CASE NOTES

R. v. RAYMER; RE PAPAL[1]

In July, 1972 the trial of several men on charges of armed robbery commenced and Papal was subpoenaed to attend and testify. He duly appeared on that occasion but the trial miscarried. Further abortive trials were held, the accused finally being remanded for trial in June 1973. Papal's whereabouts could not be ascertained for service of a subpoena in respect of one of those trials, while he elected to appear in another. When served with a subpoena on the final occasion he allegedly said: "Oh not again!".

Under these circumstances an application, supported by affidavits, was made by the Crown to Crockett J. to issue a warrant for the apprehension of Papal. The application was made under s. 415(1A)(a) of the *Crimes Act* 1958, which was enacted by Act No. 8410 on 17th April 1973 and came into operation on 9th May 1973. The relevant part of the section is as follows:

> "(1A) Whenever it is proved to the satisfaction of a judge of the Supreme Court or of the County Court (as the case requires)—
>
> (a) that any person referred to in paragraph (a) or paragraph (b) in subsection (1) is likely to absent himself from the trial, or
>
> (b) . . .—
>
> the judge may issue his warrant to apprehend such person, and may also order any such person to pay a fine of not more than $200, but no such fine shall exempt such person from any other proceedings or disobeying such subpoena or summons."

Subsection (1) refers to any person who has (a) been bound by a justice to appear or (b) has been served a subpoena *ad testificandum*, a subpoena *duces tecum* or a summons. Papal, having had a subpoena *ad testificandum* served upon him, was clearly a person referred to in subsection 1(b).

In the affidavits filed by the Crown, the police officers who served the subpoenas on Papal, swore that Papal refused to appear and give evidence, fearing for his safety if he testified against the accused.

Crockett J. concluded, on the information before him, that Papal was likely to absent himself from the trial and issued a warrant for his apprehension. Pursuant to this warrant Papal was taken into custody and, after seeking legal advice, made an application to Crockett J. for withdrawal of the warrant.

The following submissions were made on behalf of Papal: It was first contended that the judge has power to reconsider the material upon which

[1] [1973] V.R. 843. Supreme Court of Victoria; Crockett J.

the warrant was issued and may conclude that his original finding was wrong. His Honour, having come to the conclusion that his initial decision was right, did not find it necessary to decide whether such power exists. He was of opinion, however, that it may be open to the court to reconsider the material.

The second, and main submission, was that the court has an inherent power to examine the basis upon which the warrant was issued and set it aside if it is shown that the issue of such warrant was without proper foundation. This submission was upheld by the trial judge who stated:

> "In the first place one would expect in principle that there should be some such residual power in the court, despite the statutory basis for the jurisdiction initially exercised. That jurisdiction must necessarily be exercised on the undisputed evidence of one party only. Its exercise affects the liberty of the subject. The witness may be detailed for a long period. . . . It would be monstrous to think that if the witness could show that the Crown evidence was demonstrably wrong and that the warrant thus should never have been issued, that he must yet remain in custody because no avenue is available to have the judge cancel his warrant."[2]

On the facts available, however, it was found that the warrant was not issued without proper foundation.

Counsel's final submission was that Papal should be discharged on his entering into a recognizance pursuant to s. 415(2) of the *Crimes Act*. That subsection in effect provides that "any justice may discharge such witness upon his entering into a recognizance with or without sureties . . .".

The effect of the section, however, was held to be very limited. Its procedure is similar to admission of an accused to bail and as his honour said:

> "The first consideration in granting bail is whether the accused is likely to appear at his trial. Similarly, a witness should not be discharged if he is unlikely to attend the trial to testify. If this is the very ground of his apprehension in the first instance, then he can scarcely expect to be discharged under s. 415(2)."[3]

It is thus only in the most exceptional circumstances that a justice may discharge such witness on his entry into a recognizance under subsection (2) of the section.

Summing up the effect of the decision, it seems that only in rare circumstances will the court withdraw the warrant completely or discharge the witness on his entry into a recognizance with or without sureties. In the majority of cases, therefore, a witness, once apprehended, will be imprisoned pending trial. If the case under discussion is any indication of the length of a criminal action then a witness could be imprisoned for an unjustifiably long period. One, therefore, may be justified in questioning the desirability of the section as it presently stands. An examination of the section's origins, the reasons for its introduction, and its present application may provide an answer.

[2] Ibid p. 847.
[3] Ibid. p. 847.

Origins of the power to compel attendance of witnesses

The second Act of Phillip and Mary is regarded as the initial statutory authority which enabled the Crown to bind over witnesses to appear and compel them to testify against the accused. This statute recognized the necessity of securing a person's attendance at trial without subjecting him to confinement by allowing the magistrate to require a recognizance.[4]

A distinguished authority of the Common Law, Lord Ellenborough, in discussing the legal effect of a subpoena, pointed out that

> ". . . the right to resort to means competent to compel . . . testimony seems essential to the very existence and constitution of a court of common law . . . and it would not possibly proceed with due effect without them."[5]

Present application of the power

Today, section 415 of the *Crimes Act* 1958, enables a court to compel a witness to appear and testify. Refusal to comply with such order is treated as contempt of court and is severely punished.

Subsection 415(1) deals with the problem of a witness whose failure to attend only becomes apparent at the commencement of the trial. The presiding judge can issue a warrant for his arrest and the witness will promptly be brought before the court to give evidence and be summarily punished. No question, therefore, arises as to what should be done with the witness over a possibly protracted period.

The operation of the above subsection was thought to be too restrictive. As Sir George Reid, the then Attorney-General, commented in introducing subsection 415(1A):

> ". . . it [s. 415(1)] does not meet the case where there is reason to believe that a person bound over or served with a subpoena does not intend to appear, or where it is known that a person is keeping out of the way to avoid service of a subpoena upon him. In these circumstances it is desirable that a judge be enabled to issue a warrant of apprehension as soon as it appears that the intended witness does not propose to appear."[6]

The main reason for giving the court power to arrest in anticipation of disobedience is availability of evidence. Indeed, the Criminal Law Revision Committee in its Sixth Report on Perjury and Attendance of Witnesses, found that "It is very important that all relevant evidence should be available at the trial; and not only the prosecution but possibly the defence might be seriously handicapped by the absence of a witness".[7]

Imprisonment ensures a witness's attendance in court and his presence may provide the necessary leverage for eliciting a confession or guilty plea from the accused. Imprisonment also prevents third parties from influencing a witness by encouraging him to alter his story or abscond.

[4] 1 & 2 Phil. & Mar. c. 13. There is no common law right of detaining witnesses.
[5] *Amey* v. *Long* 103 E.R. 653, 658.
[6] 1973 Parliamentary Debates (Council) Vol. 312 p. 4450.
[7] 1964 Criminal Law Revision Committee, 6th Report, "Perjury and Attendance of witnesses" par. 58(1).

A further, mainly administrative, reason for the enactment of the subsection was to bring the jurisdiction of the higher courts into harmony with the powers exercised in Magistrates Courts. Section 40(1) of the *Justices Act* 1958 enables a justice to issue a warrant for the apprehension of a witness if he is satisfied by evidence upon oath that such witness will not attend the hearing. It was thus an anomaly of the law conferring anticipatory powers of arrest to justices but no similar powers to higher court judges.

On the other hand, however, it may be argued that preventive justice of this kind is objectionable in principle. As Jackson J. said in *Williamson* v. *U.S.*:

> "Imprisonment to protect society from predicted but unconsumated offences is so unprecedented in this country and so fraught with dangers of excess and injustice that I am loath to resort to it."[8]

Furthermore, a witness who knows that he might become liable to imprisonment if he goes to the police, might be inclined to forget the whole incident or resort to self-help. Considering the already existing reluctance of civilians to be involved in police inquiries and give evidence in court, such provisions may deter witnesses even further.

Balancing the above arguments, it is submitted that the power conferred by the section is justifiable. The section, however, as it stands is incomplete and unduly harsh on the witness.

The new subsection is expressed in the same terms as subsection 415(1) and as Crockett J. pointed out:

> "There is thus no requirement upon arrest under s. 415(1A) for a witness to be brought before a justice or any court, except, of course the court in which he is to testify, nor is there any power to commit to gaol and of course the witness is not a sentenced person nor one remanded for trial."[9]

A witness, therefore, could be imprisoned on an *ex parte* application for long periods without a fair hearing. The witness, of course, may apply to the judge who issued the warrant to set it aside, but as was shown above it is very unlikely that such an application will succeed. Furthermore, such an application requires a lawyer's assistance, and even then it can be utilized only after incarceration has occurred. What is needed is a fair hearing before detention.

The Criminal Law Revision Committee recognized the problem of imprisoning witnesses without a fair hearing. Indeed, they regarded it as "a difficult problem because it is necessary to balance the importance of securing a person who has already disobeyed, or being proved to be likely to disobey, a requirement to attend at the court should in fact attend against the undesirability of keeping a person in custody who has committed no offences".[10] They consequently recommend that a witness who cannot be brought within a week to court, "should be brought instead

[8] 184 F. 2d p. 280 (1950).
[9] Supra.
[10] Criminal Law Revision Committee, op. cit. par. 63.

before a magistrate's court . . . and that court should commit him in custody, or remand him on bail with or without sureties, to be brought or appear before the court at which he is required".[11]

Section 40(4) of the *Justices Act* seems also to suggest that when the hearing has not commenced the arrested witness is to be brought, on apprehension, before a Justice. Such Justice may then either commit the witness to gaol until the hearing or discharge him upon his entry into a recognizance with or without sureties.

It is submitted, with respect, that a similar provision should be enacted with subsection 415(1A). Indeed, Crockett J. thought it ". . . curious that there is no similar provision or a provision as is to be found in s. 55 of the *Justices Act* in s. 415".[12]

Conclusion

The power conferred on the County Court and the Supreme Court by s. 415 may be beneficial to society. Every individual owes a duty to the State to help the law enforcement agencies in apprehending and successfully prosecuting criminals. The present section as it stands, however, is unduly harsh on a witness and should be amended. As Wigmore correctly stated:

> ". . . if this duty exists for the individual to society, so also he may fairly demand that society, so far as the exaction of it is concerned, shall make the duty as little onerous as possible."[13]

NORA KOTSIA*

R. v. SERGI[1]

This case is notable for the unequivocal rejection by the Full Court of the Supreme Court of Victoria of the argument that the mental element in murder is limited to an intention to kill or an intention to inflict grievous bodily harm. The Court held that recklessness as to the causing of death or the infliction of grievous bodily harm is a state of mind falling within the concept of malice aforethought involved in the crime of murder.[2]

The appellant was convicted of murder in the Supreme Court of Victoria and appealed to the Full Court relying on three grounds in support of the appeal.

This case note is confined to an examination of the Court's approach to

[11] Ibid. par. 64.
[12] Supra.
[13] Wigmore; *Evidence*, (3rd ed., Boston, Little Brown and Co. 1940) par. 2192.
* B.Juris., Monash University.

[1] [1974] V.R. 1.
[2] In *R.* v. *Hallett* [1969] S.A.S.R. 141, 154 the Supreme Court of South Australia thought that this proposition was "abundantly established".