IN RE JOHN MANUEL

1928

*Dec. 4.
*Dec. 21.

Criminal law—Conviction under Customs Act, R.S.C. 1927, c. 42, s. 217—Harbouring goods unlawfully imported into Canada—Summary jurisdiction under s. 217 (2)—Value of goods not shown to be under $200.

Appellant was convicted before a stipendiary magistrate (the conviction being affirmed, on appeal, by the County Court Judge) for harbouring spirits unlawfully imported into Canada whereon the duties had not been paid, contrary to s. 217 of the *Customs Act*, R.S.C. 1927, c. 42. The warrant of commitment did not show that the value of the goods was under $200, and was, on that ground, attacked as bad on its face, as not showing jurisdiction in the convicting court.

Held (Mignault J. *dubitante*): In not showing such value to be under $200 the warrant of commitment did not fail to show jurisdiction.

Per Anglin C.J.C., Newcombe and Smith JJ.: Subs. 3 of said s. 217, introduced by amendment in 1925 (c. 39), does not impliedly limit the summary jurisdiction to cases where the value of the goods is less than $200. The special jurisdiction conferred by subs. 3 to proceed, alternatively, by indictment, for a more rigorous penalty, where the value is $200 or over, does not, so long as the procedure by indictment is not invoked, detract from the power exerciseable by magistrates under subs. 2, interpreted independently.

Per Rinfret J.: The warrant recited a conviction of an offence described in terms strictly following those of subs. 1 of s. 217; then subs. 2 enacts that "every such person" guilty of the offence so described is "liable on summary conviction," etc. Therefore it could not be said that, on its face, the warrant did not show jurisdiction. It may be that subs. 3 makes the offence indictable when the goods are of the value of $200 or over; but there was nothing in the proceedings before the court or on the face of the commitment to show they had that value; moreover, the presumption is that the jurisdiction was rightly asserted.

MOTION by way of appeal from the judgment of Lamont J., dismissing an application by the present appellant for a writ of *habeas corpus*.

The appellant was convicted before a stipendiary magistrate "for that he * * * did, in the city of Halifax, on * * * unlawfully, without lawful excuse, harbour a quantity of spirits, to wit, rum unlawfully imported into Canada, whereon the duties lawfully payable have not been paid, contrary to the provisions of section 217" of the *Customs Act*, c. 42, R.S.C. 1927. The conviction was affirmed, on appeal, by the County Court Judge.

The warrant of commitment, which recited the conviction in the above terms, was attacked on the ground that

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

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it did not show that the value of the goods alleged to have been harboured was under $200, and, therefore, that it was bad on its face, as not showing jurisdiction in the convicting court. It was contended, on appellant's behalf, that the effect of the enactment, in 1925 (c. 39), of what is now subs. 3 of s. 217, was to make the offence an indictable one where the goods are of the value of $200 or over, and impliedly to limit the summary jurisdiction to cases where the value of the goods is less than $200. *Rex* v. *Thompson* (1) was cited in support of the motion.

Duncan MacTavish for the motion.

John F. MacNeill for the Attorney-General of Canada, *contra.*

The judgment of Anglin C.J.C., Newcombe and Smith JJ., was delivered by

NEWCOMBE J.—This motion comes by way of appeal from the judgment of my brother, Lamont, of 23rd November, 1928, dismissing an application by the prisoner for a writ of habeas corpus. The papers shew that the prisoner was convicted before Mr. Cluney, Stipendiary Magistrate of the city of Halifax, on 4th July, 1928, for the offence which will be literally described; and that the conviction was, on 14th November, affirmed on appeal by the County Court Judge for the district. A verified copy of the warrant of commitment dated 27th November, 1928, is produced, and, in it, the conviction is recited as follows:—

> Whereas John Manuel, late of Halifax, in the county of Halifax, was on this day convicted before the undersigned, Judge of the County Court for District No. 1 (acting on appeal by the said John Manuel from a conviction made on the 4th day of July, 1928, before A. Cluney, Stipendiary Magistrate in and for the city of Halifax), for that he, the said John Manuel did, in the city of Halifax, on the 24th day of April, A.D. 1928, unlawfully, without lawful excuse, harbour a quantity of spirits, to wit, rum unlawfully imported into Canada, whereon the duties lawfully payable have not been paid, contrary to the provisions of Section 217 of the Customs Act, chapter 42, Revised Statutes of Canada, 1927, and it was thereby adjudged that the said John Manuel for his said offence should forfeit and pay the sum of one hundred and fifty dollars, to be paid and applied according to law, and should pay to the prosecutor the sum of five dollars and fifty cents for his costs in that behalf;

(1) (1928) 50 Can. Cr. Cas. 183.

and it was thereby further adjudged that if the said several sums were not paid forthwith the said John Manuel should be imprisoned in the city prison of the said city of Halifax in the said city of Halifax, for the term of three months, unless the said several sums and the costs and charges of the commitment and of the conveying of the said John Manuel to the said city prison were sooner paid.

The ground of the application is that the commitment is bad upon its face, because it does not shew " that the value of the said goods alleged to have been harboured is under $200."

The most recent revision of the Public Statutes of Canada came into force on 1st February, 1928, although declared by the proclamation to operate by the designation of the Revised Statutes of Canada, 1927. Section 217 of the *Customs Act,* c. 42, as contained in that revision, is immediately derived from c. 39, s. 2, of 1925, and c. 50, ss. 25 and 26, of 1927.

The question arises under subs. 2 of the Act as it appears in the revision designated 1927. That subsection originally formed part of s. 197 of the *Customs Act,* as enacted by c. 14, s. 38, of 1888, and it was re-enacted in a subsection, as it now stands, by the Revised Statutes of 1906, c. 48, s. 219. In 1925, s. 219 was repealed and at the same time re-enacted with some amendments, including the addition of subs. 3; but there was nothing in any of the earlier Acts corresponding in anywise with subs. 3. Subsection 1 of section 219, as enacted in 1925, in conformity with the repealed section, had made it an offence, knowingly to harbour or conceal goods unlawfully imported into Canada, and had provided that, if such goods were found, they should be seized and forfeited; and that, if not found, the person offending should forfeit the value thereof; and by subss. 2 and 3 it was enacted that

(2) Every such person shall, in addition to any other penalty, forfeit a sum equal to the value of such goods, which may be recovered in any court of competent jurisdiction, and shall further be liable, on summary conviction before two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding one year and not less than one month, or to both fine and imprisonment.

(3) Where the goods so harboured, kept, concealed, purchased, sold or exchanged are of the value of two hundred dollars, or over, such person shall be guilty of an indictable offence and liable to a term of imprisonment not exceeding seven years and not less than one year for a first offence, and to a term of imprisonment not exceeding ten years and not less than three years for a second and each subsequent offence.

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These two subsections were not in themselves altered by the amendments of 1927, and are introduced into the revision, in the terms in which they were enacted, by c. 39 of 1925. Subsection 2 has in effect thus been in force for forty years, and, as a separate subsection, since 1906. The amendments by c. 50 of 1927 are immaterial to the question now at issue. It is the interpretation of subsections 2 and 3 of c. 39 of 1925 which is really involved, and the question is, whether the commitment is bad because it is not stated therein that the value of the rum unlawfully imported and harboured by the prisoner was less than $200.

It will be perceived that, by subsection 2, the person harbouring the goods is liable, in addition to the penalties previously provided, on summary conviction, to a penalty not exceeding $200, and not less than $50, or to imprisonment for a term not exceeding one year, and not less than one month, or to both fine and imprisonment. There is, in this subsection itself, no limitation of the magistrates' jurisdiction to proceed summarily, depending upon the value of the goods. It is, however, provided by the following subsection that, where the value of the goods is $200 or over, the offender shall be guilty of an indictable offence, and liable to the imprisonment therein prescribed; and it is argued that that provision impliedly limits the summary jurisdiction to cases where the value of the goods is less than $200.

I would reject that contention. It is not uncommon practice, in Dominion legislation, to provide that a statutory offence may be prosecuted either summarily or upon indictment; s. 499 of the *Criminal Code* is an example; and ss. 127 and 128 of the *Excise Act* are other examples; there is no inherent objection to such alternative methods of procedure, and another specimen is introduced by the enactments now in question. Subsection 2, in express terms, applies to "every such person"; that is, to any person who, without lawful excuse, harbours any goods unlawfully imported into Canada, whereon the duties lawfully payable have not been paid. He is to forfeit a sum equal to the value of the goods, recoverable in any court of competent jurisdiction, and is further liable, on summary conviction, to the additional penalties prescribed. I

think the intention of Parliament is sufficiently obvious; and that the special jurisdiction conferred by subsection 3 to proceed, alternatively, by indictment, for more rigorous penalties, where the value of the goods is $200 or over, or, in such a case, for first, second or subsequent offences, at the option of the prosecuting authority, does not, so long as the procedure by indictment is not invoked, detract from the power exerciseable by the magistrates under subsection 2, interpreted independently.

It is not said, and cannot, I think, be said with any justification, that subsection 3 affects the liability of an offender under subsection 2 to forfeit a sum equal to the value of the goods, if that value be $200 or more; and, if not, why should it affect the offender's liability to the penalties enforceable by summary proceedings, also imposed by subsection 2? The two subsections appear to be independent and self-contained, and subsection 3 does not, in my opinion, imply or suggest any intention to abridge or affect the operation of subsection 2 as it theretofore existed, and continues to exist. I cannot help thinking that, when, in 1925, Parliament amended the original section, if it were the intention to reduce the well established jurisdiction of the magistrates, apt words would have been used, and that it was not meant to change the law in such an important particular by a far-fetched inference.

I am fortified in my conclusion by the judgment of the Supreme Court of Nova Scotia *en banc,* pronounced in the case of *Rex* v. *Boutillier* (1).

The appeal should, in my opinion, be dismissed.

MIGNAULT J.—I have had the advantage of reading the judgment of my brother Newcombe dismissing the appeal of the prisoner Manuel from the refusal by my brother Lamont of a writ of *habeas corpus* to enquire into the cause of his commitment, which commitment purports to have been made under section 217 (formerly 219) of the *Customs Act,* chapter 42, R.S.C., 1927.

I understand that a majority of my learned colleagues concur with my brother Newcombe in rejecting the appeal. I have not been able, however, to free myself from

(1) (1928) 49 Can. Cr. Cas. 312, at p. 314.

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considerable doubt as to the correctness of his decision. Subsection 2 of section 217 (formerly 219), as originally drafted, undoubtedly conferred upon two justices of the peace jurisdiction to try the offence created by subsection 1, without regard to the value of the goods. When, however, Parliament repealed the whole section in 1925 and re-enacted it, a very important provision was inserted in the new section as subsection 3, declaring that when the goods so harboured, etc., are of the value of $200 or over, such person (the person harbouring the goods) shall be guilty of an indictable offence and subject to a term of imprisonment not exceeding seven years, and not less than one year, for a first offence.

It seems clear that in proceedings by indictment, it would be essential to the validity of the indictment that it should set out that the goods are of the value of $200 or over. When this value exists, the statute creates an offence which, as it appears to me, is triable only by indictment. The words "where the goods so harboured * * * are of the value of two hundred dollars or over, such person *shall be guilty of an indictable offence*," seem to me to exclude any proceedings other than by indictment. I cannot, therefore, in a case coming within the condition of subsection 3, conceive that it should be tried under the summary conviction provisions referred to by subsection 2.

I do not think that there is any parity between this case and the case contemplated by section 499 of the *Criminal Code*. Parliament, no doubt, by express enactment, can provide that an offence shall be punishable either on conviction on an indictment, or on summary conviction. Under section 499 the offence and the punishment are the same, whether the one or the other mode of trial is selected. Here, however, where the value of the goods is under $200, the offence is not the same as that contemplated by subsection 3, nor is the punishment the same.

I am not in favour of dissents in criminal cases coming before this Court by way of appeal, so I merely give expression to the doubt I feel with respect to the decision of the majority of my colleagues.

RINFRET J.—The ground of the application by John Manuel for a writ of *habeas corpus* was: That the warrant

of commitment is bad on its face because it does not shew jurisdiction in the convicting court, inasmuch as the goods unlawfully imported into Canada are not therein alleged to have been valued under $200.

I think the application was rightly refused by my brother Lamont and the appeal from his judgment ought to be dismissed.

The warrant of commitment recites that John Manuel was convicted, first, before a stipendiary magistrate; and then, on appeal, by a judge of the County Court, for that he did

> unlawfully, without lawful excuse, harbour a quantity of spirits, to wit: rum unlawfully imported into Canada whereon the duties lawfully payable have not been paid, contrary to the provisions of section 217 of the Customs Act.

Subsections 1 and 2 of section 217 of the *Customs Act* read in part:—

> 1. If any person * * * without lawful excuse, * * * harbours * * * any goods unlawfully imported into Canada * * * whereon the duties lawfully payable have not been paid * * *
>
> 2. Every such person shall * * * be liable, on summary conviction before two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding one year and not less than one month, or to both fine and imprisonment.

The warrant, therefore, recites that Manuel was convicted of an offence which is described in terms strictly following those of subs. 1 of s. 217 of the Act. Then subs. 2 enacts that "*every such person*" guilty of the offence so described is "liable on summary conviction, before two justices of the peace," etc.

I fail to see how, under those circumstances, it can be said that, on its face, the warrant of commitment does not show jurisdiction in the stipendiary magistrate.

It may be that subs. 3 of s. 217 makes the offence indictable when the goods so harboured "are of the value of two hundred dollars or over," but there is nothing in the proceedings before us or on the face of the commitment to shew that the spirits harboured by Manuel had that value. Moreover, the presumption is that the jurisdiction was rightly asserted.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: *James H. Power.*
Solicitor for the Crown: *Rainard H. Scriven.*