REX v. HILL

(1951), 14 C.R. 266 (also reported: 101 C.C.C. 343, [1951] O.W.N. 824)

Ontario County Court, Lane Co.Ct.J., 25 September 1951

Indians--Provincial game and fisheries regulations--Charge of unlawful possession of seine nets without a provincial licence--Question of application of law--Seine nets found in possession of accused while on Indian reservation--Matter for federal jurisdiction--Accused acquitted.

Accused was convicted for the unlawful possession of a seine net without a licence in violation of what is now s. 18(1) of The Game and Fisheries Act, R.S.O. 1950, c. 153. An appeal was taken to the County Court Judge who heard the case *de novo*. The evidence established that accused had been found by the game and fisheries officers in possession of two seine nets. An inference could be drawn from their condition that they had been used recently. A question arose whether the nets were found on, or off, an Indian reservation. The court found that the nets were picked up within the confines of an Indian reservation which was under the jurisdiction of the federal authorities.

Held, the conviction should be set aside as accused was not guilty by reason of the fact that the offence (if any) would be a breach by an Indian upon an Indian reservation and the Parliament of Canada was the only legislative authority which could legislate thereon: *Rex v. Jim* (1915), 22 B.C.R. 106, 26 C.C.C. 236, 20 Can. Abr. 1153, applied.

APPEAL from a conviction for having in possession seine nets contrary to The Game Fisheries Act.

J. D. O'Flynn, for accused.

B. G. Donnan, *K.C.*, for informant.

6th April 1951. L**ANE** C**O**. C**T**. J. [after stating the nature of the appeal]:--The notice of appeal is dated 6th March 1951, and may be said to be somewhat carelessly drawn. The prosecution took the position at the opening of Court that it was for the defence to show that the appeal had been properly completed and was properly before the Court before the Court could have jurisdiction to deal with it. The filings and documents, including the certificate of the magistrate, had been properly transferred from the magistrate's court to the County Court, as appears by the documents themselves, on hand in court. There appeared, however, to be no proof of service of the notice of appeal filed. After satisfying myself that the documents in question had been properly served I directed that proof of service might be put in by the defence.

The objection was then taken by the prosecution that the notice of appeal itself was defective in form. The basic argument on this point is, first, that it does not set out with sufficient clarity the conviction appealed from; and secondly, that it gives grounds, or the basis upon which this appeal is taken, set out as (a), (b), (c) and (d). The prosecution urge that once having given grounds for the appeal in the notice of appeal the appellant would thereby be bound. They say further that since the appellant has given the grounds set out in the notice of appeal, I not only have the right, but am required, to look into the basis of the grounds themselves before I am justified in proceeding with the appeal. They take the position that if I do this it will demonstrate clearly to the Court that the grounds given are no grounds whatsoever and not justified. After hearing the motion and the reply of the appellant I decided that justice would be better done were I to reserve the motion and proceed with the hearing of the appeal on its merits.

At this stage, therefore, before I enter into the merits of the appeal I must deal with the preliminary motions. The first ground, that the notice of appeal did not show with sufficient clarity the particulars of the conviction appealed from, is, in my opinion, not tenable because in the notice of appeal the particulars of the conviction are set out as follows: [His Honour here quoted, and proceeded:] As I see it, the notice of appeal, first, must be in writing. This notice complies. Secondly, the notice must set forth with reasonable certainty the conviction or order appealed from. The only lack in this notice that I can find is the lack of the date upon which the conviction was registered by the magistrate. No one, under the circumstances here, could possibly be misled. Since this is the fact I am prepared to find that this part of the requirement has been met.

It is required that the notice of appeal be served upon the respondent and upon the convicting magistrate within 30 days. This requirement too has been complied with. It is true that the appellant should have filed papers proving that he had met this requirement prior to the

opening of the Court. This, however, is in my opinion a matter of good practice and nothing more. The filing of the papers is not the act which is essential to give jurisdiction but the service of the documents themselves is the essential act. While it is necessary to prove that that act took place, this would be a matter which might be proved to the satisfaction of the Court in many ways and would not, and could not, go to the root of the jurisdiction. I am satisfied that the proper services were made and that this requirement has been met.

I realize that the requirements set out in The Criminal Code, R.S.C. 1927, c. 36, for this type of appeal must be strictly complied with to give the Court jurisdiction. In view of the fact that The Criminal Code no longer sets out a form of notice which must be followed in appeals of this type, any notice of appeal which meets the particulars laid down by s. 750, as amended by 1947, c. 55, s. 22; 1948, c. 39, s. 30; and 1950, c. 11, s. 11, should be held to comply substantially with the requirements and not oust the jurisdiction of the County Court Judge hearing the appeal. In my opinion, therefore, the objection to form must fail.

On the question whether the appellant is bound by the grounds given for his appeal in his notice of appeal, I have some doubts. In the first place it is rather difficult to understand why the appellant could not have utilized the general "blanket" clause set out as (d) to get in whatever grounds he might be advised on the appeal. More important, however, is the fact that this case in appeal is actually to be heard on evidence, and is for all purposes a new trial, and in the ordinary sense is not the usual type of appeal. If this appeal were an appeal on the record, which may be considered as the common type of appeal from one Court to another, I would be seeking to find whether or not a mistake had been made in the Court below. Here we are not so much interested in whether a mistake has taken place in the Court below as in whether the accused is guilty or innocent of the charge which is to be tried before this Court in this instance, as if it were for the first time. The magistrate may very well have been right in the decision he gave upon the evidence adduced before him, and yet at the same time the accused may have suffered an injustice because some evidence vital to the issue was not adduced before the magistrate. Under such circumstances, then, it seems that my duty, in view of the fact that this is a trial *de novo*, is to see that the accused has justice done him in the County Court rather than to enquire into the proceedings in the magistrate's court on the first trial. Section 752(1), as re-enacted by 1948, c. 39, s. 31, in my opinion makes it obligatory on me to hear the matter on the basis of a trial *de novo* and to disregard everything that took place during the trial before the magistrate. I believe that this applies equally to an objection to the notice of appeal as it does to the trial itself.

I have, as a matter of curiosity, checked the record in this case, including the evidence before the magistrate, and I do not see how I could have come to a conclusion different from the conclusion to which he came on the first trial. However, in view of the fact that no notice of appeal is required to be given in any particular form, and in view of the fact that this is a completely new trial and my responsibility is to see that justice is done on the evidence before me, I cannot do otherwise than hold that the accused, or appellant, is free to have his appeal heard whether there are or are not any grounds of appeal set out, or whether or not the grounds set out are justified.

I feel that if any authority is needed for the general basis upon which I am resting this ruling it may be found in the case of *Rex v. Farrel* (1910), 21 O.L.R. 540, 16 C.C.C. 419, where it is said (p. 543): "The burden of proof is the same before the County Court Judge as before the magistrate--the burden of proof is not upon the appellant, as it would be in the case of an appeal properly so-called, to prove that the Court below is wrong . . ."

The motion made by the prosecution will therefore be dismissed.

On the facts at issue here I am prepared to make the following findings: The accused, William Isaac Hill, on 7th November 1950, at the township of Tyendinaga on the shore of the Bay of Quinte, was found in possession of two seine nets by officers of the Department of Game and Fisheries and others. The nets at the time when they were picked up by the officers were wet. It was clear and sunny and there had been no rain that day. It would appear then that some inference of use could be made, although that is not part of the charge here and there is no evidence whatsoever to suggest that the accused had used the nets that day or on any other day. One net, the larger of the two, was on the shore within a few feet of the water's edge and I believe the leads were attached to the winches which are used for hauling the seine. The other net was in the back of a punt across a small peninsula and in a cove. The punt's bow only was on the shore and the stern of the boat was out in the water, which was something less than two feet deep. I find that the location of the shoreline where the nets were found was between the Shannon River and the town of Deseronto and was on that part of the shoreline of the bay which lies immediately in front of the Tyendinaga Indian Reservation. There was some considerable evidence covering the point on the shore where the one seine was found, as to whether or not that location was ever under water, and there was other evidence with regard to the smaller net which tended to show that this net location was on occasion on dry land. I am prepared to find as a fact that both nets were found in locations which were above low-water mark, and I would probably be prepared to find, if it were in issue, that both nets were actually below high-water mark. It must be remembered that there are considerable fluctuations from year to year in the levels in Lake Ontario and in the Bay of Quinte which would account for this fact. I would further find that William

Isaac Hill, the accused, was an Indian and a member of the band. In addition I would find that the accused was not the holder of a licence issued under The Game and Fisheries Act, now R.S.O. 1950, c. 153, entitling him to have a seine net.

The first point that I must decide is partially one of law and partially one of fact, and that is whether the seines were found on or off the Indian reservation. There is no question but that the original grant of the lands in question to the Indians of this band was made, as shown on ex. 4, in 1793. The boundary of the reservation given in that document bounds it in front by the Bay of Quinte between the mouths of the River Shannon and Bowen's Creek. It is true that there is a different description in the release by the Indians given in 1891, where they surrendered the reserve in question by a description which would include all land covered by water of the bay out to deep water. I have been referred by Mr. O'Flynn's argument to this second description, but so far as I am concerned it is in the nature of a release or surrender and would be, in my opinion, more like a quit claim deed, where parties release something in which they claim to have an interest, but may not legally have one. I must therefore come to the conclusion that the description of the reservation which is effective from a legal standpoint is limited to the waters of the Bay of Quinte. In view of this then it would appear to me that I must decide whether that description means high- water mark or low-water mark. In coming to a conclusion on this I have checked The Beds of Navigable Waters Act, R.S.O. 1950, c. 34, which in s. 2(2) reads as follows: "Where in any patent, conveyance or deed from the Crown made either heretofore or hereafter, the boundary of any land is described as a navigable body of water or the edge, bank, beach, shore, shoreline or high water mark thereof or in any other manner with relation thereto, such boundary shall be deemed always to have been the high water mark of such navigable body of water."

It would seem from this that high-water mark would be the boundary. On the other hand, before this section was enacted by 1940, c. 28, s. 3(2), there had been some doubt on this particular point and it had been held that low-water mark was the boundary of land so described. In this connection I would refer to the case of *Carroll v. Empire Limestone Co.* (1919), 45 O.L.R. 121, 48 D.L.R. 44, as well as to *Stover v. Lavoia* (1906), 8 O.W.R. 398, which was also followed in the case of *Servos v. Stewart* (1907), 15 O.L.R. 216. While for most purposes the statutory rules as laid down in the Act above referred to would be conclusive, yet if The British North America Act is to be considered in connection with this matter it would seem that s. 91(24) would override this, because it is stated there that "Indians, and Lands reserved for the Indians" are within the exclusive legislative jurisdiction of the Parliament of Canada. In view of the fact that these are lands reserved for the use of Indians it would seem to me that the section of the Act above set out is inoperative and that the common law of the Province generally must be held to govern. It would therefore seem that the least that could be said is that the boundary of the reservation is low-water mark under the decisions above set out. It may be that those decisions are partially based upon another and older provincial statute which is referred to in one of them, and if that is the case, and that was the basic reason for the decision, then it could be that the English common law rule might apply, and that the bed of the bay would be the boundary instead. I am, however, not called upon to decide that issue here because the seines were found, as I have decided, between low and high water mark. I must therefore find that the seines were, when picked up by the officers, within the confines of the Tyendinaga Indian Reserve.

The next issue then which I must decide is whether or not an Indian on the reservation is subject to a provincial law, and in particular to the provisions of The Game and Fisheries Act of Ontario. There is no question in my mind but that an Indian on the reservation is subject to The Criminal Code. That, of course, is a federal statute and a federal law, and the Indian is subject to control and under the legislative authority of the Parliament of Canada.

There is also no question but that the Indian is subject to the laws of the Province once he is off or out of the confines of the reservation. There is considerable law on this point. I would refer in particular to *Rex v. Hill* (1907), 15 O.L.R. 406; *Rex v. Martin* (1917), 41 O.L.R. 79, 29 C.C.C. 189, 39 D.L.R. 635, and many others.

There is no question but that an Indian on a reservation would be bound to refrain from fishing without a licence if he were so charged (unless there is in existence a specific right given to Indians so to fish by the federal authority), because the federal authority has passed, for the Province of Ontario, certain requirements under s. 2 of The Fisheries Act, 1932 (Can.), c. 42, which prohibit fishing without a licence, the applicable parts of which read as follows: "2(1) Subject to subsection (2) of this section, no person shall take clams or fish by any means other than angling, except under a licence." (P.C. 5694, [1949] S.O.R. 3175.)

In this instance the exceptions do not apply. I have checked the federal statutes and regulations to find if there are in existence any special rights granted to the Indians and I have failed to find any such special legislation. I have checked particularly The Indian Act, R.S.C. 1927, c. 98, and amendments, and have found that s. 69, as amended by 1936, c. 20, s. 2, has partially dealt with the matter by contemplating regulations, but apparently intending them only to apply to Alberta, Manitoba, Saskatchewan and the Territories. I have checked the regulations and have been unable to find anything which would at all apply. I have, therefore, come to the conclusion

that there are no regulations which affect this matter under The Indian Act, at least in so far as the Province of Ontario is concerned. If, therefore, the accused had been charged with operating the seine in question without a licence obtained from the Ontario authorities he could have been apprehended and charged under these Regulations. That course had apparently been followed in the case of *Sero v. Gault* (1921), 50 O.L.R. 27, 64 D.L.R. 327. That case contains general statements on this aspect of the law by a very eminent judge, which would tend to show that an Indian on a reservation is subject to the general law of the Province, but even there the judge qualifies it, and I think rightly so, to be effective by reason of the federal requirements passed under The Fisheries Act. There is no question in my mind that under this case and under The Fisheries Act and its Regulations the operation of a seine is prohibited to Indians as well as white people even though that operation be on a reservation.

Here the man is not charged with operating a seine, but he is charged rather with the possession of a seine. There is nothing under the Regulations passed pursuant to the federal Act which prohibits the possession of that type of net. Therefore, there is no assistance to be obtained from the federal legislative authority to support the charge here. It must therefore stand or fall solely as a charge under an Ontario statute against an Indian possessing a seine on a reservation.

I have read a great many cases on this matter and for a time I had come to the conclusion that most of the cases cited to me were applicable only by inference, because it seemed to me that in almost every instance the Court was able to by-pass the vital issue of an Indian breaking a provincial statute on a reservation. In almost every instance the Court was prepared to say that because the man in question was not an Indian but on a reservation he was liable; or he was an Indian off a reservation and therefore liable.

However, I have found one decision which is directly in point. It is the decision of Chief Justice Hunter of British Columbia and is to be found in the case of *Rex v. Jim* (1915), 22 B.C.R. 106, 26 C.C.C. 236. He holds in that case that an Indian is not liable to conviction under a provincial game law for the killing of a buck out of season on the reservation. I have therefore come to the conclusion, on the authority of that case and by inference from many Ontario cases, that the accused here is not guilty by reason of the facts that the offence, if any, would be a breach by an Indian upon an Indian reservation of a provincial Act, and that the Parliament of Canada is the only competent legislative authority which can regulate the situation which is involved here.

I, therefore, must find the accused not guilty and set aside the conviction.

Appeal allowed.