REX v. MARTIN

(1917), 40 O.L.R. 270 (also reported: 12 O.W.N. 396)

Ontario Supreme Court, Sutherland J., 1 August 1917

(Appealed to Ontario Supreme Court, Appellate Division, infra p.343)

Ontario Temperance Act--Magistrate's Conviction for Offence against sec. 41 --Jurisdiction--Unlawfully Having Intoxicating Liquor--"Indian"-- Evidence--Indian Act, R.S.C. 1906, ch. 81, secs. 2 (f) (i.), 136--Affidavits Supplementing Evidence before Magistrate--Inadmissibility--Sentence-- "Hard Labour"--Interpretation Act, R.S.O. 1914, ch. 1, sec. 25--Distress --Amendment--Criminal Code, sec. 889--Absence of Written Information --Place of Offence.

The defendant, having been convicted by a magistrate for unlawfully having intoxicating liquor in his possession, contrary to sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, was imprisoned under a warrant of commitment issued pursuant to the conviction; and a motion having been made for his discharge, upon the return of a *habeas corpus*, it was held:--

(1) That the mere statement of the defendant to the magistrate that he was an Indian, and therefore, as he attempted to shew, not subject to the Ontario Act, did not go far enough--it was incumbent upon him (if he was to have the benefit of the Indian Act, R.S.C. 1906, ch. 81, sec. 136) to prove that he was a male person of Indian blood reputed to belong to a particular band (sec. 2 (f) (i.)) of the Act); and an affidavit supplementing the evidence given before the magistrate was not admissible.

(2) That a sentence of imprisonment with hard labour may be imposed upon a conviction for an offence against the Ontario Temperance Act: Interpretation Act, R.S.O. 1914, ch. 1, sec. 25.

(3) That the warrant of commitment and the conviction could, under sec. 889 of the Criminal Code, be amended to meet the objection that it was only in default of sufficient distress that the defendant was to be imprisoned, and that no distress-warrant was issued.

(4) That the objection that there was no written information or complaint could not prevail, not having been taken before the magistrate.

(5) That the place of the offence was sufficiently stated in the conviction as "at and in the city of H."

MOTION. upon the return of a *habeas corpus*, for an order discharging the defendant from custody under a conviction by the Police Magistrate for the City of Hamilton for an offence against the provisions of sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, by unlawfully having intoxicating liquor in his possession in the city of Hamilton. He was sentenced to pay a fine of $200: in default of payment, the fine to be levied by distress; and, in default of sufficient distress, the defendant to be imprisoned and kept at hard labour for three months. The fine not being paid, the defendant was in gaol when the motion was made.

July 19. The motion was heard by SUTHERLAND, J., in Chambers.

D. O. Cameron, for the defendant.
J. R. Cartwright, K.C., for the Crown.

August 1. SUTHERLAND, J.:--Lyman F. Martin was charged with having violated the provisions of sec. 41 of the Ontario Temperance Act, by "unlawfully having liquor in his possession" in the city of Hamilton. He was tried before the Police Magistrate for the said city, and convicted, and sentenced to pay the sum of $200, "and if said sum be not paid forthwith the said sum be levied by distress and sale of the goods and chattels of the said Lyman F. Martin, and in default of sufficient distress in that behalf the said Lyman F. Martin to be imprisoned in the common gaol of the city of Hamilton, in the said county of Wentworth, and there be kept at hard labour for the space of three months."

This is a motion for the discharge of the prisoner, upon the following grounds:--

(1) That the accused is an Indian within the provisions of the Indian Act, R.S.C. 1906 ch. 81: that there is an exclusive jurisdiction in the Dominion Parliament over Indians; and that, sec. 136 of the said Act providing for the punishment of an Indian who shall unlawfully have in his possession any in- toxicant, any assumed jurisdiction on the part of the Provincial Legislature must yield, and the conviction, therefore, is, on this ground, illegal.

The only evidence appearing in the proceeding as to the applicant being an Indian is in an answer of the accused himself: " 17. Q. Are you an Indian? A. Yes."

By the interpretation clause of the Indian Act. sec. 2 (*f*), "Indian" means (i.) "any male person of Indian blood reputed to belong to a particular band."

It was contended on behalf of the Crown, and I think rightly, that the mere statement of the accused that he was an Indian did not go far enough and that it was incumbent upon him to prove that he was a male person of Indian blood reputed to belong to a particular band, so as to get the benefit of the Act.

It was sought to supplement the evidence given before the magistrate by an affidavit; but, on the authorities, I could not admit this: *Regina v. Bolton* (1841), 1 Q.B. 66; *Rex v. Morn Hill Camp Commanding Officer*, [1917] 1 K.B. 176; *Rex v. Chappus* (1917), 39 O.L.R. 329.

On this ground of objection the application fails.

(2) It was objected also that there was no provision in the Ontario Temperance Act for the imposition of "hard labour." But by the Interpretation Act, R.S.O. 1914, ch. 1, sec. 25, it is provided: "Where power to impose imprisonment is conferred by any Act it shall authorise the imposing of imprisonment with hard labour." This objection fails.

(3) That there was no distress-warrant issued. But, under the Criminal Code, sec. 889, this can be amended. See *Regina v. Murdock* (1900), 27 A.R. 443.

(4) That there was no written information or complaint. But no objection was taken at the hearing on this score: *Regina v. Hughes* (1879), 4 Q.B.D. 614.

(5) That no place is mentioned in the conviction. As a matter of fact, it reads, that the accused "at and in the city of Hamilton did lawfully have liquor," etc.

On all grounds, I think, the motion fails, and must be dismissed with costs.

[An appeal by the defendant from the above decision was dismissed by the Second Divisional Court of the Appellate Division on the 23rd November, 1917. The judgment will be reported in due course. See the note 13 0.W.N. 187.]