

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Pugsley, JJ.A.

Cite as: R. v. Colley, 1993 NSCA 207

BETWEEN:

CLEVELAND COLLEY)	John A. Black
)	for the Appellant
)	
Appellant)	
)	
- and -)	
)	Robert E. Lutes, Q.C.
)	for the Respondent
HER MAJESTY THE QUEEN)	
)	
)	
Respondent)	Appeal Heard:
)	December 13, 1993
)	
)	
)	Judgment Delivered:
)	December 13, 1993
)	

THE COURT: Appeal dismissed per oral reasons for judgment of Hallett, J.A.; Chipman and Pugsley, JJ.A. concurring.

HALLETT, J.A.:

On this appeal it is contended that Chief Justice Glube erred in refusing to prohibit Judge Kennedy, a Provincial Court judge, from conducting a preliminary inquiry with respect to fraud charges against the appellant. This matter has a long history. Judge Randall had conducted a preliminary inquiry with respect to these charges. However, he did not allow the appellant's counsel to make full representation following the presentation of the evidence. He committed the appellant to stand trial. The appellant then applied to the Supreme Court to quash the committal. Justice Gruchy granted his application and remitted the matter to Judge Randall. The appellant then appealed that part of the order that remitted the matter to Judge Randall. This court confirmed the order of the Supreme Court but remitted the matter to another judge of the Provincial Court. The appellant was then brought before Judge Kennedy on the original information. The appellant took the position that Judge Kennedy could not proceed with a preliminary inquiry on the charges because the committal had been quashed. Judge Kennedy ruled he had jurisdiction as only the committal had been quashed and not the information. The appellant then sought an order from the Supreme Court prohibiting Judge Kennedy from proceeding with the preliminary inquiry. Chief Justice Glube refused his application which resulted in this appeal. Chief Justice Glube interpreted the Appeal Court order as remitting the matter to a judge other than Judge Randall and for that judge to conduct a new preliminary hearing. Before us the appellant contends neither the Supreme Court nor this Court had the statutory power to remit the matter to the Provincial Court to conduct a preliminary inquiry as the accused was not in custody. The appellant contends that it is only under s. 775 of the **Code** that the Supreme Court or this court could direct a Provincial Court judge to take a proceeding. Section 775 provides:

"775 Where proceedings to which this Part applies have been instituted before a judge or court having jurisdiction, by or in respect of a person who is in custody by reason that he is charged with or has been convicted of an offence, to have the legality of his imprisonment determined, the judge or court may, without determining the question, make an order for the further detention of that person and direct the judge, justice or provincial court judge under whose warrant he is in custody, or any other judge, justice or provincial court judge, to take any proceedings, hear such evidence or do any other thing that, in the opinion of the judge or court, will best further the ends of justice."

In our opinion s. 775 is not relevant to the issue before this Court.

In our opinion s. 535 of the **Code** conferred jurisdiction on Judge Kennedy in these circumstances. Section 535 provides:

"Where an accused who is charged with an indictable offence is before a justice, the justice shall, in accordance with this Part, inquire into that charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part."

The provision of the Order of this Court remitting the matter to the Provincial Court was somewhat superfluous as the information setting out the charges against the appellant was still in existence; it had not been quashed. Therefore, Judge Kennedy, upon having the information and the appellant before him had the jurisdiction to inquire into the charges in accordance with Part XVIII of the **Code**, "Procedure on Preliminary Inquiry".

We are satisfied Chief Justice Glube correctly interpreted the order of this Court on the appeal from Justice Gruchy's order. The appeal from the refusal by Chief Justice Glube to grant the appellant's application to prohibit Judge Kennedy from conducting the preliminary

inquiry is dismissed.

J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.