REX v. MYERS

(1925), 21 Alta.L.R. 352 (also reported: [1925] 2 W.W.R. 471, 44 C.C.C. 51)

Alberta Supreme Court, Appellate Division, Harvey C.J.A., Stuart, Beck, Hyndman and Clarke JJ.A., 3 May 1925

Criminal Law--"Depositions"--Meaning of in S. 1124, Cr. Code.
Criminal Law--Intoxicating Liquors--Indian Act--Violations of S. 135 (2)--Defects in Convictions--Amendment under S. 1124, Cr. Code--Absence of Depositions of Witnesses--Effect of Record of Plea of Guilty.

Criminal Law--Trial--Mixing of Trials.

Criminal Law--Intoxicating Liquors--Question of Conviction of Principal and Agent for Same Act.

The word "depositions" in sec. 1124, *The Criminal Code*, includes the written record of anything on which the magistrate could properly enter a conviction, including a written record of an admission of guilt made under sec. 721 (*Rex v. Alexander*, 6 Alta. L.R. 227, 5 W.W.R. 17, over- ruled).

Convictions on pleas of guilty of the same accused for violations of sec. 135 (2) of *The Indian Act*, R.S.C., 1906, ch. 81, held defective because of the omission of the word "forfeit" with respect to the fine imposed and the omission to say to whom the costs were to be paid. One of the convictions was also held defective because it fixed the costs at $6, whereas the minute fixed them at $1.60, and because there was no reference in the minute to imprisonment in default of payment of the fine, which imprisonment was imposed by the formal conviction, and because the magistrate attempted to apply the principle of suspended sentence. The objections that the words "treaty Indian" were used in the informations and the expression "by himself or agent" in both the convictions and informations were held not to be fatal. The Court, on appeals from the dismissal of applications to quash the convictions, although there were no depositions of witnesses before it, held that the word "depositions" in sec. 1124 of *The Code* included the written record in the minutes of admission of guilt, and, applying said section, amended the formal defects in the convictions and amended the second conviction, the fine having been paid, by omitting altogether the provision for a substantive term of imprisonment.

The hearing together of two charges against the same accused, and also of a charge against another accused held not to have prejudiced the former, he having altered his pleas of "not guilty" to pleas of "guilty" in both cases, after remands.

The principle of *Rex v. Martin*, 9 Alta. L.R. 265. 9 W.W.R. 1317, held not applicable to the circumstances herein.

Appeals from the dismissal of applications to quash two convictions of same accused. Convictions amended; appeals dismissed, as to first conviction with costs, as to second conviction without costs.

The appeals were heard by HARVEY, C.J.A., STUART, BECK, HYNDMAN and CLARKE, JJ.A.
J. H. Ogilvie, for accused, appellant.

L. S. Fraser, for Crown, respondent.

Cur. adv. vult.

May 3, 1925.

HARVEY, C.J.A. concurs with Stuart, J.A.

STUART, J.A.--These are two appeals from orders of Chief Justice Simmons dismissing applications by the defendant to quash two convictions made against him by Mr. Wylie, a police magistrate at Fort Chipewyan, for violations of the provisions of *The Indian Act*, R.S.C., 1906, ch. 81, with respect to the sale of intoxicants to Indians.

One information charged that the accused "did on or about July 28, 1924, at Fort Chipewyan in the said Province unlawfully by himself or agent sell intoxicant, to wit, lemon extract, to Horace McKay a Treaty Indian, contrary to sec. 135, subsec. (2) of *The Indian Act*." The formal conviction returned follows this wording exactly and after the statement of the conviction the document proceeds thus: "And I adjudge the said Edward Myers for his said offence to pay a penalty of one hundred dollars and six dollars costs or in default of payment to two months' imprisonment in the Royal Canadian Mounted Police Guard Room at Fort Chipewyan aforesaid."

In this case the following notations appear upon the information after the statement of the offence: "Appeared on the 9th of August. Pleaded not guilty. Remanded on his own recognizance to the 11th of August. Appeared 11th Aug. Tried together with case of 4th of August and case of A. Comstock 28/7/24 remanded in custody to 12th inst. Appeared 12/7/24, plea of not guilty withdrawn. Pleaded guilty. Fined $100 and costs $6.00. In default of payment to 2 months' imprisonment in the R.C.M.P. guard room at Ft. Chipewyan. Allowed to 22nd August, 1924, to pay fine and costs. Fine and costs paid 18th August, 1924. Case concluded. Moiety of $50.00 paid to Corporal W. H. Bryant."

The other information charged that the defendant on August 4, 1924, at the same place "did unlawfully by himself or agent sell intoxicant, to wit, lemon extract, to Horace McKay a Treaty Indian, contrary to section 135, subsec. (a) of *The Indian Act*."

The conviction follows in the same words and then proceeds thus: "and I adjudge the said Edward Myers for his said offence to pay a penalty of one hundred and fifty dollars and six dollars costs or in default of payment to two months' imprisonment in The Royal Canadian Mounted Police Guard Room at Fort Chipewyan aforesaid, and I further adjudge the said Edward Myers for his said offence to be imprisoned for two months in the said Royal Canadian Mounted Police Guard room at Fort Chipewyan (suspended on good behavior twelve months)."

In this second case the following are the notations on the information:

"Appeared on the 9th of August. Pleaded not guilty. Remanded on his own recognizance to the 11th of August. Appeared on 11th Aug. Tried together with case of 28th July and case of A. Comstock 28/7/24. Remanded to 12th inst. Appeared 12th Aug. Plea of not guilty withdrawn and pleaded guilty. Fined $150 and $1.60 costs and 2 months' imprisonment suspended for 12 months; on account of accused sickness. Allowed to 22nd August, 1924, to pay fine. Fine and costs paid Aug. 18/24. Case concluded. Moiety of $75 paid to Corporal W. H. Bryant."

Sec. 135 of *The Indian Act* provides for punishment by either fine or imprisonment or by both and by subsec. 2 of that section provides for payment of a moiety of the penalty to the informant. It says:

"A moiety of every such penalty shall belong to the informer or prosecutor."

The section so far as farther material reads thus:

"Everyone who by himself, his clerk, servant or agent and every one who in the employment or on the premises of another directly or indirectly on any pretense or by any device,

"(*a*) sells, barters, supplies or gives to any Indian or non- treaty Indian, or to any person male or female who is reputed to belong to a particular band, or who follows the Indian mode of life, or any child of such person any intoxicant, or procures the same to be done * * *

"Shall, on summary conviction before any judge, police magistrate, stipendiary magistrate, * * * be liable, * * "

One objection to the convictions was based on the use in the informations of the expression "Treaty Indian." It was pointed out that there is no such expression used in the Act. But the word "Indian" is used in sec. 135 and it is part of the expression referred to. I do not think the insertion before it of the word "Treaty" can be considered in any sense a defect no more than if some other unofficial descriptive adjective, such as "gray-haired," had been used. Aside from the statute we know that in common parlance the expression is a very common one.

Another objection was that the use of the expression "by himself or agent" in both the convictions and both informations was improper and makes the charge read as an alternative one. I do not think this objection is fatal. The meaning quite obviously is that it is charged that the accused did the act either in one way or in another way, that is, directly by himself personally, or indirectly

through an agent. It is not a statement of alternative acts, that is, it does not amount to saying the accused either did one forbidden act or did another forbidden act. That, of course, would be fatal. But the reference is merely to the means or method by which the single act charged was done. It seems to me to be clear that sec. 725 of *The Criminal Code* prevents the success of the contention advanced. See also *Rex v. Brouse*, 23 O.W.R. 790, 4 O.W.N. 640, 21 C.C.C. 17; and cases there cited and *Rex v. McManus* [1919] 3 W.W.R. 190 at p. 192, 31 C.C.C. 180.

But there are undoubtedly some defects upon the face of the convictions. They do not say that the defendant is to "forfeit and pay" which are the words set forth in form 32 in *The Code* and it has been held by this Court that the use of the word "forfeit" is essential. Again, the convictions do not say to whom the costs are to be paid. We have also held that this is a defect. Again, in one case the conviction fixes the costs at $6 whereas the minute fixes the sum at only $1.60. Furthermore, in the second case there is no reference in the minute to any imprisonment in default of payment of the fine while the formal conviction imposes imprisonment for two months in default of payment. Finally, in the second case it seems to me to be clear that the magistrate was doing more than merely postponing the commencement of the period of substantive imprisonment till the expiration of twelve months. It is probable that he would have power to do that; but owing to the use in the conviction of the words "suspended on good behavior for twelve months" I think the only reasonable inference to be drawn is that he was attempting to apply the principle of suspended sentence under sec. 1081 of *The Code* which we have already, in *Rex v. Warner*, 20 Alta. L.R. 545, [1924] 3 W.W.R. 512, held that a police magistrate cannot do.

The question therefore arises as to the duty and power of the Court under sec. 1124 of *The Code*. That section provides in substance that a conviction shall not be quashed for informality or insufficiency therein "if the Court or Judge * * * upon perusal of the depositions is satisfied that an offence of the nature describe in the conviction has been committed over which the justice has jurisdiction." And it also provides that the Court or Judge where so satisfied shall, even if the punishment imposed is in excess of that which might lawfully be imposed have the like powers in all respects to deal with the case as seems just are by sec. 754 conferred upon the Court to which an appeal is taken under the provisions of sec. 749.

A difficulty arises from the fact that there are no depositions--at least before us. It seems clear from the affidavits and the magistrate's return that some depositions were in fact taken. In a subsequent communication to the clerk the magistrate states that he did send in these depositions. But they are not now to be found. The fact is that two other men were charged with similar offences at the same time, viz., Lasanko and Comstock. In response to the notices in the present cases the magistrate seems to have sent in everything connected with all four cases and there are some depositions in the case against Lasanko. Communication is slow and perhaps uncertain between Edmonton and the remote post of Fort Chipewyan. It is possible that the magistrate may have confused the Lasanko depositions with those required. At any rate the facts are, that there were some depositions in these cases taken on August 11 and 12, that these are not now available to the Court but that on the latter date the accused decided on the advice, as appears from the affidavits, of a person representing him who had apparently some legal education and experience, though not a barrister or solicitor, to admit that he was guilty of the offences charged and that the magistrate thereupon entered the convictions.

It is now contended that owing to the absence of these depositions the Court of course cannot now peruse them and so cannot satisfy itself that the accused committed the offences charged and therefore that the power and duty of amendment given and imposed by sec. 1124 cannot be exercised and performed.

In *Rex v. Alexander*; *Rex v. Shouldice*, 6 Alta. L.R. 227, 5 W.W.R. 17, 25 W.L.R. 290, 21 C.C.C. 473, my brother Beck held that, in a case where there were no depositions taken but the accused had pleaded guilty, that is, in the words of sec. 721, had "admitted the truth of the information," the power of amendment given by the section did not exist. In that case he said at p. 20 (5 W.W.R.):
"But a plea of guilty is not a deposition and I cannot bring myself to read the section so as to cover such a case or as if the words 'if any' occurred after the word 'depositions' as, if I did so, I should necessarily leave no restrictions upon the means of being satisfied."

With the greatest possible respect I think this is placing too narrow an interpretation upon the section. The word "depositions" is not defined. But, in my opinion, it is wide enough to include any evidence upon which the magistrate has properly acted and which is inserted in the written record of what has occurred. It is true that the word "depositions" generally refers to testimony taken upon oath. But if we consider for example, the corroborated statement of a child of tender years which although not given under oath is admissible evidence under certain conditions, certainly the record of what such a child said would be considered part of the depositions. Testimony under oath of a

witness who told of an admission of guilt by the accused would be a deposition. Are we to say that, it the accused makes such an admission, *ore tenus*, right in Court to the presiding magistrate, such an admission cannot be considered as coming within the meaning of the word "depositions" as used in the section? Surely such a result ought, for the sake at least of a reasonable appearance of consistency and good sense, to be avoided by the Court if at all possible. To take another possible situation. Suppose we had the lost depositions and supposing, so far as the testimony contained therein were concerned, there were not sufficient in it to satisfy us of the guilt of the accused but at the end thereof the stenographer or magistrate had noted that the accused thereupon arose and admitted his guilt, his words being taken down and recorded, would it be said that such a statement, so recorded, was not part of the "depositions"? In my opinion in such a case the Court would undoubtedly treat such a recorded admission as part of the depositions. And if in such a case, why not in the present case where we have the record of the admission but through an accident not that part of the depositions which preceded it and which might be quite insufficient to establish guilt?

In my opinion the word "depositions" in sec. 1124 should be so interpreted as to include the written record of anything upon which the magistrate could properly enter a conviction and this would include a written record of an admission of guilt made under sec. 721.

This seems to have been the opinion of Hodgins, J.A. in the Ontario case of *Rex v. Zurs*; *Rex v. Ollikkila*, 46 O.L.R. 382, 32 C.C.C. 140, in which case there had been a plea of guilty although apparently the magistrate had returned an amended conviction. But that learned Judge stated that even if the magistrate had no power to do so he himself could do so under sec. 1124. And the result was affirmed by the Appellate Division in 47 O.L.R. 263, 33 C.C.C. 98. Of course the point was not fully discussed and may have been unnecessary to the ultimate result if the magistrate's power of amendment had been legally exercised. But in any case, the matter was brought to the attention of the Appellate Division because *Rex v. Alexander*; *Rex v. Shouldice*, *supra*, was actually cited by counsel for the Crown.

With regard to the decisions of Middleton, J. cited by the appellant, viz., *Rex v. Clifford*, 35 O.L.R. 287, 26 C.C.C. 5; *Rex v. Gerald*, 26 C.C.C. 7, it is to be observed that in both cases the information itself was held to be defective. In the first the reason for quashing the conviction was that, from the evidence (and there *was* evidence, that is, depositions) it did not appear that there was sufficient to establish guilt. In the second, the motion to quash was actually dismissed where some evidence had been taken and there, as here, the accused pleaded guilty. So far, therefore, as *Rex v. Gerald*, *supra*, is concerned, it is an authority to the effect that in exercising the power of amendment the Court can act upon a plea of guilty for there is nothing in the report to show that Middleton, J. was satisfied by the partial depositions that the accused was guilty.

Indeed rather than quash the convictions on such a ground I think the Court ought even still to allow time for the magistrate to return amended convictions which he can always do at any time before an order quashing a conviction is actually made. *Rex v. Bissette* [1917] 3 W.W.R. 501, 29 C.C.C. 97, 41 D.L.R. 52, and cases there cited. But for the reasons given I do not think we need to resort to that course.

Chief Justice Simmons in dismissing the applications intimated, so we were informed, that all necessary and proper amendments would be made. But what these amendments were to be there is nothing to show and the amendments were never in fact made. His orders make no reference to the matter. I think it was the duty of the Crown officers to see that this was done. The omission to do it makes it impossible to say whether we have to make any new amendments in this Court beyond those which the Chief Justice intended to make.

It will be observed that we have not only a power to amend the convictions but under the concluding words of the section we can do anything that a District Judge would have done if there had been an appeal.

With respect to the first conviction it will be amended so as to read:

"And I adjudge the said Edward Myers for his said offence to forfeit and pay a penalty of one hundred dollars to be paid and applied according to law and also to pay to the informant W. H. Bryant the sum of six dollars for costs and if the said sums are not paid on or before 22nd August next I adjudge the said Edward Myers to be imprisoned in the Royal Canadian Mounted Police Guard room at Fort Chipewyan for the term of two months unless the said sums are sooner paid."
With respect to the second conviction, as already indicated, I think the provision for suspension of sentence was beyond the power of the magistrate and in my opinion we should exercise the power given to a District Judge on appeal and omit altogether the provision for a substantive term of im-

prisonment. It is by no means certain that the magistrate would have imposed any term of imprisonment at all if he had realized that he could not act under sec. 1081, as he clearly appears to have been doing. Of course, under that section it is not proper to impose a sentence at all. The principal is that the imposition of any sentence is postponed, and may never be imposed, if there is good behaviour during the period referred to. If there is misbehaviour during that period the accused may be brought up for sentence. The fine has been paid and it is only a matter of form now to amend the conviction. To add a term of imprisonment in default of payment of the fine although no reference is made to it in the minute of adjudication is certainly within our power when exercising the power of a District Judge on appeal. The second conviction should therefore be amended so as to read:

"And I adjudge the said Edward Myers for his said offence to forfeit and pay a penalty of one hundred and fifty dollars to be paid and applied according to law; and also to pay to the said W. H. Bryant the sum of one dollar and sixty cents for costs; and if the said sums are not paid on or before the 22nd day of August next I adjudge the said Edward Myers to be imprisoned in the Royal Canadian Mounted Police Guard room at Fort Chipewyan for the term of two months unless the said sums are sooner paid."

I ought to add that there was a further objection that the two cases and the case against Comstock were heard together and the trials mixed. There might have been a difficulty on this score had it not been for the altered pleas and the definite and deliberate admissions of guilt. It is in such a case impossible to say that the accused was prejudiced by the way the proceedings were conducted.

There was also some point raised with regard to the position of Mr. Wylie as a police magistrate, but there does not appear to be anything in the point. See sec. 708 of *The Code*. Finally an objection was made that we have here convictions of both a principal and his agent for the same act and *Rex v. Martin*, 9 Alta. L.R. 265, 9 W.W.R. 1317, 33 W.L.R. 809, 26 C.C.C. 42, was relied upon. But it does not appear from anything before us that the convictions were for the same specific act even if that decision were otherwise applicable. So far as appears there may have been four different sales, and it is therefore impossible in my view of the matter to apply the principle of the case cited so as to assist the appellant.

With regard to costs it does not appear that Chief Justice Simmons dealt with the second conviction as we have dealt with it. The appellant has almost certainly secured some benefit by his appeal to which he was entitled and which apparently was not given him by the learned Chief Justice. I think therefore that there should be no costs of the appeal in that case but that the appeal with respect to the first conviction should be dismissed with cost. The amendmants required in that case are purely formal and should I think be assumed to have been covered by what the Chief Justice said.

BECK, J.A.--I concur in the result.

HYNDMAN and CLARKE, JJ.A. concur with Stuart, J.A.

Convictions amended; appeals dismissed, as to first conviction with costs; as to second conviction without costs.

L. S. Fraser, agent for Attorney-General of Alberta, respondent.
Griesbach, O'Conner & Co., solicitors for accused, appellant.