

CANADA / JUDGMENT

R. v. Barbeau

[1992] 2 SCR 845

COURT

Supreme Court of Canada

DECIDED

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R. v. Barbeau

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Report

[1992] 2 SCR 845

Case number

22341

Judges

La Forest, Gérard V.; L'Heureux-Dubé, Claire; Gonthier, Charles Doherty; Cory, Peter deCarteret; Stevenson, William

On appeal from

Quebec

Subjects

Criminal law

Notes

SCC Case Information: 22341

Decision Content

R. v. Barbeau, [1992] 2 S.C.R. 845

Alain Barbeau Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Barbeau

File No.: 22341.

1992: April 30; 1992: August 27.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory and Stevenson* JJ.

on appeal from the court of appeal for quebec

Criminal law -- Procedure -- Indictment -- Preliminary inquiry -- Accused charged with offence which did not exist at relevant time and committed for trial following preliminary inquiry -- Error detected at beginning of trial and new indictment presented -- Whether Crown could only proceed by means of direct indictment requiring Attorney General's consent -- Criminal Code, R.S.C., 1985, c. C-46, s. 577 .

In 1986 the accused was charged with six counts of sexual assault arising out of acts allegedly committed in July and September of 1982. The charges were made pursuant to s. 271 (formerly s. 246.1) of the Criminal Code , which was not proclaimed in force until January 4, 1983, a few months after the acts in question had occurred. The amending legislation specifically provided that the new provisions were not to apply retroactively. The accused elected to be tried by judge and jury and a preliminary inquiry was held. When it was completed the accused was committed to stand trial. At the beginning of the trial, the accused, having detected the error, moved to quash the indictment. The Crown conceded that he had been charged with a crime that did not exist, and then immediately presented the court with a new indictment charging the accused with six indecent assaults under the provisions of the former s. 149(1) of the Criminal Code . The trial judge quashed the first indictment and accepted the new one. The accused brought a motion seeking to quash the new indictment, contending that the Crown could only proceed by means of a direct indictment which would require the personal signature of the Attorney General. Section 577 of the Code provides that where a preliminary inquiry has not been held or where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred without the consent of the Attorney General or Deputy Attorney General. This motion was rejected, the trial proceeded and the accused was convicted on four of the six counts. The Court of Appeal, in a majority judgment, dismissed the appeal against conviction.

Held: The appeal should be dismissed.

While this Court's decision in Chase differentiates between charges of sexual assault under s. 271 of the Code and indecent assault under the former s. 149(1) , in this case there was nonetheless full disclosure of the events which formed the basis of the Crown's case against the accused. The incidents upon which the charges were based were thoroughly explored at the preliminary inquiry. There is no doubt that evidence as to the events which occurred justified proceeding with the charges of sexual assault; equally, the same evidence clearly justified proceeding with the

charges of indecent assault. No prejudice has been occasioned to the accused by the quashing of the original indictment and the preferring of the second indictment. The original indictment was valid in every respect except for the nomenclature used to identify the offence. The parties proceeded throughout the preliminary inquiry on the assumption it was valid. The evidence identified the actions which constituted the incidents of sexual assault or indecent assault, depending on the title used. The actions were the same, the evidence was the same. The testimony given at the preliminary inquiry constituted a prima facie case that the accused had committed an offence described as indecent assault prior to January 4, 1983 and sexual assault thereafter. In the circumstances the error in the "labelling" or title of the offence constituted a voidable error, and not one that was void. It follows that it was in order for the Crown to present a fresh indictment which conformed to the evidence adduced at a preliminary hearing whose validity had not been challenged.

Cases Cited

Referred to: R. v. Chase, [1987] 2 S.C.R. 293; Caccamo v. The Queen, [1976] 1 S.C.R. 786; R. v. Chabot, [1980] 2 S.C.R. 985; McKibbin v. The Queen, [1984] 1 S.C.R. 131; R. v. Copeland (1986), 27 C.C.C. (3d) 186.

Statutes and Regulations Cited

Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125, ss. 19, 33.

Criminal Code, R.S.C. 1970, c. C-34, ss. 149 [am. 1972, c. 13, s. 70], 246.1 [ad. 1980-81-82-83, c. 125, s. 19], 507.

Criminal Code, R.S.C., 1985, c. C-46, ss. 271, 535, 548, 574 [rep. & sub. c. 27 (1st Supp.), s. 113], 577 [rep. & sub. idem, s. 115].

APPEAL from a judgment of the Quebec Court of Appeal, [1991] R.J.Q. 741, 37 Q.A.C. 214, affirming the accused's conviction on four counts of indecent assault. Appeal dismissed.

Gratien Duchesne, for the appellant.

Denis Dionne, for the respondent.

//Cory J.//

The judgment of the Court was delivered by

Cory J. -- In 1986 the appellant was charged with six counts of sexual assault alleging that he had fondled and touched a ten-year-old girl in July and September of 1982. The charges were made pursuant to s. 271 of the Criminal Code, R.S.C., 1985, c. C-46 (formerly s. 246.1), which provides:

271. (1) Every one who commits a sexual assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
- (b) an offence punishable on summary conviction.

This section was added to the Criminal Code by an amending Act, S.C. 1980-81-82-83, c. 125, s. 19. It was not proclaimed in force until January 4, 1983, which was, of course, a few months subsequent to the occurrence of the acts which led to the charges brought against the accused. The Criminal Code amendment Act specifically provided in s. 33 that the new provisions were not to apply retroactively. That section reads:

33. An offence committed prior to the coming into force of this Act against any provision of law affected by this Act shall be dealt with in all respects as if this Act had not come into force.

For some considerable time, no one noticed the error in the indictment. In due course the appellant elected to be tried by judge and jury. A preliminary inquiry was held. When it was completed the appellant was committed to stand trial. He then re-elected trial by a provincial court judge.

The error was eventually detected at the beginning of the trial in May 1987. Before he had entered a plea the appellant moved to quash the indictment on the ground that the offences with which he was charged did not exist at the relevant time. The hearing of this motion was postponed until the following day. When the proceedings resumed, the Crown conceded, before the trial judge could rule on the motion, that the appellant had been charged with a crime that did not exist. The Crown then immediately presented the Court with a new indictment charging the appellant with six indecent assaults under the provisions of the former s. 149(1) of the Criminal Code, R.S.C. 1970, c. C-34. That section reads:

149. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years.

The trial judge quashed the first indictment alleging six sexual assaults and accepted the new indictment alleging six indecent assaults.

The appellant brought a number of pre-trial motions; only that seeking to quash the new indictment is pertinent to this appeal. It was contended that on the new indictment the Crown could only proceed by means of a direct indictment which would require the personal signature of the Attorney General pursuant to s. 577 (formerly s. 507) of the Criminal Code . That section reads:

577. In any prosecution,
- (a) where a preliminary inquiry has not been held, an indictment shall not be preferred, or
 - (b) where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred or a new information shall not be laid

before any court without,

- (c) where the prosecution is conducted by the Attorney General or the Attorney General intervenes in the prosecution, the personal consent in writing of the Attorney General or Deputy Attorney General, or
- (d) where the prosecution is conducted by a prosecutor other than the Attorney General and the Attorney General does not intervene in the prosecution, the written order of a judge of that court.

This motion was rejected by the trial judge.

The trial then proceeded and the appellant was convicted on four of the six counts. He was sentenced to eight months' imprisonment plus a period of probation.

Both the conviction and the sentence were appealed and on February 21, 1991 the Quebec Court of Appeal dismissed the appeal against conviction with a dissent by Fish J.A. The sentence appeal was allowed and the period of imprisonment reduced to time served (7 days). The appeal is before this Court as of right in light of the dissent by Fish J.A.

Judgment of the Courts Below

Quebec Court of Sessions of the Peace (Gagnon Prov. Ct. J.).

The trial judge held that the new or the substituted indictment should not be quashed. In his view, s. 577 of the Code did not apply to this case. Pursuant to the section, the consent of the Attorney General to prefer an indictment is only required when a preliminary inquiry has not been held or when the accused has been discharged after a preliminary inquiry. In his view a preliminary inquiry had indeed been held in this case. He held:

[translation] There was a preliminary inquiry and [the appellant] was not discharged by that inquiry. He was committed for trial for sexual assault.

...

It is true that the committal for trial was for offences other than those now indicated on the indictment. Section 504(1) (b) of the Criminal Code provides that the prosecutor, here the Attorney General's prosecutor, may prefer an indictment against any person who has been ordered to stand trial in respect of "any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial, whether or not the charges were included in one information".

This court has accordingly referred to the evidence taken at the preliminary inquiry. After reviewing that evidence, the court concludes that the offences of indecent assault with which the accused is charged are disclosed by that evidence. [Emphasis in original.]

The trial judge thus determined that the indictment did not have to be signed by the Attorney General and could be preferred by his prosecutor.

Quebec Court of Appeal, [1991] R.J.Q. 741, 37 Q.A.C. 214

Malouf J.A. gave the reasons of the majority. Monet J.A. filed separate reasons concurring in the result while Fish J.A. dissented. Malouf J.A. observed that pursuant to s. 574 of the Criminal Code an indictment can be preferred in respect of any charge founded on the facts disclosed in evidence at the preliminary hearing. Section 574 provides:

574. (1) Subject to subsection (3) and section 577, the prosecutor may prefer an indictment against any person who has been ordered to stand trial in respect of
- (a) any charge on which that person was ordered to stand trial, or
 - (b) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial,

whether or not the charges were included in one information.

Malouf J.A. found that all the requirements of s. 574 were met in this case. The preliminary hearing provided evidence which disclosed the offence of indecent assault. As a result, the new indictment charging the accused with indecent assault did not require the Attorney General's signature. When he read the reasons of his colleagues, Malouf J.A. added to his own reasons. He observed that the appellant in this case had every opportunity to make full answer and defence. At the time of the substituted indictment of indecent assault, the accused (appellant) had been completely informed as to the evidence pertaining to the offence with which he was charged and had received all the benefits that a preliminary inquiry can provide. In his view, no prejudice had been occasioned by the substitution of the new indictment. He noted as well that the procedural point upon which Fish J.A. based his dissent was not raised before the trial court or argued before the Court of Appeal. The parties had not been given an opportunity to review the issue and in his opinion the Court of Appeal should decline to decide that issue.

Monet J.A. in concurring reasons agreed that the original indictment was flawed. Further he conceded that *R. v. Chase*, [1987] 2 S.C.R. 293, established that the offences of indecent assault and sexual assault were not identical. However, he went on to observe that for the victim the terminology was unimportant. For society, the reprobation was precisely the same. For the accused in this case, the acts under investigation were identified and the circumstances surrounding those acts were fully investigated at the preliminary inquiry. The accused had been committed for trial and this committal had not been attacked by the accused. It followed that in his view the new indictment signed by the Attorney General's prosecutor was valid.

Fish J.A. found that the Crown was bound to prefer a direct indictment in the circumstances of this case. Although the appellant's focus was on s. 577 (b), which pertains to indictments preferred when a preliminary inquiry has been held, Fish J.A. based his reasons on s. 577 (a). He concluded the preliminary inquiry was a nullity and as a result it could not be said that there had been a *de facto* preliminary inquiry which led to a committal for trial.

In his view there could be no legal and valid trial on the first indictment because it disclosed no offence. It followed that there could be no legal and valid inquiry on an information framed in such a way that it did not disclose an offence. In his opinion there was no jurisdiction to hold the preliminary inquiry based on an information that was invalid. In the result the preliminary inquiry and committal to trial were void ab initio.

Fish J.A. conceded that there were strong arguments in favour of the validity of the indictment. He too observed that the essential elements of the charge which were investigated at the preliminary inquiry were, in fact, substantially if not legally identical to those for which the appellant was eventually tried. Thus the appellant was fully apprised of the Crown's case against him. Further, there was evidence adduced upon which the appellant could properly be committed to trial. Thus all the policy requirements were satisfied, although the legal requirements were not. In his view there had been no preliminary hearing and no committal to trial and as a result there could be no indictment preferred under s. 574(1)(b).

Issue

The sole point in issue raised by the dissent of Fish J.A. is this:

1. Was the indictment invalid because it did not conform to s. 577 of the Criminal Code ?

Analysis

At the outset it must be emphasized that the appellant is relying on a very technical argument. He does not allege that there has been any prejudice whatsoever. Nonetheless he relies on the defect in the original indictment to argue that he did not have a valid preliminary inquiry. In these circumstances it is appropriate to respond to a technical objection with a technical answer. In order to deal with the appellant's argument it is necessary to look once again at the object of the preliminary inquiry.

Preliminary Inquiry

Today the prime function of a preliminary inquiry is to determine whether there is sufficient evidence to commit the accused to trial. Section 535 of the Criminal Code requires the "justice" to "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...". The preliminary inquiry has a long history. Prior to the establishment of permanent police forces it was as much a process for the investigation of crime as it was for determining the probable guilt of the accused.

Pursuant to s. 548 , when all the evidence is taken, if in the justice's opinion there is sufficient evidence to put the accused on trial for the offence charged, or any other indictable offence in respect of the same transaction, the justice shall order the accused to stand trial. Pursuant to subs. 2 of the same section where the justice orders the accused to stand trial for an indictable offence other than or in addition to the one with which the accused was charged, the justice shall endorse on the information the charges on which the accused is ordered to stand trial.

It cannot be denied that the preliminary hearing permits the accused to discover the extent of the case against him. It is true that in *Caccamo v. The Queen*, [1976] 1 S.C.R. 786, this Court made it clear that the Crown has a discretion to present only that evidence which makes out a *prima facie* case. Nonetheless the fact remains that the preliminary does permit an accused person to explore to some extent the Crown's case.

Once again I would emphasize that in this case there was no lack of discovery and no prejudice whatsoever to the accused. It is true that *Chase*, *supra*, differentiates between charges of sexual assault under s. 271 of the Code and indecent assault under the former s. 149(1). Nonetheless in this particular case there was full disclosure of the events which formed the basis of the Crown's case against the appellant. The incidents upon which the charges were based were thoroughly explored at the preliminary inquiry. There is no doubt that evidence as to the events which transpired justified proceeding with the charges of sexual assault. Equally, the same evidence clearly justified proceeding with the charges of indecent assault. The fact that there has been no possible prejudice occasioned to the appellant by the process adopted in this case is not without significance to the resolution of this appeal.

The appellant contends that despite the fact that there has been no practical prejudice there is a legal prejudice. That submission cannot be accepted. When the appellant discovered the error in the original charge, a motion was made to quash the indictment on the ground the offences with which he was charged did not exist at the time he was alleged to have committed them. In *R. v. Chabot*, [1980] 2 S.C.R. 985, Dickson J. (as he then was) held that once an indictment is preferred, it is no longer possible to attack by procedural means a committal to trial. He wrote (at p. 990):

The Court of Appeal concluded, I think correctly, that at some point the indictment becomes the operative document in the criminal process. At that point, the indictment provides a "fresh starting point". The indictment in effect becomes the foundation upon which the further proceedings are built. After presentment of the indictment, the accused is free to move to quash the indictment by motion made in the trial court but he can no longer attack the regularity of the committal for trial by certiorari.

It is important to note that nothing in the motion to quash the first indictment indicates that the appellant questioned the validity of any of the earlier proceedings. It was only at this point that the appellant realized, necessarily for the first time, that the initial charges did not reveal crimes in existence at the time of the alleged offences. Yet the appellant attacked neither the preliminary inquiry, alleging a lack of jurisdiction, nor the committal to trial, alleging it to be a nullity. The trial judge was simply asked to quash an indictment based on a defect apparent on its face. At this stage, therefore, the preliminary hearing had not been attacked or criticized in any way. The appellant's subsequent motion to quash the new indictment was based upon a contention that a preliminary inquiry had been held and that the accused had been discharged. This combination of events, according to defence counsel, pursuant to s. 577 (b) required that any subsequent indictment be preferred directly. I disagree.

The original indictment charging sexual assault rather than indecent assault was valid in every respect except for the nomenclature used to identify the offence. The parties proceeded throughout the preliminary inquiry on the assumption it was valid. The evidence identified the actions which constituted the incidents of sexual assault or indecent assault, depending on the title used to identify the touching or fondling. The actions were the same, the evidence was the same. The testimony given at the preliminary inquiry constituted a *prima facie* case that the accused had committed an offence described as indecent assault prior to January 4, 1983 and sexual assault thereafter.

In the circumstances the error in the "labelling" or title of the offence constituted a voidable error and not one that was void. The situation might be different if an entirely new offence had been instituted by the legislation of January 4, 1983. For example, if it was only after that date that "air piracy" was declared an offence, then an indictment alleging that the accused had committed air piracy prior to that date would be void as it would not disclose a crime known to the law at the relevant time. Similarly, in this case, if the evidence adduced at the preliminary hearing had established a *prima facie* case of sexual assault, but not of indecent assault, then the indictment would have been void as it would not have disclosed an offence known to the law at the relevant time. It follows that, in the circumstances of this case, it was in order for the Crown to present a fresh indictment which conformed to the evidence adduced at a preliminary hearing whose validity had not been challenged. The Crown, at that point, proceeded in accordance with s. 574(1) of the Criminal Code . See *McKibbin v. The Queen*, [1984] 1 S.C.R. 131; *R. v. Copeland* (1986), 27 C.C.C. (3d) 186 (B.C.C.A.).

There were many avenues open to the defence in the present case. Had defence counsel moved before or during the preliminary inquiry to challenge the jurisdiction of the magistrate, it undoubtedly would have resulted in the laying of a new information and the holding of a preliminary inquiry on the charges of indecent assault. Had defence counsel made a motion at any time after the preliminary inquiry and the subsequent committal but before an indictment was preferred in the Chabot sense of the term, again the result would likely have been successful. After the preferment of the indictment for sexual assault, defence counsel could have challenged both this indictment and the jurisdiction of the magistrate who had presided over the preliminary inquiry. This would have left nothing upon which to base Crown counsel's second indictment. These are but examples of remedies that the defence might have utilized. None were explored.

In summary, the original indictment erred in the name or title the offences were given. The acts of the appellant amounted to indecent assault prior to January 4, 1983 and to sexual assault thereafter. The preliminary inquiry established that there was a *prima facie* case against the appellant. The incidents described in the testimony could be entitled as indecent assault prior to January 4, 1983. The same incidents could be described as sexual assault after January 4, 1983. No prejudice has been occasioned to the accused by the quashing of the original indictment and the preferring of the second indictment. Only the name of the offence was changed. In the particular circumstances of this case, it was appropriate, in light of the unchallenged preliminary inquiry,

for the Crown to immediately prefer a new indictment pursuant to s. 574(1) . This created a proper foundation for the ensuing trial and conviction.

In the result, I would dismiss the appeal and confirm the conviction of the appellant for indecent assault.

Appeal dismissed.

Solicitor for the appellant: Gratien Duchesne, Alma, Quebec.

Solicitor for the respondent: Denis Dionne, Alma, Quebec.

* Stevenson J. took no part in the judgment.

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