

## BEYAK v. THE KING

[1938] 2 D.L.R. 723 (also reported: [1938] 2 W.W.R. 153, 70 C.C.C. 46)

Manitoba King's Bench, McPherson C.J.K.B., 23 April 1938

*Intoxicating Liquors VI B--Indictment II--Sufficiency of information --Indian Act--"Intoxicant"--"Liquor"--  
Certiorari.*

An information containing the word "intoxicant" instead of the word "liquor," in a charge under s. 126(a) of the Indian Act for selling, supplying or giving an intoxicant to an Indian, is in proper form and states an offence under the statute, and a conviction on such an information is not reviewable on certiorari.

*Continuance and Adjournment--Separate charges--Liquor Act--Indian Act--Discretion of Magistrate--  
Certiorari.*

Where charges for offences under the Liquor Act and the Indian Act or both laid on exactly the same facts and circumstances, the right of the accused to an adjournment, in order to prepare his defence to the charge later preferred under the Indian Act, is discretionary with the Magistrate and his refusal to grant the adjournment is no ground for certiorari.

**APPLICATION** for certiorari on conviction under Indian Act. Dismissed.

*W. D. Card*, K.C., for the Crown.

*W. Swystun*, for appellants.

**McPHERSON, C.J.K.B.:**--This is an application for a writ of *certiorari* against a conviction by J. G. Crawford, Esquire, Police Magistrate, of Gladstone, in the Province of Manitoba, on October 13, 1937, for that he did convict the applicant of, on or about August 27, 1937, at the Village of Westbourne, in the Province of Manitoba, having sold, supplied or gave an intoxicant to an Indian, to wit Norman Grisdale, being an offence and contrary to s. 126(a) of the *Indian Act*, R.S.C. 1927, c. 98, and amendments thereto.

The application contains, as filed, some 19 grounds in support of same, but on the hearing of the motion, counsel for the applicant relied only on the following:--

"4. That the charge read to the accused at the hearing on the 13th day of October, A.D. 1937, discloses no offence;

"5. That the conviction discloses no offence;

"6. That the conviction is for a separate and distinct offence."

The information, as sworn to, reads in part--"sold supplied or gave to an Indian, to wit Norman Grisdale, an intoxicant on or about the 27th day of August, 1937, contrary to section 126(a) of the *Indian Act*."

The typewritten notes show that the Magistrate used the word "liquor," instead of "intoxicant," in reading the charge. Counsel for the accused argued that while the word liquor is defined in the *Manitoba Temperance Act*, it is not so defined in the *Indian Act*, and that therefore no offence was disclosed. The information containing the word intoxicant is in proper form and makes an offence, and the misuse of the word liquor at the trial could not have in any way misled the accused or prejudiced his defence. I therefore hold that on that point the information and conviction were in proper form and gave no right to a writ of *certiorari* being issued.

The second ground on which the accused relied is contained in ss. 14 to 17, both inclusive, in that the learned trial Magistrate wrongfully refused an adjournment to the accused when the accused asked for same after a new charge had been read to him at the hearing which prohibited him from obtaining a necessary witness, was contrary to natural justice, and was biassed and prejudiced on the part of the Magistrate, and did not give the accused an opportunity of making his full answer in defence.

The facts, which are not disputed, leading to an application for adjournment appeared to be that on September 17, 1937, the charge was laid under the *Manitoba Temperance Act* against the accused for one offence committed on August 27, 1937. E. G. Porter, K.C., acting for the accused, advised the Crown Prosecutor that a plea of guilty would be entered, and upon that undertaking, witnesses required by the Crown, who would have to be brought in from Regina, Selkirk and other places, were instructed not to appear. On the return of the summons on September 22, 1937, the accused with new counsel, Mr. Yakimischak, and a plea of not guilty was entered. By an agreement of counsel an adjournment was made until October 13, 1937. On October 4, 1937, Crown counsel was advised that the Indian Department was laying a charge against the accused under s. 126 of the *Indian Act*.

The affidavit of Mr. Card, Crown counsel, sets out the particulars very fully. It says on October 4, 1937, on being advised to the above effect, he telephoned Mr. Yakimischak and advised him that a

charge under the said section was being laid; that it was in effect the same charge as was laid under the *Government Liquor Control Act*, 1928 (Man.), c. 31; that if the accused was convicted under the Indian Act, it was not his intention to proceed under the *Liquor Act* on a similar set of facts, and suggested an adjournment until the accused was served under the new charge. Counsel for the accused refused to consider an adjournment of the *Liquor Act* charge, and Crown counsel suggested an adjournment be agreed to discuss the matter, which was also refused. Counsel for the accused in his affidavit swears that at the trial he stated to the Magistrate that he was not prepared to meet the new charge, and that he had not the slightest notice of the said charge, and asked the Magistrate for one week's adjournment in order to make a proper preparation for the purpose of making a full answer and defence on behalf of the accused. Crown counsel's affidavit on this point is very detailed, and counsel for the accused's affidavit does not contradict the same but refers to a statement made to the Magistrate. The Magistrate refused to grant the adjournment and the trial continued, counsel for the accused objecting to same and requesting an adjournment during the hearing and at the end of same, which was refused by the Magistrate.

The original information alleges the offences to have been committed on September 3, 1937, which was clearly an error as the Indian Grisdale died on August 28, 1937, and the information was amended to read August 27, 1937, and was re-sworn before the hearing commenced.

No information was given on the application for adjournment as to what witnesses not present on behalf of the accused would be required, but in the affidavit filed in this application, it refers to one George West, of the Village of McGregor, and it is claimed he could not be located in time for the trial on October 13.

It was agreed by both counsel on this application that the charges under the *Liquor Act* and under the *Indian Act* were both laid on exactly the same facts and circumstances, so that if this witness was necessary on a charge proceeded on, he was also necessary for one under the Manitoba *Liquor Act*, and the accused had notice of that charge in September, 1937.

Counsel for the appellant relied on *Rex v. Edmonton Brewing Co.* (1923), 40 Can. C.C. 173, but on appeal in that case, at p. 236, although the original conviction was reversed, it was not on the ground of a right to an adjournment, and the discretion of the trial Court to refuse same was confirmed.

The Magistrate's decision on this point was also upheld in *Ex p. Monahan* (1909), 17 Can. C.C. 53, and *Mulvihill v. The King* (1914), 18 D.L.R. 217, 23 Can. C.C. 194. I Cannot find that the Magistrate acted in any improper way in using his discretionary powers when refusing to grant an adjournment which would justify the issue of the writ applied for.

Counsel for the Crown strongly urged that as an appeal from the Magistrate's decision had been filed, and was only abortive by reason of the plaintiff's own action, there was no right to a writ: *Rex v. O'Brien*, *Ex p. Theriault* (1917), 41 D.L.R. 97, 29 Can. C.C. 141; *The Queen v. Herrell* (No. 2) (1899), 3 Can. C.C. 15; *Rex v. Chapman* (1926), 45 Can. C.C. 266.

The application for writ is refused with costs to the Crown fixed at \$50.

*Application dismissed.*