REX v. MARTIN

(1917), 39 D.L.R. 635 (also reported: 29 C.C.C. 189, 41 O.L.R. 79, 13 O.W.N. 187)

Ontario Supreme Court, Appellate Division, Meredith C.J.C.P., Riddell, Lennox and Rose JJ., 23 November 1917

(On appeal from judgment of Ontario Supreme Court, supra p. 339)

Ontario Supreme Court, Appellate Division, Meredith C.J.C.P., Riddell, Lennox and Rose, JJ. November 23, 1917.

INDIANS (§ I--1)--OFFENCES OUTSIDE RESERVATION--PUNISHMENT. An Indian is punishable as other persons are for offences outside a reservation against provincial legislation.

APPEAL by the defendant from an order of SUTHERLAND, J.,[Statement.] in Chambers, of the 1st August, 1917, dismissing the defendant's motion for an order discharging him from close custody in the common gaol at Hamilton.

The appeal was based upon the following grounds:--

(1) That the evidence at the trial shewed the defendant to be an Indian, and so not subject to the Ontario Temperance Act.

(2) That the Judge in Chambers should not have rejected an affidavit shewing that the defendant was an Indian.

(3) That no distress warrant was issued nor any return made before the commitment of the defendant to gaol in default of sufficient distress.

(4) That the proceedings at the trial were contrary to natural justice, in that the defendant was not given an opportunity to make his defence.

(5) That no authority to impose hard labour in default of payment of the fine imposed was given, nor did the magistrate's minute of conviction shew an award of hard labour.

J. B. Mackenzie, for the appellant.

J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.C.P.: --The real question involved in this appeal is: whether the Ontario Temperance Act applies to Indians; for, if not, the magistrate who made the "con- viction" in question was without jurisdiction; and so there is really no conviction; and the appellant should have been discharged from custody in these *habeas corpus* proceedings.

In such a case sec. 95 (1) An appeal to the Appellate Division of the Supreme Court shall lie from any judgment or decision of a Judge of the Supreme Court, upon any application to quash a conviction made under this Act, or to discharge a prisoner who is held in custody under any such conviction, whether such conviction is quashed or the prisoner discharged, or the application is refused; but no such appeal shall lie unless the Attorney-General of Ontario certifies that he is of opinion that the point in dispute is of sufficient importance to justify the case being appealed. of the Act cannot prevent this Court from so ruling. That section applies to "an application to quash a conviction made under this Act;" but an act done without jurisdiction--by whatever name it may be called--cannot be a conviction under the Act; and no one can really think that the Legislature meant the section to apply to anything but a conviction made by a person having jurisdiction under the Act, for an offence within its provisions, committed by a person to whom it is applicable.

A general right of appeal to this Court, in *habeas corpus* proceedings, is given by the Ontario Habeas Corpus Act, R.S.O. 1914, ch. 84, sec. 8: a right curtailed by sec. 95 of the Ontario Temperance Act, but only in cases of convictions under that Act.

If, then, Indians be within the provisions of the Ontario Temperance Act, the conviction was one made under the Act, and sec. 95 deprives the appellant of the general right of appeal, because the certificate of the Attorney-General provided for in it has not been made.

That the appellant is an Indian was sufficiently proved at the trial, if such the proceedings before the magistrate can fairly be called; and, if it had not been so proved, there is no good reason why it might not be satisfactorily proved in these proceedings.

There was no contest, of any kind, before the magistrate, upon that subject. Indeed I gather, from the report of the proceedings before him, that he was satisfied from the man's appearance that he was an Indian, and that he asked the question, "Are you an Indian?" only to have that which was apparent confirmed by the man's oath.

That an Indian who commits an offence against a provincial law, beyond the limits of an Indian reserve, may be convicted and punished just as all other persons may, is made plain by such cases as *Rex v. Hill*, 15 O.L.R. 406, and *Rex v. Beboning* (1908), 17 O.L.R. 23.

That being so, the appeal fails altogether: it is not open to this Court to entertain the appeal upon the other grounds relied upon by Mr. Mackenzie: they do not involve the question of jurisdiction which I have mentioned.

But, regarding the question of failure to attempt to levy by distress before imprisonment, I may point to the fact that for the offence of which the appellant is found guilty the penalty is a fine of not less than $200, "and in default of immediate payment" imprisonment for not less than three months: see secs. 58 and 41: and that secs. 101 and 102 have wide curative effect; and to the powers conferred upon magistrates by secs. 744 and 745 of the Criminal Code, made applicable to provincial officers by sec. 4 of the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, which in turn is made applicable to the Ontario Temperance Act by sec. 72.

The appeal fails, and should be dismissed.

It is now--some length of time after the foregoing opinion was written--said that Mr. Mackenzie's perseverance has procured some sort of a consent from the Attorney-General of Ontario that the question whether an Indian is liable to the penalties of the Ontario Temperance Act may be considered in this case; but, for the reason before given, I do not consider any consent or certificate of the Attorney-General necessary for that purpose, and so do not stop to inquire whether such consent or certificate is a compliance with the provisions of sec. 95 of the Act.

RIDDELL, J.:--This is an omnibus motion, but it is in substance an appeal from the judgment of Mr. Justice Sutherland, reported in (1917) 40 O.L.R. 270.

Objection was taken that by sec. 95 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50, no appeal lies "unless the Attorney- General of Ontario certifies that he is of opinion that the point in dispute is of sufficient importance to justify the case being appealed." The Attorney-General has informed us that the question of the application of the Ontario Act to this defendant is of such importance. If I may say so without presumption, I think the decision of the Attorney-General most proper: while no one in such a position would desire to allow an appeal to be taken on technical objections or mere matters of form, the Government cannot desire that a conviction should stand where the convicted person is not in law under the prohibition of the law at all.

I would dismiss the appeal, if necessary, on the ground taken by Mr. Justice Sutherland, viz., that this defendant has not shewn that he is an "Indian" within the meaning of the Indian Act, R.S.C. 1906, ch. 81, sec. 137.

But, even had he shewn that he was "of Indian blood reputed to belong to a particular band," and so was an "Indian" within the meaning of sec. 137(1) Section 137 of the Indian Act provides that "every Indian or non- treaty Indian who . . . has in his possession . . . . any intoxicant, shall, on summary conviction . . . . be liable to imprisonment . . . . or to a penalty . . . . or to both penalty and imprisonment . . . ;" and, by sec. 2 (*f*), "Indian" means (among other things) "any male person being of Indian blood reputed to belong to a particular band," and "non-treaty Indian" means "any person of Indian blood who is reputed to belong to an irregular band," etc. of the Dominion Act, I do not think his case at all advanced.

We are bound by *Rex v. Hill*, 15 O.L.R. 406, to hold that an unenfranchised Indian is subject to provincial legislation in precisely the same way as a non-Indian, at least where, as here, he is out of his reservation; we also must hold that legislation such as the present is not legislation concerning Indians, however much Indians may be affected in common with the rest of His Majesty's subjects.

I think the language used by the Judicial Committee in *Canadian Pacific R.W. Co. v. Corporation of the Parish of Nôtre Dame de Bonsecours*, [1899] A.C. 367, 372, 373, may well be applied here *mutatis mutandis*:--

"The British North America Act, whilst it gives the legislative control of the Indian defendant *quâ* Indian to the Parliament of the Dominion, does not declare that the defendant shall cease to be a denizen of the Province in which he may be, or that he shall, in other respects, be exempted from the jurisdiction of the provincial legislatures . . . It therefore appears . . . that any attempt by the Legislature of Ontario to regulate by enactments his conduct *quâ* Indian would be in excess of its powers. If, on the other hand, the enactment had no reference to the conduct of the defendant *quâ* Indian, but provided generally that no one was to sell, etc., liquors, then the enactment would . . . . be a piece of legislation competent to the Legislature . . .," even though he--not in his status *quâ* Indian, but under the general words--should come within the prohibition.

In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them.

In *Cunningham v. Tomey Homma*, [1903] A.C. 151, it was held that the Province could debar a Japanese from the franchise, although "naturalization and aliens" came within the powers of the Dominion.

It is not without significance that, were effect to be given to the defendant's contention, any Indian might sell or give any amount of intoxicating liquor anywhere in Ontario to any one who was not an "Indian" *simpliciter* or a "non-treaty Indian." It is obvious that the whole purpose and intent of the Dominion legislation is the protection of the Indian, who is believed to be peculiarly susceptible to, and likely to be injured by, the use of intoxicants. The Ontario legislation is for the protection of everybody in Ontario; and I do not think that the Dominion legislation is exclusive.

The defendant being no longer in custody, *habeas corpus* does not lie; *Re Bartels* (1907), 15 O.L.R. 205, 10 O.W.R. 553, and cases cited: *cf. Re Beck* (1916), 32 D.L.R. 15 (Court of Appeal, Manitoba).

I would dismiss the motion with costs.

LENNOX and ROSE, JJ., agreed in the result.

Appeal and motion dismissed with costs.