REGINA *v*. FARRAR

(1890), 1 Terr.L.R. 306 (also reported: 1 (No. 3) N.W.T.R. 13)

Northwest Territories Supreme Court, Richardson, Macleod, Rouleau, Wetmore and McGuire JJ., 3 December 1890

Habeas corpus--Practice--Dispensing with issue of writ--Discharge of prisoner without being brought up--Parties to be served--Conviction --Hard labor--Duplicity.

A conviction, which attaches hard labor to imprisonment in default of there being sufficient distress to levy the fine imposed, is bad.

A conviction which charges an offence on two separate days, charges two distinct separate offences, and, if it be a case where s.26 of the Summary Convictions Act (1)R. S. C. c. 178. See new Crim. Code. s. 845. s.-s. 3. applies, (2)Which is not always the case when the proceedings are under provincial or territorial legislation, e.g., Liquor License Ordinance C.O. (1898) c. 89, s. 102. is bad; a warrant of commitment based on such a conviction is consequently bad.

It is a usual, convenient and established practice that a rule *nisi* to shew cause why a writ of *habeas corpus* should not issue should also require cause to be shewn why, in the event of the rule being made absolute, the prisoner should not be discharged without the actual issue of the writ of *habeas corpus* and without his being personally brought before the Court; but in order that the rule may be made absolute in this form; the magistrate, the keeper of the prisoner, and the prosecutor should all be served with the *rule nisi*, or at least be represented on its return.

[*Court in banc, December 3rd, 1890*.]

[Statement.] The facts and the points involved appear in the judgment.

C. C. McCaul, Q.C., moved absolute a *rule nisi* granted by Macleod, J., returnable before the full Court, for a writ of *habeas corpus* to bring up the body of Thomas Farrar or in the event of the rule being made absolute that the prisoner should be discharged without the writ of *habeas corpus* actually issuing, and without his being brought before the Court, on the ground that the warrant of committal was invalid on its face, inasmuch as the conviction on which the warrant was based, and which was recited in it was bad as (1) being for two offences; (2) ordering the fine to be levied by distress; and (3) awarding in default of distress imprisonment for three months with hard labor, to begin after the expiry of the substantive term already awarded.

D. L. Scott, Q.C., for the magistrates and the gaoler.

[*December 3rd, 1890*.] [Judgment]

The judgment of the Court (RICHARDSON, MACLEOD, ROULEAU, WETMORE and McGUIRE, JJ.) was delivered by

WETMORE, J.--An order *nisi* was made by my brother Macleod in this matter requiring all parties concerned to shew cause at this term why a writ of *habeas corpus* should not issue, directed to Richard Burton Deane, Superintendent of the North-West Mounted Police Force at Lethbridge, to have the body of Thomas Farrar before this Court, and why, in the event of the rule being made absolute, the said Thomas Farrar should not be discharged without the writ of *habeas corpus* actually issuing and without his being personally brought before the Court.

A duly verified copy of the warrant of commitment, under which Farrar is held in custody, was read at the argument, by which it appears that he was committed by two Justices of the Peace by virtue of a conviction against him for an alleged offence or offences against the Indian Act. (1) R. S. C. c. 43. s. 94. as amended by 51 Vic. (1888) c. 22. s. 4. The commitment is clearly bad. The conviction is set forth in this document, and it alleges that Farrar was convicted for that he, on the twenty-fifth day of October, did sell intoxicants to "Cree Woman," an Indian, and to "Good Killer," an Indian; and for that, on the twenty-sixth day of October, he did sell intoxicants to the said "Cree Woman" and the said "Good Killer"; and that it was adjudged that for his offence he should be imprisoned in the Guard Room of the North-West Mounted Police, at Lethbridge, and there kept at hard labor, for six months; and also that he should forfeit and pay three hundred dollars; and that he should pay

the prosecutor Jarvis the sum of seven dollars and twenty cents costs; and that if these sums were not paid forthwith they should be levied by distress and, in default of sufficient distress, that he should be imprisoned in the said Guard Room, and there kept at hard labor, for the term of three months, to commence from the expiration of the six months, unless the said sums were sooner paid; and -

[Judgment.] the warrant, after reciting the conviction substantially as I have set it out, commanded the constables and peace officers to convey the said Farrar to the said Guard Room, and commanded the keeper thereof to receive him into his custody there, and there imprison and keep him at hard labor for the term of six months.

It was admitted at the argument by the learned counsel for the magistrates, and there can be no doubt, that the conviction as set forth is bad for awarding imprisonment for three months *with hard labor* in default of distress. (1) See *Reg. v. Mathewson*, ante p. 168: The Summary Convictions Act, R. S. C. c. 178, s. 67; Crim. Code. s. 872. I merely mention this, but do not base my judgment upon this defect, as the warrant in question did not commit the party to custody for the three months in default of distress; and it is not necessary to express any opinion as to the effect of that defect, as the conviction as recited is clearly bad for a cause, which goes to the root of the whole imprisonment and penalties awarded. The sales on the 25th and 26th days of October, although to the same parties, were two separate and distinct offences, and for each offence Farrar would be liable to the full penalties provided for such an offence. Section 26 of the Summary Convictions Act (2) R.S.C. c. 178. See new Crim. Code, s. 845, s.-s. 3. provides that "every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences." This provision of the Act is very plain and positive. If an information can only be laid for one offence, it is very evident that a person can only be convicted of one offence. A person cannot be charged with one offence and convicted of two offences. The conviction as set forth in the warrant is bad, and consequently the warrant, which is founded upon such a conviction, is bad and the order *nisi* for a *habeas corpus* should be made absolute.

Having arrived at this conclusion, the next question which arises is whether the other part of the application should be granted, and the prisoner discharged, without the [Judgment.] writ of *habeas corpus* actually issuing and without his being personally brought before the Court. The prisoner's counsel, in taking out the order *nisi* in these terms, was acting in accordance with the established practice; and it is quite open to the Court to make an order in this case, in accordance with the terms of the application, cause having been shewn against the rule, provided that the practice has been in other respects complied with. The text of Paley on Convictions, 6th edition, 409, is fully borne out by some of the authorities cited in the notes thereto, which I have examined. This practice is also stated to have been in use before the recent Crown Office Rules in England in Short & Mellor's Crown Office Practice, 351. This is a practice, however, which has merely been adopted by the Courts for convenience. It has not been prescribed in any other way; and before we are called upon to exercise the power of discharge at this stage the practice should be strictly followed. The practice in these cases has been to serve the rule on the magistrates, the keeper of the prison, and the prosecutor; see *Ex parte Jacklin*, (1) 2 D. & L. 103: 1 New Sess. Cas. 280: 13 L. J. M. C. 139: S. C. *sub nom* R. v. Fytche. 8 Jur. 576. and Paley on Convictions, 6th edition, 409, note (*h*). The order *nisi* was served only on Superintendent Deane, as keeper of the Guard Room, as appeared by the affidavit of service, but as the magistrates appeared by their counsel at the argument the omission to serve them is cured. But the prosecutor Jarvis has not been served and no person appeared for him. The prisoner cannot therefore be discharged at this stage.

The motion to make the rule absolute will be adjourned to the 22nd January next, to admit of the prosecutor being served .

On January 22nd, 1891, the rule was made absolute on the terms asked.

Rule absolute.