S.C.C. No. 02370

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Chipman and Freeman, JJ.A.

Cite as: R. v. Colley, 1991 NSCA 1

B E T W E E N:

CLEVELAND COLLEY appellant - and - HER MAJESTY THE QUEEN respondent	)	Castor H.F. Williams for appellant Bruce P. Archibald and Denise Smith for respondent Appeal Heard: March 15, 1991 Judgment Delivered: March 15, 1991

THE COURT: Order quashing committal for trial confirmed; appeal allowed from part of order requiring submissions of counsel to be made before same Provincial Court Judge who refused to hear submissions on preliminary inquiry per reasons for judgment delivered orally by Freeman, J.A.; Clarke, C.J.N.S. and Chipman, J.A., concurring.

The reasons for the judgment of the Court were delivered orally by:

FREEMAN, J.A.:

The appellant accused, successful in an application to quash the Provincial Court order committing him for trial, has appealed from the order of the Trial Division remitting the matter to the same Provincial Court judge to hear the submissions of defence counsel.

The appellant, Cleveland Colley, was committed to stand trial on eight fraud-related counts and one of theft by His Honour Judge Hughes Randall of the Provincial Court. His application for an order in the nature of certiorari quashing the committal was heard before Mr. Justice David Gruchy of the Trial Division.

The application was based on the allegation that at the preliminary inquiry "Counsel for Mr. Colley requested to make submissions with respect to the charges but was not allowed to do so by the learned Provincial Court Judge." The Crown accepts that statement.

The transcript discloses that after defence counsel

Castor Williams indicated in response to a statutory inquiry from the bench that the accused had nothing to say on his own behalf and informed the court that there would be no defence witnesses, there was discussion between the judge and counsel as to the wording of the various charges. At the conclusion of this Judge Randall announced that the accused would be ordered to stand trial on March 1, 1990, in County Court.

Mr. Williams then said: "Your Honour, I would like to address the court, do you know what I mean with . . . "

He was interrupted by the judge who said:

> "Well as far as I'm concerned, there's evidence to commit and that's all there has to be as far as I'm concerned."
>
> "Okay," Mr. Williams replied. "Thank you, your Honour."

Judge Randall concluded the exchange as follows:

> "There's those changes that have to be, you know, that I've made. But there's evidence satisfactory, in my mind, to commit."

Mr. Justice Gruchy quoted the decision of former Chief Justice Laskin in Forsythe v. The Queen (1980), 53 C.C.C.

(2d) 225 at p. 229:

> " In speaking of lack of jurisdiction, this Court was not referring to lack of initial jurisdiction of a Judge or a Magistrate to enter upon a preliminary inquiry. This is hardly a likelihood. The concern rather was with the loss of this initial jurisdiction and, in my opinion, the situations in which there can be a loss of jurisdiction in the course of a preliminary inquiry are few indeed. However, jurisdiction will be lost by a Magistrate who fails to observe a mandatory provision of the Criminal Code: see Doyle v. The Queen (1976), 29 C.C.C. (2d) 177, 68 D.L.R. (3d) 270, [1977] 1 S.C.R. 597. Canadian law recognizes that a denial of natural justice goes to jurisdiction: see L'Alliance des Professeurs catholiques de Montreal v. Labour Relations Board of Quebec (1953), 107 C.C.C. 183, [1953] 4 D.L.R. 161, [1953] 2 S.C.R. 140. In the case of a preliminary inquiry, I cannot conceive that this could arise otherwise than by a complete denial to the accused of a right to call witnesses or of a right to cross-examine prosecution witnesses. Mere disallowance of a question or questions on cross-examination or other rulings on proferred evidence would not, in my view, amount to a jurisdictional error. However, the Judge or Magistrate who presides at a preliminary inquiry has the obligation to obey the jurisdictional prescriptions of s. 475 [am. R.S.C. 1970, c. 2 (2nd Supp.), s. 8] of the Criminal Code." (emphasis added)

He also cited, as persuasive authority, Dubois v. R. (1986), 25 C.C.C.(3d) 221, R. v. Taillefer (1978), 42 C.C.C. (2d) 282 (Ont. C.A.), R. v. Marshall (1982), 9 A.R. 589 (Alta Q.B.) and Re Michael Gordon Young (1982), 7 W.C.B. 375 (Ont. H.C.J.)

He quoted Holland, C.J.O. in Taillefer as follows:

> " A committal for trial is a very serious matter for the accused. While society must be protected, the rights of the accused must also be jealously guarded. To refuse counsel for the accused the right to make submissions before a committal is made is a denial of natural justice.
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> ...
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> " The defence must be given a fair chance to show, if it can, that what might otherwise appear to be a prima facie case of guilt, could have an innocent contruction placed upon it. This is a fundamental right which was denied in this particular case."

In that case, in circumstances similar to the present case, the matter was "remitted to the Provincial Court Judge who committed the appellants to hear argument of all counsel as to whether the appellants should be committed for trial." Mr. Justice Gruchy followed that example.

The appellant argues that it should not be remitted to the same Provincial Court Judge because of an apprehension of bias. Counsel urges that the words of Judge Randall quoted above show the "judge had foreclosed his mind to any arguments."

A reasonable person might arrive at that conclusion. While the words of Judge Randall might be innocuous in another context, following as they did the denial of the right of counsel to address the court, they raise a reasonable apprehension that his mind was made up. In those circumstances, any decision Judge Randall might come to after hearing the submission of counsel would be tainted by that suspicion.

We are satisfied the appellant has met the evidentiary burden for setting aside decisions in like circumstances as discussed in de Smith, Judicial Review of Administrative Action, 4th ed., 1980--Stevens & Sons Ltd. London, pp. 262-268.

Mr. Justice Gruchy's order quashing the order of committal is confirmed. The appeal is allowed from that part of his order remitting the matter to the same Provincial Court Judge to hear submissions of counsel, and that part of the order is set aside.

Freeman, J.A.

Concurred in: Clarke, C.J.N.S.

Chipman, J.A.