or the sequence of items as therein set out must be adopted, but it does not follow that one or any of its essential requirements should be ignored. The order for deportation is the basis and justification for the issue of the warrant. If, therefore, the warrant be issued without a sufficient reference to the order for deportation, it is to that extent defective or incomplete. Counsel for the accused contended that the warrant should set out the reasons embodied in the order for deportation. This is not required by either the statute or Form G. It would rather appear that the requirements of the statute are satisfied by setting out therein, as the form suggests, such description or identification of the order for deportation that either the accused or the party detaining the accused may identify same.

Warrants defective because of omissions both as to substance and to form have been before the Courts and where they have recited a conviction or order which exists in fact permission to amend the warrants has been granted. This practice has been followed even where it was necessary to have a writ of *certiorari* issued in order to bring the record before the Court. In this particular case the record has been placed before the Court by way of a return and the order for deportation as amended is upon its face competently made, in fact its competence is not challenged, and must, therefore, be accepted as a valid adjudication.

Under these circumstances it would seem that an opportunity should be given to amend the warrant. *The King* v. *Barre* (1); *The King* v. *Morgan* (2); *The King* v. *Morgan,* (No. 2) (3); *The King* v. *MacDonald* (4). *In the matter of Clarke* (5).

In *In re Timson* (6) the principle of permitting amendments was accepted but because of the particular circumstances of that case the amendment was refused. See also *The King* v. *Venot* (7).

That an amendment should be permitted in this case would seem to follow, particularly as under other sections

(1) [1905] 11 C.C.C. 1.
(2) [1901] 5 C.C.C. 63.
(3) [1901] 5 C.C.C. 272.
(4) 16 C.C.C. 121.
(5) [1842] 2 Q.B. 619; 114 E.R. 243.
(6) [1870] L.R. 5 Ex. 257.
(7) [1903] 6 C.C.C. 209.

of this *Act* the order for deportation serves the dual purpose of evidencing the adjudication and justifying the retention of the party to be deported, and it may be amended. The basis for amending the order for deportation in such a case was discussed in *Samejima* v. *The King* (1), where Mr. Justice Lamont, with whom Duff, J. (later Chief Justice) and Cannon, J. agreed, stated at p. 647:

> If the Board of Inquiry made a deportation order defective on its face, it could, in my opinion, recall it and substitute therefor an order in proper form, so long as the defective order had not been acted upon. Even after it has been served on the person in custody and constitutes the return made to a writ of *habeas corpus*, it may still, in my opinion, by leave of the court or judge, be amended, or another order substituted for it, so as to make it conform to the finding of the Board.

The other objection that the warrant does not disclose the term of imprisonment is not supported by either the provisions of section 43 or Form G. Neither of these contemplate the setting forth of the term of imprisonment for the offence under section *4 (d) of The Opium and Narcotic Drug Act* and this objection cannot be supported.

Counsel for the accused raised a point with respect to his right to appeal, which cannot be dealt with upon an application for *habeas corpus* where the issue is confined to determining the legality of the applicant's retention in custody. *Vasso* v. *The King* (2); *In re Henderson* (3); *Ex parte Macdonald* (4); *In re Trepanier* (5). Whatever his rights may be with respect to any appeal they are unaffected by the results of this application.

The appeal should be dismissed with a direction that the warrant be amended to include a sufficient reference to the order for deportation made in this matter and dated September 8, 1945.

Appeal dismissed.

Solicitor for the applicant: *Denis Murphy.*

Solicitor for the Commissioner of Immigration: *F. P. Varcoe.*

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(1) [1932] S.C.R. 640.
(2) [1933] S.C.R. 36.
(3) [1930] S.C.R. 45.
(4) [1897] 27 S.C.R. 683.
(5) [1885] 12 S.C.R. 111.