Supreme Court of Canada
Giroux v. The King, (1917) 56 S.C.R. 63
Date: 1917-11-28

J. E. Giroux. Appellant;

and

His Majesty The King. Respondent.

1917: October 24; 1917: November 28.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Criminal law—Indictment without preliminary inquiry—Option— Speedy trial— Jurisdiction—Criminal Code, ss. 825, 826, 827, 828, 873.

A bill of indictment was preferred to the grand jury against the appellant under sec. 873 of the Criminal Code, and a true bill was found. The appellant was arraigned and pleaded not guilty. On the day fixed for the trial, he moved to be allowed to elect for a speedy trial under the provisions of Part XVIII. of the Criminal Code, and the presiding judge, with the consent of the Crown prosecutor, granted the motion. The appellant was subsequently arraigned in the Court of Sessions of the Peace and found guilty.

Held (Idington and Duff JJ. dissenting), that the judge of the Court of Sessions of the Peace had jurisdiction to try the offence.

APPEAL from the judgment of the Court of King's Bench, Appeal Side[1], affirming the judgment of the Court of Sessions of the Peace, at Montreal.

The accused, appellant, was found guilty by the trial judge, but he prayed for a case to be reserved for the Court of Appeal.

The circumstances of the case and the questions submitted on the reserved case stated by the trial judge for decision by the Court of King's Bench, are stated, as follows, by Mr. Justice Cross, in his reasons for judgment in the court appealed from.

(See Q.R. 26 K.B., at pp. 331 and 332.)

"The accused Giroux appeals against a conviction

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of theft made against him by the judge of Sessions upon a speedy trial.

"He had not been committed for trial by a justice. The prosecution commenced by a bill of indictment preferred to the grand jury by direction of a judge.

[1] Q.R. 26 K.B. 323.

"He pleaded to the indictment and a day was fixed for trial; but on the day so fixed, he elected to take a speedy trial. Effect was given to his election and he was tried as above mentioned.

"The learned trial judge has reserved for our decision the question whether the election of speedy trial could be made or was valid, seeing that there had been no preliminary inquiry; that he had pleaded to the indictment and had been afterwards admitted to bail until this day fixed for his trial by a jury."

N. K. Laflamme K.C. for the appellant cited King v. Wener2; The King v. Thompson3; The King v. Sovereen4; Reg. v. Burke[5]; The King v. Hébert[6]; The Queen v. Gibson[7]; The King v. Komiensky[8]; The Queen v. Lawrence[9].

N. K. Laflamme K.C. for the appellant

J. C. Walsh K.C. for the respondent.

THE CHIEF JUSTICE.—An indictment for theft and receiving stolen goods was found by the grand jury of the District of Montreal in April, 1915, against the appellant. On that indictment, he was arraigned and filed his plea of not guilty. The trial was fixed for a subsequent day, when the appellant, before the trial commenced, moved for leave to make his option to be tried by the Quarter Sessions under the provisions

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of section XVIII. of the Criminal Code. The presiding judge with the consent of the Crown Prosecutor granted the motion and gave the leave asked for; and, on the same day—May 17th, 1915—the appellant entered into a recognizance before a judge of the Sessions "to appear in person at the Court of the Sessions of the Peace on the 27th May then instant," to answer to the charge of theft for which he had been indicted.

After much inexplicable delay the appellant was finally tried before the judge of the Sessions and found guilty of the offence with which he was charged.. At his request, two questions were reserved for the consideration of the Court of Appeal.

On the application of appellant's counsel, that court also examined into the sufficiency of the evidence to support the conviction. In the result, all the questions were answered adversely to the pretensions of the appellant. Mr. Justice Carroll dissented from the

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[2] 6 Can. Cr. Cas. 406.
[3] 14 Can. Cr. Cas. 27.
[4] 20 Can. Cr. Cas. 103.
[5] 24 0. R. 64.
[6] 10 Can. Cr. Cas. 288.
[7] 3 Can. Cr. Cas. 451.
[8] 6 Can. Cr. Cas. 524.
[9] 1 Can. Cr. Cas. 295.

answer of the majority to the first question, which was to this effect: Could the accused, Giroux, charged with the offence of larceny on an indictment preferred by the Crown Attorney, with the written consent of the judge presiding at the assizes, elect, in the circumstances which I have just detailed, to be tried before the Sessions of the Peace under Part XVIII. of the Criminal Code?

In the view which I take of the case, it will be unnecessary for me to deal with the other questions and upon which there is no dissent in the lower court.

As I have already said, the indictment found against the appellant was preferred under the provisions of section 873 of the Criminal Code. No information had been lodged with a magistrate, no preliminary

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investigation had been held and consequently there were no depositions and no commitment for trial, and it is in consequence argued on behalf of the appellant that the material necessary to enable him to exercise his right to elect under the provisions of ss. 826, 827 and 828 of the Code did not exist.

It is not necessary for me to express any opinion as to whether the appellant could as of right, in the circumstances of this case, exercise his right to elect; but I have no doubt whatever that the leave given by the trial judge on the application of the appellant with the consent of the Crown Prosecutor had for its effect to validate all the subsequent proceedings before the judge of the Sessions. I do not say that the consent of the appellant conferred jurisdiction on the judge of the Sessions but the latter had jurisdiction of the subject matter and in that respect was not dependent upon the appellant's consent. The consent is only important in this aspect of the case. It may be that by pleading to the indictment the appellant chose his forum and acquired the privilege to be tried by a jury. But by his application for leave to be tried by the judge of the Sessions he waived this privilege and selected another forum which he had a perfect right to do with the consent of the prosecuting officer.

The new forum had, as I have already said, complete jurisdiction to try the offence with which the appellant was charged and it is equally certain that he not only appeared voluntarily before the judge of the Sessions to answer the charge but at the trial he with the assistance of counsel cross-examined the Crown witnesses and examined witnesses

on his own behalf. The only possible objection to the proceedings before the Sessions Court is that a bill of indictment

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had been already found against him at the Assizes for the same offence as that for which he was tried in the Court of Sessions and that indictment remains undisposed of.

But the trial on that indictment was suspended on appellant's own request, and his conviction before the judge of the Sessions and the sentence would be a complete bar to any further proceedings on the indictment. As Graham J. said in *Re Walsh*[10], at p. 19: "The case of *Reg. v. Burke*[11], shews what becomes of the indictment." In my opinion the proper course would be to move to have it quashed.

To sum up. Both courts had jurisdiction to try the offence. Assuming that the prisoner had by his plea to the indictment selected his forum and acquired the right to be tried by a jury, it was open to him to waive that choice and he was also free to forego the privilege of a trial by a jury. Consent cannot confer jurisdiction but a privilege defeating jurisdiction may always be waived if the trial court has jurisdiction over the subject matter.

I venture to say that to set aside the proceedings below would in the circumstances of this case amount to a travesty of justice. I have carefully read the cases referred to in the factum and at the argument and when considered with reference to the particular facts with which in each case the judges were dealing, I do not find that they give us much assistance.

In the *Burke Case* (2), the defendants had elected to be tried by the County Court Judge under the "Speedy Trials Act" and indictments were subsequently found against them at the assizes for the offences for which they had so elected to be tried.

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The question at issue was whether they could be deprived of their right to be tried by the County Court Judge and it was there decided that the right to elect to have a speedy trial was a statutory right of which the defendants could not be deprived if they were in a position to avail themselves of it.

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[10] 23 Can. Cr. Cas. 7.
[11] 24 O.R. 64.

In *The King* v. *Sovereen*[12], the prisoner argued that a person out on bail is entitled to elect to be tried by a judge without a jury after an indictment is returned founded on the facts disclosed by the depositions taken at the preliminary inquiry and it was held that he is not entitled as of right upon bill found and arraignment thereon to elect to be tried without a jury. The prisoner was in that case committed for trial by a magistrate and the indictment on which he was committed was preferred as in this case by the Crown Prosecutor with the written consent of the trial judge. It is only in this last respect that the cases are analogous.

It is not necessary to say more than this that I agree with the opinions expressed in *The King v. Sovereen*[12] by Chief Justice Moss and Mr. Justice Magee. The prisoner in that case claimed to be entitled to make his election as of right and as Magee J. said, he had not put himself in a position to claim that right, not being in custody and not having given notice to the sheriff. The Chief Justice, with whom Garrow J.A. and Latchford J. concurred, said:—

> I am unable to think that it was the intention to give an accused person the *general right to elect* to be tried without a jury.

In *Re Walsh*[13], it was held:—

> A person sent up for trial for an indictable offence and against whom while out on bail a true bill is found is entitled on being taken into custody to elect for a trial without a jury.

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In this case, the appellant, with the consent of the Crown Prosecutor and the approval of the judge, waived his right to be tried by a jury at the Assizes and then voluntarily appeared before a court having jurisdiction over the offence with which he was charged. He was then put upon his trial for the offence for which he had been indicted; he was assisted by counsel, examined and cross-examined witnesses and now seeks after he has been found guilty to escape the consequences of his own free choice. I fail to understand how ss. 826 *et seq.* have any application to the facts of this case.

I am of the opinion that this appeal must be dismissed.

DAVIES J.—I concur with Mr. Justice Anglin.

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[12] 20 Can. Cr. Cas., 103.
[12] 20 Can. Cr. Cas., 103.
[13] 23 Can. Cr. Cas. 7.

IDINGTON J. (dissenting).—The learned judge who presided at the March term of the King's Bench, Crown Side, for the District of Montreal, duly directed, pursuant to section 873 of the Criminal Code, an indictment for theft and receiving stolen goods knowing them to have been stolen to be presented to the grand jury against the appellant.

Thereupon the grand jury found a true bill upon which the appellant was arraigned and pleaded not guilty to the said indictment, on the 25th April, 1915, when the trial was duly fixed for the 17th May following.

He had never been prosecuted before any Justice of the Peace in respect of the said offence or committed by any such Justice of the Peace to stand his trial. The preferring of the indictment to and return of a true bill by the grand jury followed by appellant's arraignment, his plea thereto and appointment of a

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day for trial of that issue comprised all that took place.

In short there was not the slightest semblance of any such proceedings having been had as to lay the foundation for such a proceeding as contemplated, by the speedy trial provisions of the Criminal Code, to be necessary to give jurisdiction for the exercise of any of the rights, duties or powers furnished thereby.

Yet on the day fixed for his trial, when presumably everything was ready therefor, instead of its taking place he asked to be allowed to elect to be tried by a judge under the said speedy trial provisions. Without any jurisdiction to do so on the part of the presiding judge, or vestige of authority on the part of the Crown officer, each seems to have graciously assented to this novel proposition for the disposal of an indictment, found by the grand jury in a higher court, being transferred to a lower court, on the part of one who had (as expressed by the late Mr. Justice Würtele in regard to a man before him in the like plight), conclusively and exclusively elected to be tried in due course according to law by a jury.

Doubtless this assent was inadvertently given without reference to the express terms of the Criminal Code providing for the manner of trial of any one indicted before and presented by a grand jury, as having been truly so indicted.

It is stated in appellant's factum that on the same day he went before Mr. Justice Bazin and made his option for a speedy trial in the Court of Special Sessions of the Peace.

The case before us, however, only shews that on the 17th May, 1915, the accused appeared before Adolphe Bazin, Esquire, judge of the Sessions of the Peace for Montreal, and entered with a surety into a

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recognizance to appear on the 27th May at the Court of General Sessions of the Peace in person to answer the indictment found against him for theft and, so continue from day to day until discharged.

The first speedy trial provisions were enacted in 1869, by 32 & 33 Vict. ch. 35, and confined to the Provinces of Ontario and Quebec and with many amendments later were extended to other provinces.

The purpose had in view was to enable those committed for trial to avoid being kept in suspense for many months awaiting the coming of a court with a jury, if they should choose to dispense with their right to a jury trial.

Those innocent gladly availed themselves of such an opportunity. Those guilty of some trifling offence which might be adequately punished by a shorter term than they probably would serve, if unable to find bail, were equally glad to avail themselves of the privilege. And even those who could find bail were in very many cases likewise pleased to put an end, by so electing, to the painful suspense they were enduring;

Such legislation furnished also a public gain, in saving the time of jurors, both grand and petit at Assizes or Sessions.

In this peculiar case it is hard to find what good cause was to be served by applying the speedy trial provisions of the Act, for it was not until the 14th of the month of January following that the appellant was actually put upon his trial and pleaded again "not guilty," before the district judge, when some witnesses were examined, and the case was adjourned till the 20th Jan., when it was again adjourned till the next day, only to be adjourned again till the

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1st February, and only after three more adjournments ended by the judge finding him guilty.

Thereupon there was the special case reserved to determine whether the judge ever had jurisdiction to take such proceedings.

The Act itself and the many amendments to it gave rise in course of time to many cases, and reserved cases, relative to the jurisdiction of the judge in the given circumstances of each such case. Hence there were decisions of the higher courts or judges thereof in a great variety of circumstances in the Provinces of Quebec, Ontario, Manitoba, British Columbia and Nova Scotia.

These decisions would not, of course, bind us if an obvious misconception of the law had occurred in them all.

So far from there being diversity of opinion there has been developed a uniformity of opinion relative to the main features of the statute founding jurisdiction.

In not a single instance did it occur, till this case, where an indictment of a grand jury duly found and pleaded to was, notwithstanding the express provisions by the procedure sections of the Criminal Code, attempted to be transferred to another and lower court for trial.

In effect that is what was attempted here in rather an off-hand fashion.

The case of *Reg.* v. *Burke*[14], shews how when the accused had been improperly, in violation of his right to elect, indicted and induced to plead to the indictment, he could free himself from such a predicament.

Assuming the denial of legal right as was assumed in that case, the proper course was adopted of quashing

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the indictment. Then the accused was free to exercise his right.

No such phase is presented in this case. The indictment and plea thereto still stands ready for trial as it was two years or more ago.

[14] 24 O. R. 64.

Of the many cases I have referred to, presenting the true situation of accused in such circumstances, I would refer to the opinion of the late Mr. Justice Würtele in the case of *The King* v. *Wener*[15], wherein at page 413 he spoke as follows:—

> The Criminal Code does not prescribe that an accused can elect to be tried without a jury when, without a preliminary enquiry or without a committal or an admission to bail, and subsequent custody for trial, a bill of indictment has been preferred by the Attorney-General or by any one by his direction, or with the written consent of a judge of a court of criminal jurisdiction, or by order of such court, and thus remove the prosecution from the forum to which it properly belongs to another to which jurisdiction has not in such case been given by law. In the absence of any statutory provisions or statutory authority an accused has no right in such a case to demand and obtain a trial in any other court than the one in which the indictment was found, and which has jurisdiction over the case, and is seized with it

And I would also refer to the opinion of the late Sir Charles Moss, Chief Justice of Ontario, in the case of *The King* v. *Sovereen*[16], before the Court of Appeal for Ontario, so late as 1912, after all the existing amendments had been made to the speedy trial provisions of the Criminal Code. At p. 105 he spoke as follows:—

> Speaking for myself, and with the utmost respect for those who have indicated or expressed a different view, I think that where, as here, a person committed for trial, and whether in custody or upon bail, has not, before a bill of indictment has been found against him by a grand jury, taken the steps necessary to enable him to elect to be tried by a judge without a jury, he is not, upon bill found and arraignment thereon, entitled as of right to ask to be allowed to elect to be tried without a jury. If that is not the effect of the legislation, it places it in the power of the accused not merely to postpone his trial, but to render futile all that has been done by the grand jury, and necessitate

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> a compliance with all the forms prescribed by section 827 of the Code, including the preparation and preferring by the prosecuting officer of a charge in accordance with the directions given in sec. 827.
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> I am unable to think that it was the intention to give an accused person the general right to elect to be tried without a jury. On the contrary, I think that the intention was to give it only in cases in which the exercise of such an election would or might effect a speedy trial of an accused person, and thereby save the delay which waiting for a trial by jury might involve.

I agree with these opinions. In either case there was some basis for the accused to have elected had he chosen to do so before plea.

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[15] 6 Can. Cr. Cas. 406.
[16] 20 Can. Cr. Cas. 103.

In the case before us there never was the semblance of any such basis. I conclude therefore that there was no jurisdiction in the district judge to have accepted any such so called election or to try the accused under such circumstances and the appeal should be allowed accordingly.

There being no jurisdiction the second point reserved falls to the ground and we have no right to answer the question propounded upon the evidence.

DUFF J. (dissenting) .—I concur with Mr. Justice Idington.

ANGLIN J.—Upon a bill preferred by Crown counsel with the consent of the presiding judge under s. 873 (1) of the Criminal Code, the grand jury, at a sittings of the Court of King's Bench (Crown Side), held in Montreal, presented an indictment charging the defendant with theft—an offence cognizable by the Court of the Sessions of the Peace. Upon arraignment the defendant pleaded "not guilty," and a subsequent date for his trial was thereupon fixed. He was meantime released on bail on the date fixed he surrendered himself for trial and then demanded that he be allowed to elect to be tried under Part XVIII. of the Code by a judge of the Sessions of

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the Peace. Counsel for the Crown consented and an order was made granting the demand. He accordingly appeared on the same day before Bazin J. and made his formal election for speedy trial. He was afterwards tried and convicted by Choquet J., presiding at a special sittings of the Court of the Sessions of the Peace. He thereupon sought, and in view of the decisions in *The King* v. *Sovereen*[17], and some other cases, quite properly was accorded a reserved case for the decision of the Court of King's Bench upon the question (submitted in the form of two questions), whether, under the circumstances stated, his election for trial under Part XVIII. of the Code was valid and sufficient to give the judge of the Court of Sessions jurisdiction to try him. I deal with the question so reserved, to which, as I understand it, the special jurisdiction conferred on this court by section 1024 of the Criminal Code is restricted.

Under section 825 of the Code, every person committed for trial for an offence within the jurisdiction of the general or Quarter Sessions of the Peace may, with his consent, be tried under Part XVIII. A person in custody awaiting trial, however he may so find himself, is

[17] 20 Can. Cr. Cas. 103.

under s.s. 4 to "be deemed to be committed for trial within the meaning of the section." The defendant, in my opinion, was "in custody awaiting trial" on the charge, when he had surrendered himself for trial on the appointed date. *Re Walsh*[18]; *The King* v. *Thompson*[19]. I read "the charge" as meaning the charge mentioned in s.s. (1), i.e., a charge cognizable by the Court of Sessions. The interests of justice are protected, as far as Parliament considered such

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protection necessary, by the provision of s.s. 5 that, where the offence charged is punishable with imprisonment exceeding a period of five years, the Attorney-General may require a trial by jury.

I see nothing in any provision of the Code, as it now stands, which precludes an election for trial under Part XVIII. by an accused under indictment, no matter how or when presented, if he comes within the comprehensive terms of section 825. The difficulty which formerly existed owing to the supposed impossibility of complying with section 827 in the absence of depositions taken upon a magistrate's preliminary investigation in cases where such investigation had been waived and the accused had consented to be committed for trial without it, was overcome by the insertion of the words "if any" in s. 827 by 8 & 9 Ed. VII., c. 9, s. 2. Any similar difficulty in cases of indictments, preferred under the section now numbered 873 was thus likewise removed.

It is contended that the special provision made by s. 828 for re-election after indictment by a person who had already elected for trial by jury imports an intention to preclude the right of election in other cases after indictment. But the *raison d'être* of this provision was not to provide for the case of an indictment having been found, but to confer or make clear the right to a second election. . Its terms, however, pointedly indicate that the presentment of an indictment was not regarded by Parliament as a bar to the right of election. No good reason can be suggested why, if the man who has already elected for a jury trial should be allowed to re-elect after indictment and up to the moment when his actual trial begins, the man who has never elected should be debarred from doing so by the presentment of an indictment.

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[18] 23 Can. Cr. Cas. 7 at p. 9.
[19] 14 Can. Cr. Cas. 27 at p. 30.

As Mr. Justice (afterwards Chief Justice) Graham said in *Re Walsh*[20]:—

> When Parliament did draw the line of exercising the option as it does in sec. 828, sub-sec. 2 (the re-election provision), it provided that he (the accused) may exercise "the election at any time before such trial (*i.e.,* before a jury) has commenced."

I agree with the views expressed upon this point by the learned judges of the Nova Scotia Appellate Court in *Re Walsh*[20] and by Howell C.J.A. in *The King* v. *Thompson*[21].

But it may be said that after plea to the indictment, at all events, the right of election is irrevocably gone for two reasons: that the plea is an election of forum; and that upon arraignment the trial has already commenced. Neither reason in my opinion is sound.

Assuming that the plea should be regarded as an election of and submission to the forum of the Court of King's Bench and a jury trial, it was the first and only election made by the accused and by s. 828 express provision is made for a re-election by a prisoner who has elected to be tried by jury "at any time before such trial has commenced." That the arraignment is not part of the trial—that the trial only begins after plea—appears from the heading "Arraignment and Trial" (s. 940) in the Code itself and is established by many authorities collected in the judgment of Graham. E.J. in *Re Walsh*[20], at p. 17. Parliament has therefore in explicit terms provided for an election after plea, since plea precedes the commencement of the trial. The reasoning of Mr. Justice Graham and Mr. Justice Ritchie in support of the right of election after indictment seems to me conclusive in a case such as that before us. If Parliament, which, in enacting

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s. 828, had election after indictment brought expressly to its attention, did not mean that that right should exist where an indictment is preferred under s. 873, notwithstanding the comprehensive terms in which secs. 825 and 828 are couched, I think it certainly would have said so by an explicit exception. In the case of re-election, whatever the offence and however punishable, by the proviso to sec. 828 after indictment the consent in writing of the prosecuting officer acting under s.s. 2 of s. 826 is required, and in any case either the judge or the prosecuting officer may prevent effect being given to a second election (s.s. 3). The requisite consent of the prosecuting officer was given here.

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[20] 23 Can. Cr. Cas. 7 at p. 17.
[20] 23 Can. Cr. Cas. 7 at p. 17.
[21] 14 Can. Cr. Cas. 27 at p. 30.
[20] 23 Can. Cr. Cas. 7 at p. 17.

With great respect for the learned judges who hold the contrary view, in my opinion, the fact that the indictment under which the accused was awaiting trial had been preferred under s. 873 (1) of the Code, did not prevent his exercising the right of election either under s. 825 or s. 828 and the judge of the Court of Sessions of the Peace therefore had jurisdiction to try him.

The tendency of the courts in the earlier cases to place a narrow construction upon the "Speedy Trials" provisions of the Criminal Code has been adverted to in the *Thomson Case*[22] and *Walsh Case*[23]. It should probably be attributed to the view strongly held by many, lawyers as well as laymen, that trial by jury, especially in criminal cases, should be preserved intact. But Parliament by one amendment after another has overcome the several restrictions that judges have from time to time sought to place upon the right to elect for trial before a judge of the Court of Sessions,

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thus evincing its policy and determination that this mode of trial shall, as far as possible, be available within the limits and subject to the safeguards which it has prescribed, and its desire that the sections of the Code providing for it should receive a liberal rather than a narrow construction.

Upon another question, as to the sufficiency of the evidence, which the Court of King's Bench allowed the defendant to raise, there was no dissent in that court and there is therefore no right to appeal here.

Appeal dismissed.

[22] 14 Can. Cr. Cas. 27 at p. 30.
[23] 23 Can. Cr. Cas. 7 at p. 17.