REGINA V. FEARMAN

(1892), 22 O.R. 456

Ontario Common Pleas, MacMahon and Rose JJ., 25 June 1892

Intoxicating liquors--"The Liquor Licence Act"--Evidence of licence inspector and defendant— Admissibility--Indian reserve.

For an offence under "The Liquor License Act," R. S. O. ch. 194, the license inspector, who lays the information, is a competent witness.
An objection that the conviction, which was for selling liquor without a license at the village of M., in the township of O., should have negatived that the place where the offence was committed was in an Indian reserve, which it was alleged formed part of such township, was overruled, as there was nothing to shew the fact alleged, and under section 1 of R. S. O. ch. 5, there was *primâ facie* jurisdiction.

[Statement.] THIS was a motion by way of appeal from an order of the Chief Justice of this Division, refusing an order for a writ of *certiorari* herein.

The defendant was convicted, on the 20th of February 1892, by James Grace and W. J. Shaw, two Justices of the Peace for the county of Brant, for an infraction of section 50 of "The Liquor License Act," R. S. O. ch. 194, by unlawfully keeping liquor for the purpose of sale, etc., without a license at the village of Middleport, in the township of Onondaga, in the county of Brant; and was fined twenty dollars and costs.

The grounds taken were:
1. That the evidence of the informant (the license inspector) was improperly received, as it was alleged he had a pecuniary interest in the result--an interest in the penalty; 2. The magistrates refused to receive the evidence of the defendant, tendered on his own behalf. 3. That the offence (if any) was committed in the township of Onondaga, a part of which township, it is alleged, comprises the reserve of the Six Nation Indians; and as "The Liquor License Act" is not in force in the reservation, the conviction should have negatived the offence having been committed therein.
In Easter Sittings (May 23rd, 1892), before **ROSE** and **MACMAHON**, JJ., *Du Vernet* supported the motion. The evidence of the informant, the license inspector, should [Argument.] not have been received, as he was interested. This case was tried after the decision in *Regina v. Bittle*, 21 O. R. 605, and though the magistrate refused to receive the evidence of the defendant, he admitted the evidence of the informant. The question as to the admissibility of the evidence of an informant was first taken in *Regina v. Strachan*, 20 C. P. 182, a case under the License Act of 1868, 32 Vic. ch. 32 (O.), but was overruled because there was an express provision in section 25 making the prosecutor or complainant a competent witness; but there is no such provision in the present Act. The case of *Rex v. Stone*, 2 Lord Raym. 1445, shews that the evidence of an informant, as being interested, is not receivable. See also Gilbert on Ev., 6th ed, 110-111; Phillips on Ev., 10th ed., pp. 46-7. The informant here is interested, as he is liable for the costs of the prosecution: secs. 45, 46. Section 5 of the Dominion Act, 51 Vic. ch. 45, does not apply. The defendant was a competent witness, Sec. 1 of 55 Vic. ch. 14 (O.), which is substituted for sec. 9 of R. S. O. ch. 61, makes his evidence admissible. The next objection is that Local Option Act was not in force, and so there could be no license, and thus a conviction for selling without a license would be bad. The defendant endeavoured to prove this at the trial, but the Court would not allow the evidence to be put in. The next objection is that the offence, if any, was committed in the township of Onondaga, which comprises the Six Nation Indian Reserve, and the fact of the offence having been committed there should have been negatived. The onus is on the magistrate to shew he had jurisdiction:

Regina v. DuQuette, 9 P.R. 29.

Langton, Q. C., contra. Sec. 9 of R. S. O. ch. 74, The Ontario Procedure Act, read in connection with 51 Vic. ch. 45, sec. 5 (D.), makes the informant a competent witness. "The Evidence Act," R. S. O. ch. 61, sec. 2, has, however, put an end to all question as to the admissibility of evidence on the ground of interest, as it expressly provides that no person is to be thereafter excluded from giving [Argument.] evidence from any alleged incapacity by reason of interest. The 32 Vic. ch. 32, sec. 25 (O.), has never been repealed, and was left out in the revision as being expressly provided for by "The Evidence Act." An informant never was disqualified merely by reason of his being an informant, but only when he was interested. Here the license inspector has no interest. Under the Act he has no pecuniary interest in the penalty, as no portion of it goes to him, and he is indemnified against costs. The case of *Rex v. Stone* is more fully reported in Burn's Justice of the

Peace, 30th ed., at p. 1141, and it appears the evidence of the informant there was excluded because he was the only witness and was suing for a pecuniary reward. The defendant's evidence was not admissible. The 55 Vic. ch, 14 (O.), does not apply, as it was passed after the conviction was made. There was nothing to shew that the Local Option Act was in force, and the objection is not taken in the order *nisi*, and should not be entertained. Then, as to the objection as to the Indian Reserve being in the township, and not negativing the sale having taken place there. This was held untenable in *Regina v. Whiting*, not reported.

June 25th, 1892. **MACMAHON, J.:--**
I do not consider the question so much discussed during the argument as to whether 51 Vic. ch. 45, sec. 5 (D.), is introduced into the said Act by virtue of R. S. O. ch. 74, sec. 9, as I am clearly of opinion that the license inspector has no pecuniary interest in the result of the prosecution.

Under section 45 of "The Liquor License Act," R. S. O. ch. 194, any penalty in money recovered where the inspector is prosecutor shall be paid by the convicting justice to him, to be by him paid to "The License Fund Account." And in any case where an inspector has prosecuted, and has been unable to obtain the amount of the costs, the same is to be made good out of such license fund. And where he has prosecuted and failed to obtain a conviction, [Judgment.] he shall be indemnified against costs out of the license fund, should the justice before whom the complaint is made certify that such officer had reasonable and probable cause for preferring such complaint. And, by section 90, the council of every municipality is required to set apart not less than one-third part of such fines or penalties received by the municipality for a fund to secure the prosecutions for infractions of the Act.

The reason why the law prohibited a conviction being had on the uncorroborated evidence of an informer is stated in the case referred to by Mr, Du Vernet of *Rex v. Stone*, 2 Lord Raym. 1545, Burn's Justice of the Peace, 30th ed., 1141: "It is said that where a statute appoints a conviction to be on the *oath of one witness*, this ought not to be by the single oath of the informer; for, if the same person were allowed to be both prosecutor and witness, it would induce profligate persons to commit perjury for the sake of the reward."

The rule is thus stated in Phillips on Evidence, 10th ed., 47: "In cases of summary convictions, where a penalty is imposed by statute and the whole or in part is given to the informer, who becomes entitled to receive it immediately upon the conviction, the informer was considered an incompetent witness, unless he was made competent by statute."

The license inspector has no pecuniary interest in any part of the penalty. No portion of it goes to benefit him. All fines and penalties are paid into the "License Fund Account," which is used for the purpose of carrying out and enforcing the Act.

The inspector may lay the information for an infraction of the Act, and to that extent he is an informer. But the statute absolutely prohibits his having any interest in the penalty; and it is on the ground of interest that the evidence of informers was excluded.

There is no reward to be obtained by the inspector, and therefore no reason for excluding his evidence. I should, therefore, have held the inspector was a competent witness [Judgment.] irrespective of R.S.O. ch. 74, until my attention was drawn to the statute by the judgment of my learned brother Rose, and I agree with him in holding it is, in its features, wide enough to render competent as a witness a person interested in a penalty. The second ground is disposed of by *Regina v. Hart*, 20 O. R. 611, and *Regina v. Bittle*, 21 O.R. 605.

The third ground taken was considered by me in *Regina v. Whitney* (not reported), where I said: "By R. S. O. ch. 5, sec. 1, the township of Onondaga is within and forms part of the county of Brant for municipal purposes. That township also, for the purposes of representation in the House of Commons, forms part of the south riding of the county of Brant, R. S. C. ch. 6, sec. 2, par. 24. Although it was said in argument that part of the township of Onondaga is included within the Six Nation Reserve, there is nothing before us shewing this. Even had there been evidence shewing that the Indian Reserve formed part of the township of Onondaga, it would not have been necessary to the validity of the conviction that it should contain an averment negativing the commission of the offence in that part of the township. We must assume that the magistrates, in hearing a complaint for an infraction of the Liquor License Act, were trying a case within that part of their territorial jurisdiction where the Act was in force until the contrary was shewn.

Had it been shewn that the alleged offence was committed within the Indian reservation, there could not have been a conviction under the Liquor License Act, as the offence would only have been punishable under the Indian Act, as amended by 51 Vic. ch. 22, sec. 4, (D.).

All the grounds fail, and the motion must he dismissed with costs.

ROSE, J.:--
Only two grounds of appeal were taken by the notice, 1st. That the informant was improperly allowed to give evidence in this matter.
2nd. That the defendant was not permitted to give [Judgment.] evidence.
Mr. Du Vernet, on the argument, took a further ground not taken in the notice of appeal, and which, therefore, as it seems to me, we should not consider, as it is purely technical, and there is no reason for interfering in this case on the merits.

As to the first ground, I think Mr. Langton's argument must be given effect to: viz., that section 2 of R. S. O. ch. 61, applies. This section is most general in its terms, and provides that: "No person offered as a witness shall hereafter be excluded, by reason of any alleged incapacity from crime or interest, from giving evidence *** *** before any person having *** *** authority to hear, receive and examine evidence."

And this is a reason, I think, as urged by Mr. Langton, why in the revision of 1877, ch. 181, sec. 66, the words, "and no person shall be rendered incompetent as a witness by reason of his being interested in any portion of the penalty sought to be recovered," disappeared from section 47 of 37 Vic. ch. 32.

This ground, therefore, in my opinion, fails irrespective of the question of whether the inspector could be held to be an interested witness; which has been considered by my learned brother MacMahon, but upon which I have formed no opinion. There is nothing in the second ground taken. The conviction was in February, 1892, and the amending Act, 55 Vic. ch. 14, sec. 1, (O.), was not passed until April following.

See *Regina v. Hart*, 20 O. R. 611; *Regina. v. Bittle*, 21 O.R. 605.

I agree that the motion must be dismissed with costs.

Since writing the above, my learned brother MacMahon tells me that some motions for *certiorari* are pending awaiting the decision in this case of a ground of objection to the conviction that it did not shew that the offence was not committed on the Indian Reserve, and therefore out of (462) R. v. FEARMAN 533 [Judgment.] the jurisdiction of the magistrate. It is sufficient for this case to say that there is nothing before us to shew that any portion of the township is Indian Reserve. The offence is said to have been committed in Middleport, in Onondaga Township. Section 1 of R. S. O. ch. 5, *primâ facie* establishes jurisdiction, and, if evidence were offered, no doubt it would appear that Middleport is not in the Indian Reserve.