REX v. GEE

(1901), 5 C.C.C. 148

British Columbia County Court, Bole Co.J., 21 December 1901

Agency--Illegal sale of liquor to Indian--Sale by "clerk, servant or agent"-- Ejusdem generis--Hotel servant unauthorized to make sales--Indian Act, R.S.C. 1886 ch. 43, sec. 94--51 Vict. (Can.) ch. 22, sec.4

1. An illegal sale of liquor to an Indian by a hotel cook or other employee unauthorized by the propietor to sell liquor is not, in the absence of any knowledge or connivance on the part of the prioprietor, a sale "by his clerk, servant or agent" so as to render the proprietor liable to the penalty imposed by the Indian Act, R.S.C. 1886 ch. 43, sec. 94, as amended by 51 Vict. ch. 22, sec. 4.

NEW WESTMINSTER, December 21, 1901.
This is an appeal from a conviction made by Captain Pittendrigh, S.M., under the Indian Act, for supplying liquor to Indians at Blaine, B.C., on the l4th day of September, 1901, the fine imposed being $100 and costs.

The Indian Act, sec. 94, as amended in 1888 (51 Vict. ch. 22, sec. 4), provides "Every one 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 pretence or by any device sells, barters, supplies, or gives to any Indian or non-treaty Indian any intoxicant or causes or procures the same to be done, or attempts the same or connives thereat, "is guilty of an offence, the punishment for which is provided for by the latter part of the section.

The facts of the case are shortly these:--Constable Calbick, an active and intelligent provincial police officer, very properly endeavouring to suppress the sale of liquor to Indians, sent two Indians on the day in question to St. Leonard Hotel, Blaine, B.C., to buy whisky. I have no doubt they did buy the liquor as described on the outside of the hotel from some one in the employ of defendant, so the only question of practical importance left me to decide is--was the person who made that unlawful sale an employee of the appellant for whose act the employer in the absence of proof of agency is liable within the meaning of the Indian Act. If he were, cadit quoestio and the conviction must be affirmed--if he were not, it must be quashed.

Agency has been defined in the case of *Pole v. Leask*, 33 LJ. Ch. 155 (H.L.) per Lord Cranworth, thus:--"As to the constitution by principal of another to act as his agent. No one can become the agent of any person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case it is only by will of the employer that an agency can be created. Another proposition to be kept constantly in view is that the burden of proof is on the person dealing with anyone as an agent through whom he seeks to charge another as principal. He must shew that the agency did exist and that the agent had the authority he assumed to exercise or otherwise that the principal is estopped from disputing it."

Now the words of the Act, "clerk, servant or agent," cannot, I think, be held to include servants of every description such as cooks, messengers, etc., I cannot for a moment think that the Legislature intended to make a man personally responsible for the severe penalties imposed by the Indian Act if his coachman or groom of his own motion and without any knowledge or connivance on the part of his employer gave liquor to an Indian.

A long list of cases from the well-known *Sandeman v. Beach*, 7 B. & C. 100, down to *Hunt v. G. N Ry. Co.*, [1891] 1 Q.B. 601, would go, in my opinion, to shew that such is not the true meaning of the section.

This rule of law, generally known as the ejusdem generis rule, was laid down by Lord Campbell in *R. v. Edmindson* (1859), 28 L.J.M.C. at p. 215, thus: "I accede to the principle laid down in all the cases cited that where there are general words following particular and specific words the general words must be confined to things of the same kind as those specified."

The evidence seems to indicate that the person who sold the liquor was cook in the hotel and there is no suggestion of any connivance on the part of the appellant who, it was stated, was ill in bed at the time of the sale.

Under these circumstances I do not think the conviction can be sustained. The appeal will be allowed without costs.

Appeal allowed.

Aulay Morrison, K.C., for appellant.
Corbould, K.C., for respondent.

Note: *Clerk, servant or agent*--Interpretation of statute.
See *R. v. Tessier* (1900), 5 Can. Cr. Cas. 73 (Que.), and Note ante p. 80.