CASE COMMENTS AND NOTES

QUASHING PRELIMINARY INQUIRY BY *CERTIORARI*—COMPELLABILITY OF COUNSEL TO PRODUCE DOCUMENTS—*Regina* v. *Patterson*[1]

On February 27th, 1968 the accused appeared in Magistrate's Court in Calgary for his preliminary hearing. He was charged with using an instrument with intention to procure a miscarriage, contrary to Section 237 (1) of the Criminal Code.

The preliminary hearing was not lengthy. There were only four witnesses called by the Crown, being a doctor, the complainant (a young woman 19 years of age) and two friends of the complainant. During the cross-examination of the complainant she acknowledged that she had given a statement in writing to the police during the course of their investigation. At that point counsel for the defence requested the crown prosecutor to produce the statement from his file to assist in cross-examination of the complainant. Counsel for the prosecution refused to produce the statement although it was in his file which was in front of him at the counsel table. Counsel for the defence then turned to the Magistrate and asked him to order production of the statement. The Magistrate ruled that he had no control over the matter as it was a preliminary hearing and not a trial. He said that he had no authority to direct the crown prosecutor to produce the statement. The accused was committed for trial and shortly thereafter launched a *certiorari* application which came on to be heard by Mr. Justice Milvain of the trial division (now Chief Justice of the Trial division).

The accused argued before Milvain, J. that the Magistrate did have a discretion to order production of the statement and relied upon *Reg.* v. *Imbery*.[2] The accused also contended that since the Magistrate did have a discretion he was guilty of an error in law when he said that he did not have it and this was an error which was apparent on the record which was grounds for quashing the committal for trial. The accused submitted further that the refusal to produce the statement to defence counsel was a denial of his right to conduct a full and complete cross-examination at a preliminary hearing and that amounted to a denial of natural justice which again was grounds for quashing the committal. Milvain, J. granted the application and the committal was quashed. His reasons for judgment are reported in *Patterson* v. *A. G. for Alberta*.[3]

The Crown appealed the decision of Milvain, J. to the Appellate Division of the Supreme Court of Alberta. That court allowed the appeal and restored the committal for trial in a split decision. Three of the Appellate Justices were in favour of the Crown's appeal and two dissented. Their reasons for judgment are reported in *Reg.* v. *Patterson*.[4] The accused then appealed to the Supreme Court of Canada and his appeal was dismissed. Six Justices of the Supreme Court of Canada

1 (1970) 72 W.W.R. 35, *affirming* (1969) 67 W.W.R. 483, *reversing* (1968) W.W.R. 128.
2 (1961) 35 W.W.R. 192.
3 (1968) 64 W.W.R. 128.
4 (1969) 67 W.W.R. 483.

ruled in favour of dismissing the appeal and one dissented. Their reasons for judgment are reported in *Reg.* v. *Patterson.*[5]

Out of the simple facts of this case a number of interesting and important legal issues were raised. They were as follows:

1. Does a Magistrate presiding at a preliminary hearing have a discretion to order production of statements made by a witness for the purpose of cross-examination?

It was clear on the authority of such cases as *Reg.* v. *Lantos,*[6] *Rex.* v. *Mahadeo,*[7] *Reg.* v. *Finland,*[8] *Reg.* v. *Torrens,*[9] *Reg.* v. *McNeil*[10] and Section 10 of the Canada Evidence Act that a Magistrate or Judge presiding at a trial has such authority. *Imbery* was relied upon as an authority for the proposition that a Magistrate has a similar discretion at a preliminary hearing. In that case a Magistrate was ordered to exercise his discretion by McLaurin, C.J. on a *mandamus* application during the course of a preliminary hearing on a rape charge. However the report of the case contains no reasons for judgment and consists simply of a headnote. The case carried little weight in the Appellate Courts.

2. Can *certiorari* ever be used to review a preliminary hearing?

There were two lines of cases giving conflicting answers on that question. *R.* v. *Roscommon J. J.,*[11] *R.* v. *Matheson,*[12] and *Irwin* v. *Irwin*[13] held that a preliminary hearing does not result in a final judgment and it is therefore not subject to review. *Re Schumiatcher* [14] and *R.* v. *Botting,*[15] decisions of the Apptal Courts of Saskatchewan and Ontario respectively, held that a preliminary hearing was subject to review by way of *certiorari.* In addition there were a number of reported cases from courts at the trial level which had held that *certiorari* could be used to review a preliminary hearing. There is an excellent article on this subject written by B. M. Haines[16] in which the cases on the subject are reviewed and the conflict of authorities analyzed.

3. If *certiorari* can be used to review a preliminary hearing, what are the grounds upon which such an application can succeed?

Re Popoff[17] is an authority for the proposition that *certiorari* can be used to review a preliminary hearing, but the review must be confined solely to the issue of the initial jurisdiction of the inferior court. In the article written by B. M. Haines the author reviews many cases in which *certiorari* applications were granted on a variety of grounds such as the following:

(a) there was no evidence to support the committal;
(b) there was insufficient evidence to support the committal;
(c) there was a loss, excess of or abdication of jurisdiction at some stage in the proceedings;

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5 (1970) 72 W.W.R. 35.
6 (1963) 45 W.W.R. 409.
7 [1963] 2 All E.R. 813.
8 (1959) 125 C.C.C. 186.
9 [1963] 1 C.C.C. 383.
10 (1960) 31 W.W.R. 232.
11 (1894) 2 I.R. 158.
12 (1959) 123 C.C.C. 60.
13 (1943) 80 C.C.C. 314.
14 (1962) 131 C.C.C. 112, (1962) 36 C.R. 322.
15 [1961] 2 O.R. 121.
16 Haines, B. M., *Committals and Certiorari,* (1965-66) 8 L.Q.R. 141.
17 (1959) 30 C.R. 354.

(d) there was a denial of statutory rights such as the right to cross-examine or call witnesses;
(e) a denial of natural justice;
(f) the information disclosed no offence known to law.

There also was authority for the position that *certiorari* can be granted where there is an error of law on the face of the record. In *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw*,[18] the history and scope of *certiorari* was extensively reviewed and Singleton, L. J. said:[19]

> Error on the face of the proceedings has always been recognized as one of the grounds for the issue of an order of *certiorari*. I can find no authority for saying that in this respect there is any distinction to be drawn between proceedings of a criminal nature and civil proceedings.

Denning, L.J. said:[20]

> The question in this case is whether the Court of King's Bench can intervene to correct the decision of a statutory tribunal which is erroneous in point of law. No one has ever doubted that the Court of King's Bench can intervene to prevent a statutory tribunal from exceeding the jurisdiction which Parliament has conferred on it, but it is quite another thing to say that the King's Bench can intervene when a tribunal makes a mistake of law. A tribunal may often decide a point of law wrongly while keeping well within its jurisdiction. If it does so, can the King's Bench intervene? There is a formidable argument against any intervention on the part of the King's Bench at all. The statutory tribunals, like the one in question here, are often made the judges both of fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the King's Bench may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it. The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law.

Also, Denning, L. J. said:[21]

> Of recent years the scope of *certiorari* seems to have been somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law, and several learned judges have said as much. But the Lord Chief Justice has, in the present case, restored *certiorari* to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction.

The *Patterson* case presented our Courts with an excellent opportunity to settle the questions outlined. It is interesting now to review the judgments commencing with Milvain, J., through to the Supreme Court of Canada, to see how the various Justices reacted to that challenge.

Milvain, J., in a brief judgment, faced the issues head on and in the writer's opinion came up with what should have been the correct answers to all of them. He held as follows:

1. A Magistrate presiding at a preliminary hearing does have a discretion to order the prosecutor to produce a statement made by a witness for cross-examination purposes;

2. the failure on the part of the Magistrate to appreciate that he had such jurisdiction and to exercise it was an error of law apparent on the face of the record;

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18 [1952] 1 All. E.R. 122.
19 *Id.*, at 125.
20 *Id.*, at 127.
21 *Id.*, at 128.

3. The refusal to produce the statement to defence counsel impaired his right of full cross-examination and consequently there was a denial of natural justice;

4. the preliminary hearing was reviewable by *certiorari* on either or both of the above mentioned grounds.

In the Appellate Division, separate judgments were written by Smith, C.J.A., Porter, J.A. (dissenting with Cairns, J.A. concurring), McDermid, J.A. and Allen, J.A.

Chief Justice Smith avoided the hard issues by disposing of the case on the basis of a failure by the accused to establish that he might have made some beneficial use of the statements if they had been produced to him. He held that there was an onus on the accused to establish that he had suffered some injury to his case by not having the statement produced to him. He relied upon *Re Legal Profession Act: Re a Solicitor*[22] and *Reg.* v. *Weigelt.*[23] In the *Weigelt* case the Appellate Division of the Supreme Court of Alberta was dealing with an appeal from a conviction. The Court held that it could look at the statements that had not been produced to decide whether or not there had been a substantial wrong or a miscarriage of justice as a result. The Court had statutory authority to look at that question on an appeal from a conviction under the provisions of Section 592 (1) (b) of the Criminal Code. In *Re Legal Profession Act: Re a Solicitor* the Appellate Division held that it could do the same thing on an appeal in a *certiorari* matter on the question of whether or not there had been a denial of natural justice. It is my view with respect that the Court erred in so doing. It failed to adhere to the principle that in *certiorari* proceedings a Superior Court is not acting in an appellate capacity. In a *certiorari* matter the Superior Court is acting in a supervisory capacity and its duty is to examine the record only.

Porter, J.A. held that in the circumstances of this case that:

1. there was a denial of the full right of cross-examination contemplated by Section 453 (1) (a) of the Criminal Code;

2. the Magistrate refused to examine the document and make a decision as to whether he should order its production and thereby abdicated and lost jurisdiction;

3. *certiorari* can be used to review a preliminary hearing when the foregoing occurs.

McDermid, J.A. held that *certiorari* can only be used to review the initial jurisdiction of a Magistrate. In so holding he was following *Re Popoff.* If that was the law it would mean that once a magistrate established initial jurisdiction he would be virtually beyond the control of the superior courts thereafter at the preliminary hearing since there is no right of appeal. For example, there would be no remedy in a case such as *R.* v. *Brooks*[24] in which Kirby, J. quashed a committal for trial following a preliminary hearing because the magistrate failed to ask the accused whether he desired to adduce evidence and failed to give him an opportunity to do so even though such rights are set out in the Criminal Code.

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22 (1967) 60 W.W.R. 705.
23 (1960) 32 W.W.R. 499.

Allen, J.A. held that a Magistrate has no discretion to order production of a statement at a preliminary hearing. In so holding he pointed out that Section 10 of the Canada Evidence Act and cases such as *Reg.* v. *Lantos, Rex.* v. *Mahadeo, et al.* which have held that a Judge or Magistrate has such a discretion are all cases dealing with trials and are not authorities for the proposition that a Magistrate has such a discretion at a preliminary hearing. In argument before the Court counsel for the accused pointed out that they also were not authorities for the proposition that the Magistrate did not have such a discretion at a preliminary hearing. The cases mentioned dealt with situations in which an effort was made by the defence to obtain production of statements before commencement of the trial and they held that the defence does not have such a right. Those cases are authorities only for their own facts and they do not deal with preliminary hearings.

It is the writer's view with respect that Allen, J.A. should not have relied upon them as authorities for the proposition that a Magistrate at preliminary hearing has no discretion to order production of statements. When the matter was being argued before the Appellate Division there were no case authorities that dealt with the problem when it arises at a preliminary hearing except for *Imbery* which held that a Magistrate does have discretion. It seems to the author that the cases relied upon by Allen, J.A. should not be viewed as dealing with trials as opposed to preliminary hearings. They are concerned with judicial proceedings as opposed to preliminary applications. If they had been so viewed, Allen, J.A. could then have held that a preliminary hearing is a judicial proceeding and a Magistrate has an inherent jurisdiction to order production of the statements.

In the Supreme Court of Canada Judson, J. wrote the majority judgment and in so doing spoke for himself, Abbott, J., Martland, J., Ritchie, J., and Pigeon, J. He held that:

1. a Magistrate does not have a discretion to order production of a statement at a preliminary hearing;

2. a preliminary hearing and committal for trial can be reviewed by *certiorari* on the grounds of lack of jurisdiction only.

Hall, J. concurred with the majority of the Court in dismissing the appeal but gave his own reasons. He held that if the accused had been deprived of his lawful right to cross-examine the witness the committal for trial should be quashed. He was of the view that since counsel for the defence did not question the witness further as to whether she had said the same thing on the witness stand as she said in her statement it could not be said that the accused had been deprived of his lawful right to cross-examine the witness. It is difficult to understand what would be gained by pursuing the line of cross-examination suggested by Hall, J. If the witness was dishonest, one would not expect such a witness to admit to having made one statement on the witness stand and another in written form to the police. The simple solution is to have the statement produced to defence counsel so that he can read it and confront the witness with it if it varies from the evidence given on the witness stand. Hall, J. held as follows:

1. the defence has a right to production of the statement made by a witness at a preliminary hearing if the defence establishes that there is

a variance between what the witness says on the stand and in the written statement;

2. *certiorari* can be used to review a preliminary hearing where there has been a denial of natural justice.

Spence, J., dissented and held that there had been a denial of the right of cross-examination conferred by Section 453 (1) (a) of the Criminal Code. He said that that right could not be exercised when the Crown refused to permit counsel for the accused to peruse and use in cross-examination the previously signed statement of the witness. In this case, he ruled, the Magistrate had refused to exercise his jurisdiction and declined jurisdiction. He therefore held as follows:

1. a Magistrate does have a discretion to order production of a statement at a preliminary hearing;

2. a preliminary hearing is reviewable by *certiorari* where there has been a denial of the statutory right of cross-examination or a refusal to exercise jurisdiction or delination of jurisdiction.

The reasoning in the judgment of Spence, J. dissenting in the Supreme Court of Canada is similar to that of Porter, J.A. dissenting in the Supreme Court of Alberta.

Viewed as a whole the judgments of the Appellate Division of the Supreme Court of Alberta appear to have done more to confuse the law than to clarify it. I think that the Supreme Court of Canada should not have held that a Magistrate does not have a discretion to order production of a statement to defence counsel. Surely one of the objects of the preliminary hearing is to elicit the truth and anything that assists in that process should be sanctioned by the Court. It is true that a preilminary hearing is not a trial but it is a very important proceeding nonetheless and it sometimes results in the accused obtaining his freedom at the conclusion. Any impediment to the right of full cross-examination of a witness at the preliminary hearing is undesirable. If the accused is committed for trial it often means that he has to remain in jail or raise bail and thereafter carry the burden of defending himself at the trial.

The Supreme Court of Canada has settled the law on this subject. It is now clear that production of a statement can not be compelled at a preliminary hearing and that *certiorari* can be used to review a preliminary hearing on the issue of lack of jurisdiction. It is worth noting, however, that the judgments of the Court did nothing to clarify the meaning of "jurisdiction". Laskin, J.A. noted in the *Botting* case that that term was once aptly characterized by the late Justice Frankfurter of the Supreme Court of the United States as a "Joseph's coat of many colours."

The accused went to trial on March 5th, 1970 and was acquitted before MacDonald, J. sitting without a jury. The trial judge ruled that identification evidence tendered by the Crown was unsatisfactory.

—M. E. SHANNON, Q.C.*

[24] [1965] 1 C.C.C. 290.

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