REX v. WEBB

(1943), 80 C.C.C. 151 (also reported: [1943] 2 W.W.R. 239)
Saskatchewan King's Bench, Bigelow J., 16 February 1943

Indians--Selling intoxicants to Indian--Indian includes non-treaty Indian--Absence of mens rea as defence.

It is an offence under s. 126 of the Indian Act, R.S.C. 1927, c. 98 to sell Intoxicating liquor to a non-treaty Indlan as well as a treaty Indian; *semble* absence of *mens rea* is a defence to a charge under this section.

Cases Judicially Noted: *R. v. Hughes*, 12 B.C.R. 290, 4 W.L.R. 431; *Reg. v. Mellon*, 7 Can. C.C. 179, 6 Terr. L.R. 301, refd to.
Statutes Considered: *Indian Act*, R.S.C. 1927, c. 98, ss. 2 (*b*) (*f*), 126.

Certiorari IVJ--Costs--Conviction quashed on jurisdictional grounds --Unfair prosecution.

Where the applicant's conviction for selling intoxicants to an Indian is quashed on the ground that there is no admissible evidence on the record that the person to whom the intoxicants were sold is an Indian, and as a consequence thereof the Indian agent who tried the case as a Justice of the Peace *ex officio* acted without jurisdiction, the conviction cannot be considered as being quashed on technical grounds and the applicant is accordingly entitled to his costs against the informant and the Justice, especially where the prosecution was an unjust one, and the Indian agent, who directed that the charge be laid, afterwards proceeded to the trial of the charge before himself.

Cases Judicially Noted: *R. v. Standall*, 31 Can. C.C. 144, 12 S.L.R. 282, [1919] 2 W.W.R. 632, apld.

CERTIORARI application by accused to quash his conviction for unlawfully selling intoxicating liquor to an Indian contrary to the *Indian Act*, R.S.C. 1927, c. 98, s. 126. Conviction quashed.

W. L. Clink, K.C., for the Crown.
J. N. Conroy, K.C., for defendant.

BIGELOW J.:--The applicant is a liquor vendor at Paynton. On November 6th last one Felix Jimmy applied to the liquor board for two bottles of wine. The applicant says that Felix Jimmy spoke good English but had the appearance of an Indian, so the applicant asked Felix Jimmy to produce his registration certificate, which he did, and there is nothing on that to show that Felix Jimmy is an Indian. Felix Jimmy also told the applicant that he had never taken treaty and that he had voted once. Having made these inquiries and satisfied himself that Felix Jimmy did not come under the definition of an Indian in the *Indian Act*, R.S.C. 1927, c. 98, the applicant sold him the wine. Later in the same day, looking through some recruiting files, applicant had some reason to be suspicious of Felix Jimmy, so he reported the matter at once to the R.C.M.P. for investigation. This resulted in a prosecution of the applicant by Constable D. C. Slinn before the Indian agent, J. P. B. Ostrander, who is *ex officio* a J.P. under the *Indian Act*, s. 152.

To show how unfair the information and subsequent conviction were it may be mentioned that the constable would not have laid the information without instructions from the Indian agent, that is, that the Indian agent gave the instructions to proceed to the trial of a charge before himself, a J.P. *ex officio*. This is rather an unusual way of administering justice in British countries. All in a few minutes, the information was laid, the trial was completed and the applicant convicted.

The applicant now applies for an order of *certiorari* to remove the said conviction into this Court, and that the said conviction be quashed without the actual issue of the writ.

Objection No. 6 in the notice of motion: "That there was no evidence that intoxicating liquor was sold." I think there is nothing in this contention. The letter of the applicant filed at the trial admits the sale of wine and wine is an "intoxicant" under the definition in the *Indian Act*, s. 2, cl. (*f*). Objection No. 2 in the notice of motion is as follows: "That neither the information, charging sale to a 'treaty Indian,' nor the conviction in the same terms, discloses any offence against section 126 of the *Indian Act*."

But s. 126 of the *Indian Act* makes it an offence to sell to any Indian. That would include a treaty Indian as well as a non-treaty one. "Indian" is defined in the Act, s. 2, cl. (*d*), as follows: "(i) any male person of Indian blood reputed to belong to a particular band . . . ."
Band" is defined in s.2, cl. (*b*) as follows: " 'band' means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the

Government of Canada is responsible; and, when action is being taken by the band as such, means the band in council."

Objections 3 and 4 in the notice of motion are as follows:
"3. That the said George C. Webb, having no knowledge or notice that any charge had been laid against him until it was actually read to him in court and having then requested, and been refused, an adjournment of his trial to enable him to take advice in the matter, was unjustly and unfairly denied the right and opportunity to make his full answer and defence to the charge and to be represented by counsel.
"4. That the said Indian Agent wrongly and improperly advised the said George C. Webb, and himself acted upon the assumption, that there was no possible defence open to the said George C. Webb and that he must be found guilty regardless of how innocent he may have been in intention."
The facts relating to these objections are in dispute. There is no way I can tell which side is correct, so I am not basing my judgment on these grounds. I may say here, referring to No. 4, that in my opinion the applicant had not only a possible defence but a very probable one, that is, the absence of *mens rea: R. v. Hughes* (1906),12 B.C.R. 290; *Reg. v. Mellon* (1900), 7 Can. C.C. 179, 5 Terr. L.R. 301, and cases there cited. Is it reasonable to think that the applicant was guilty of an offence which he had no intention to commit and after he had made very full *bona fide* inquiries?

That leaves objections 1 and 5 to be considered, which I will deal with together. They are as follows:
"1. That J. P. B. Ostrander, the Indian Agent who made the conviction, had no jurisdiction in the matter, there being no evidence, or no legal evidence, that Felix Jimmy, to whom the intoxicating liquor was alleged to have been sold, was an Indian as defined by the *Indian Act*.
"5. That the oral evidence of D. C. Slinn as to the contents of the letter allegedly written to him by the defendant, and as to statements made to the constable by Felix Jimmy, was not legally admissible in evidence, but was wrongly received in evidence by the said Indian Agent and acted upon by him in assuming jurisdiction to try the case and in making the conviction."

I think both of these objections are well founded and go to the very root of the jurisdiction of the Magistrate. The Indian agent only had jurisdiction as a J.P. *ex officio*, if he were dealing with an Indian: Section 152 of the *Indian Act*. "Indian" is defined above. The only evidence that Felix Jimmy is an Indian was given by Constable Slinn, who said that Felix Jimmy admitted to him that he is a treaty Indian. That of course is not evidence against the applicant.
Constable Slinn also says in his evidence, after filing applicant's letter, that his letter related that after he had made a sale he found from inquiries that Felix Jimmy is a treaty Indian. His letter is on file and speaks for itself. There is no such statement in the letter. The contents of the letter should not have been narrated by Constable Slinn anyway. The letter is on file and is the best evidence.

If this improper evidence is taken out there is nothing to show that Felix Jimmy is an Indian and there was therefore no jurisdiction to hear or determine. The conviction is quashed.

As to costs: There is no doubt about the jurisdiction to allow costs: Crown Practice Rule No. 7; *R. v. Standall* (1919), 31 Can. C.C. 144, 12 S.L.R. 282; *R. v. Ogloff* (1920), 13 S.L.R. 410, and on appeal 33 Can. C.C. 200, 53 D.L.R. 513. In *R. v. Standall*, 31 Can. C.C. at p. 150, Brown C.J.K.B. said:

I am of the opinion, therefore, that, as a general rule, both on appeals by way of stated cases and appeals by way of *certiorari*, the costs should follow the event. I agree, however, with Beck, J., in *Rex v. Knowles*, *Rex v. Wilson* (1913), 13 D.L.R. 773, 22 Cam C.C. 66, 6 A.L.R. 221, that there will be many exceptions to the rule, that the circumstances in each case must be taken into account; that, for example, a conviction may be quashed on a very technical ground and the facts of the case shew that the accused is entitled to little consideration. In the present case I see no reason for denying the appellant his costs.'

I agree with that conclusion and see no reason for denying the applicant in this case his costs. I do not consider the ground on which this conviction is quashed technical. I consider this is a very unjust prosecution which never should have begun. I see no reason why the applicant should suffer by having to pay his own costs.

Nor does the fact that counsel has appeared for the informant and the Magistrate and stated that he is not taking any part on the merits, but only opposes costs, influence my decision. The informant and the Magistrate put this matter in motion which resulted in the conviction which has caused the applicant much annoyance and costs, and may have cost him his position if he had not been able to get it rectified. A considerable part of the costs I should think the applicant will not be

able to recover from the opposite party. The applicant will have his taxed costs against the informant and the J.P.

Conviction quashed.