

The Rheinfels

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SooperKanoon Citation : sooperkanoon.com/335900

Court : Mumbai

Decided On : Aug-21-1919

Reported in : (1919)21BOMLR1116

Judge : Marten, J.

Appeal No. : Cause No. 1 of 1914

Appellant : The Rheinfels

Judgement :

Marten, J.

1. This is an application for condemnation of the German Steamship Rheinfels, her freight and stores and such of her cargo as has not been delivered. She arrived in the vicinity of Bombay harbour as long ago as the 7th August 1914 in the morning. She belonged to the Hansa line; her gross tonnage was 5,512 tons, and her speed according to her officers was 10 knots. She was fitted with wireless apparatus and was bound for Bombay, her last port of call having been Aden, some 1650 miles away. War between England and Germany began at 11 P.M. on 4th August. She, therefore, left her last port before the outbreak of war.

2. Under an order of this Court of the 4th September 1914, an order was made in somewhat; similar terms to that in *The Chile* (1914) P. 212. It pronounced that the steamship Rheinfels belonged at the time of the capture and seizure thereof to

enemies of the Crown, and it ordered the detention of the ship and all her stores until further order. The ship herself was handed over to the Director, loyal Indian Marine, on behalf of the Secretary of State for India in Council. There was liberty to apply for the confiscation and condemnation of the ship, her stores and cargo.

3. It is under the liberty to apply in this order that the present application, which is by way of motion, is now made. At the date when the order of the 4th September 1914 was made, the old Prize Court Rules, which date I suppose from the Napoleonic Wars, were still in force. It was not till the 6th November 1914 that by a Notification of the Governor-General in Council the present English Prize Court Rules were brought into operation in India. 'By the English Prize Courts (Procedure) Act, 1914, which enabled these Rules to be made, there was an express provision dealing with cases where Prize Court proceedings had a ready begun before the Act came into force. One alternative was provided by Section 1, Sub-section 2 (b), viz., that the cause might be continued in accordance with the new Rules subject to such adaptations as the Court might deem necessary to make them applicable to the case.

4. Accordingly by an order of this Court, dated the 31st March 1919, it was ordered that this cause be continued in accordance with the Prize Court Rules (1914) subject to such adaptations as the Court has deemed or may deem necessary in order to make them applicable to this Cause. And the order went on to provide that this cause be set down for further hearing on a date which was subsequently altered by another order of the 29th July 1919. .

5. The reason why the Crown is now asking for condemnation of the ship is this: that it is now ascertained, so it is said, that the ship was not captured in the port or harbour of Bombay, as was the evidence before this Court in September 1914, but was captured outside that port, if one uses the word 'port' in the sense in which it is used in the sixth Hague Convention. Consequently, it is said, on behalf of the Crown, that Articles 1 and 2 of the Hague Convention do not apply.

6. The second and alternative ground on which the application is made is this, that having regard to the wireless messages which were sent from or received at the Government station, Butcher Island, Bombay, and from other circumstances, the

Court ought to infer that the Rheinfela was aware of the outbreak of hostilities between England and Germany before she entered the port of Bombay, and that consequently she was not entitled to the protection given by Articles 1 and 2 of the Hague Convention, even if she did enter the port.

7. I think it is still open to the Crown to take these points despite the order of 4th September 1914. That order only finally decided that the Rheinfels was a German ship. It left open the question whether she could be condemned as prize

8. Taking then the point as to the place of capture first, I think it established that this ship was stopped and boarded by the British military authorities, that is to say, by the Chief Examining Officer, Commander Shearme, R. I. M., and two subordinates some three miles seawards from the Prongs lighthouse. This lighthouse is at the end of a reef which juts out into the open sea for about half a mile South or South West from Colaba Point. It must not be confused with Colaba lighthouse which is on the point itself. The Officers came in a launch from the tug Rose which was then engaged in war examination purposes under military orders. On boarding the ship, these officers exercised rights, which would not, I think, have been justified in time of peace. Amongst other things, they entered the wireless cabin on the ship, they took possession of the books, they turned the wireless operators out of the cabin and then locked it up. Further, the ship then proceeded with Commander Shearme on board, and escorted by the launch, to an anchorage South of what is known as the Middle Ground Shoal, where an armed party was put on board.

9. It is also established, in my opinion, that even this anchorage on the South of the Middle Ground Shoal is not a part of the 'port,' in the sense that ships load and unload there. The evidence is that ships do not load and unload there, and that in the monsoon it would be unsafe for any ship to discharge into lighters at that spot. In fact that anchorage is the usual Examination anchorage. The place where a ship loads or unloads is further North, viz., to the North or North-East of the Middle Ground Shoal, unless, as is more usual, the ship goes into the Docks themselves. A chart of Bombay has been put in, and there the witness has marked with a cross the place South of the Middle Ground, where the Rheinfela was anchored. The

chart is an old one, and unfortunately does not take in the Prongs light-house, nor the spot where the ship was first boarded. I have not, however, thought it necessary to adjourn the case for a further chart to be put in. The oral evidence is reasonably clear, and can, if necessary, be supplemented by an Atlas, such as the Graphic Atlas of the World, which has small but useful maps of Bombay on pages 64 and 67 of the 1910 Edition. I have not had the advantage of seeing Commander Shearme in the witness box, as counsel tells me he is in England, but his subordinate officer, Mr.

10. Warden, hits given evidence before me, and given it carefully and well.

11. The significance of the place of capture lies in this, viz., that by two decisions, the one by Sir Samuel Evans in *The Mowe* (1915) P. 1 and the other by their Lordships of the Privy Council in *The Belgia* (1916) 2 A.C. 183, it has been clearly established that the word 'port' in the 6th Hague Convention does not mean a port in the sense of a fiscal or customs port, nor does it refer to territorial waters. It 'must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking' (see *The Mowe* [1916] P. 1, 15). Accordingly in the case of *The Mowe*, although she was captured in the Firth of Forth, which was within the fiscal limits of the port of Leith, she was held to be captured at sea and not in port.

12. Similarly, in the case of *The Belgia*, which was captured outside Newport, that is to say, outside the entrance to the river Usk, which is the river for Newport, there, too, the ship was held not to have entered a port.

13. So, too, in *The Erymanthos* (1914) 1 Br. & Col P.C. 339, it was held by the Malta Prize Court that the ship, though captured at the Malta Examination anchorage, was not captured in port.

14. The 6th Hague Convention, or rather the English translation of it, will be found on page 442 of the English Manual of Emergency Legislation. Article I runs as follows:-

When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it.

15. Then it goes on:-

The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

16. Stopping there, the decisions I have referred to establish that for Art. 1 to apply, a ship must 'enter a port.' Therefore, if she is captured at sea before she enters a port, Art. 1 does not apply.

17. Then Article 2 provides:-

A merchant-ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding Article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation.

18. But there, again, she has to be in the enemy port. If she is captured before that, then the Article does not apply.

19. Article 3 deals with ships which left their last port before the war as here and are encountered at sea while still ignorant of hostilities. I use the words 'at sea' advisedly, as the English translation 'on the high Seas' appears to be a mistake. (See *The Mowe* (1915) P. 1, 16). They also must not be confiscated but only detained. It has, however, been decided that this Article does not apply to German ships, because Germany did not agree to this particular Article, and consequently her ships cannot claim the benefit of it. That was decided in *The Marie Glaeser* [1914] P. 218 and also in *The Perkeo* (1914) 1 Br. & Col P.C. 136. Accordingly, I have only to deal with Arts. 1 and 2.

20. Turning then to the facts of this case, I have already said that I am satisfied the ship was stopped and boarded well outside the Prongs light-house. In saying that, I did not overlook the original evidence, viz., the joint affidavit of Commander Warden and Commander Shearme of 10th August 1914, in which Commander Shearme stated that the ship arrived in the 'harbour' of Bombay on the 7th August and that on the same day she was captured by him and his crew assisted by the Examination Battery in the 'harbour' of Bombay, and that a military guard was placed on board in charge of the Steamship and her papers. So, too, in the answers to interrogatories administered to the Master and Officers of the German ship, they all say that she was taken and seized in Bombay 'harbour'.

21. Curiously enough, in *The Belgia* (1915) 1 Br. & Col. P.C. 303 Sir Samuel Evans had very similar evidence before him; that is to say, there was an affidavit by the Surveyor of Customs saying that the ship was seized as prize for the use of His Majesty in the 'port' of Newport. Similarly the writ in the action described the ship as having been seized at the port. (See page 305). Sir Samuel Evans in his judgment stated:-

The circumstances under which this vessel was captured have been fully stated to me, and I must decide the case in accordance with what was actually done, and not in accordance with any language, accurate or inaccurate, which may have been used by the laymen in and about the port of Newport at the time of the commencement of this war, when people were not familiar with the nomenclature, or with the provisions which one has made since.

22. Then he says :-

I find in fact, that this vessel was captured at sea after the outbreak of hostilities.

23. Then he describes the place and proceeds :-

Being captured there and in these circumstances, I have come to the conclusion that she was captured at sea. If that is right, I need not trouble at all about the Hague Convention No. VI, Articles 1 and 2; but in deference to the argument of counsel for the claimants I will say a word or two about them.

24. That was the decision which on appeal was affirmed by the Privy Council in *The Belgia* [1916] 2 A.C. 183.

25. Under the above circumstances, I am satisfied that this ship, whether she was captured outside the Prongs light-house or on this Examination ground South of the Middle Ground, had not entered 'the port' of Bombay within the meaning of the Hague Convention. But I base my decision primarily on this, viz., that in my opinion she was captured some three miles outside the Prongs light-house. I am not satisfied that this spot is within the limits of the fiscal port of Bombay, but assuming that it is, I think it clear on the authorities that this spot is not within the 'port' of Bombay, as that expression is used in the Hague Convention.

26. I also hold on the evidence that she was captured and seized at this spot. Even, however, if she was not captured and seized until she reached the Examination anchorage South of the Middle Ground, I should still hold that she had not entered the 'port' in the above sense. That anchorage may be a 'roadstead', but as pointed out by Sir Samuel Evans in *The Mowe* [1915] P. 1, 16, 17, in the French text of the Conventions, 'the word 'ports' is used in various places in conjunction with, but in contradistinction to, roadsteads and to territorial waters. See Convention XIII, where the words 'les ports, les rades, ou les eaux territoriales' are frequently used.'

27. It follows that in my opinion the 6th Hague Convention does not apply to this ship and that accordingly she ought to be condemned as a lawful prize.

28. In the view, therefore, which I take, it is unnecessary to decide the second ground on which the Crown has asked me to condemn the ship, viz., her knowledge of the outbreak of hostilities. The evidence does not establish expressly that the Rheinfels either sent or received any message showing that war between England and Germany had broken out. It is all a matter of inference. She was at the time on a voyage from Aden to Bombay. She no doubt was fitted with the Telefunken system of wireless telegraphy, which would enable her to receive messages from wireless stations in Germany. She would also be able to receive the messages which were sent out from the Butcher Island Radio Station. It is also proved to my satisfaction that as from the morning of the 5th August to the

afternoon of the 6th August, the operator in charge of this radio station was sending out messages to British ships warning them that war had broken out and that they must not enter any German Port It is clear also that from about 7-10 A. M. on the 6th August, the Rheinfels was in wireless communication with Butcher Island, being then some 240 miles away. Her wireless system was a different one, but she used the same wave length as the Marconi system, and accordingly could pick up the messages sent out from Butcher Island. Her wireless system was also in working order. One can tell that from the messages she sent. She was also near the City of Lahore which was also bound for Bombay and receiving messages from Butcher Island.

29. On the other hand, there is this that the Captain did go straight into Bombay and made no attempt to deviate and run for Marmagoa or any other port. Further, he kept up communication and gave his distances. Thus his message at 5-55 P. M. on the 6th stated that he was 130 miles off. In so doing, he was adding to his risk of being captured on the high seas, and it is rather more consistent with his not knowing that war had broken out than with the knowledge that it had. Again, if he knew that war had broken out, but decided the safest course was to go to Bombay, it might have assisted him to have arrived with his wireless out of order, supposing a plausible excuse could be given for that H.M.S. Dartmouth evidently thought it likely the Captain would make for Marmagoa, if he knew of the outbreak of war, for she set out in the afternoon of the 6th to intercept the Rheinfels there. Further, it appears by the answers to interrogatories that the wireless operators were the 3rd and 4th officers. Prima facie these officers would normally be attending to their ordinary duties as 3rd and 4th officers and would have little time left for wireless messages. I cannot, therefore, assume that this cargo boat would necessarily pick up all the messages which a passenger liner might, for the latter might keep two operators exclusively engaged in the wireless cabin.

30. I have been referred by counsel to the case of *The Gutenfels* (No. 2), (1916) 2 Br. & Col. P.C. 136 where Mr. Justice Cator, in giving judgment in the Egyptian Prize Court, said :-

The sole rule upon which a Prize Court can act is to assume that every ship fitted with wireless apparatus receives from its Government either directly or by transmission from other ships, prompt news of the outbreak of hostilities between its own and any other country.

31. He, however, held on the facts that the ship was ignorant of the outbreak of hostilities. That case went on appeal to the Privy Council on another point (*The Gutenfels*) 1916 2 A.C. 112, where the judgment was varied, and an order made as in the case of *The Chile*. Their Lordships did not, however, deal with the above proposition, and I do not think I need either. I have arrived at a definite decision on the first point, and I do not think it necessary to arrive at a definite finding either of fact or law on the second point.

32. Having regard to my decision on the first point, there will be a decree for the condemnation of the ship, her stores and tackle and also the freight which is in the hands of the Collector of Customs of Bombay. He, I am told, occupies the position of Admiralty Marshal. There is also a small sum in his hands of Rs. 1295-13-1 representing the net proceeds of certain undelivered cargo on the ship. Nearly all the cargo has been delivered under orders made by this Court from time to time, and this small balance represents unclaimed or undelivered cargo. I condemn this balance also as representing cargo on an enemy ship.

33. As regards the form of the order, the Admiralty Registrar will no doubt look at the Forms of Order contained in the Schedule to the English Prize Court Rules, (1914) Form No. 53; (See *English Manual of Emergency Legislation*, p 331). They will require some adaptation to the present case. The draft order is to be shown to me before it is passed and entered.

34. As regards the costs, I see there are certain reserved costs here. I will give a general direction that the costs of the Crown are to be paid out of the proceeds in the hands of the Collector of Bombay. Subject to those costs, there will be a direction that the Collector do transfer the moneys in his hands to the Crown or as the Crown may direct. If the Crown does not require taxation or any special order as to costs, the whole fund can be transferred.

35. I will reserve liberty to apply in case there are any other points which may require the Court's direction.

36. There is one point of practice which I should like to mention and that is this. The cause has come before me on viva voce evidence, and certain officers have been brought down to Bombay for that purpose. One has had to come from such a distant place as Rawalpindi. Should however a similar case arise in the future, I think the Advocate General should consider whether it is not possible under the Prize Court Rules 1914 to give evidence by affidavit. The officers of the ship concerned in the capture can certainly give evidence by affidavit (see Order XV, Rule 2 (b)): and I should have thought that other evidence by affidavit might properly be admitted by the Judge under Order XV, Rule 2 (e). There may be cases in which viva voce evidence is essential, but in many it is not, Further, in war time, naval and military officers cannot be spared for attendance in Law Courts, and the same observation applies to wireless operators and censor or cipher experts. My recollection of the English practice is that affidavit evidence was principally used, and that it was by no means confined to officers of the capturing ship. I think that will probably be found a far more convenient course in every way than what has taken place to-day. Not only will it save the time of the Court, but it will also save officers being taken from their ordinary duties or brought by long journeys from the other end of India.

37. One other point I should also mention. If any matter of the Hague Convention comes up again, there should be a proper official publication of the Hague Convention for use by the Court. I mean an official publication containing the original French text and the English translation. Counsel for the Crown were provided with this in England, and my recollection is of a blue book with the two texts in parallel columns. If there are no copies of this in Bombay, it should, I think, be obtained from England as the French text is material.

38. I am also told by the Advocate General that the text of the Peace Treaty has not yet been received here: and that he does not know whether it has any provision with regard to the 6th Hague Convention. I have not, however, thought it necessary to defer my decision till that information was supplied. The question

whether the 6th Hague Convention is binding at all as between England and Germany was left open in *The Gutenfels*, (1916) 2 A.C. 112 and again in *The Prinz Adalbert*, [1918] A.C. 500 and I of course have not dealt with that question.

39. Judge's Note.-In correcting the shorthand notes of the above judgment, I had occasion to refer to the Butcher Island Radio log, Ex. C. I there found that in the early morning of 7th August 1914, this station was recording messages from Nauen (in Prussia) sent out in cipher. This was not mentioned to me at the hearing and is in favour of the Crown. The answers to interrogatories denied however the possession or knowledge of any Code (except the International Code): and as there is no evidence from the Naval Intelligence Department to show that German cargo ships would know any cipher code of the German Government, it does not perhaps carry the matter much further. Nor does it follow that the 8rd and 4th officers were then engaged in the wireless cabin. On the whole, therefore, I have thought it unnecessary to have the case set down for further hearing.

40. THE order as eventually drawn up was without prejudice to any question whether the property thereby condemned as prize was droits of the Crown or droits of Admiralty (see *The Abonema*, *The Hillerod*, *The Florida*, *The Albania*, *The Adjudant*, (1919) P. 41, 56 and *The Belgia* (1916) 2 A.C. 183.

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