Chung Chuck Vs. Rex

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Court : Privy Council

Decided On : Nov-25-1929

Judge : Lord Chancellor, Lords Merrovale, Atkin, Thankerton &Amp; Russell of Killowen

Appeal No. : Privy Council Appeals Nos. 73 and 74 of 1929 (From British Columbia)

Appellant : Chung Chuck

Respondent : Rex

Advocate for Pet/Ap. : H. Wood and C.F.R. Pancott, for Appellant; H.B. Robertson and T. Mathew, for Opposite Party. H.P. Macmillan, F.P. Vercoe and S. Hall, for Intervener. Solicitors for Appellant, Black and Redden; Solicitors for Respondent, Gord, Hyell and Co.

Judgement :

The Lord Chancellor:

These are consolidated appeals from a judgment of the Court of Appeal of British Columbia, and they arise out of the prosecutions instituted against the appellants for offences against the Produce Marketing Act (Statutes of British Columbia, 1926-27. Chap. 54), as amended by the Produce Marketing Act Amendment Act (Statutes of British Columbia, 1928, Chap. 39), and certain regulations and orders made thereunder.

The appeals are brought in pursuance of leave granted to the appellants by the Court of Appeal of British Columbia. Though the proceedings in the Courts below were somewhat different in form, both appeals raise the same point for decision here. The appellant in the first appeal, Chung Chuck, who resided and grew potatoes within the area in question in 1928, was charged on 8th August 1928, with unlawfully marketing potatoes on 29th June 1928, within British Columbia without the written permission of the Mainland Potato Committee, and was convicted and fined $ 10, and in default of payment, one month's imprisonment. The appellant applied by way of habeas corpus and writ of certiorari for his discharge from custody, alleging that the said Produce Marketing Act was ultra vires of the legislature of the Province of British Columbia, for certain reasons which for the moment need not be set forth. On 27th August 1918, Murphy, J., dismissed the appellant's application, holding that the statute in question did not infringe upon the powers of the Dominion Parliament under heads (2) and (27), S. 91, British North America Act; nor upon S. 498, Criminal Code, Revised Statutes of Canada 1927, Chap. 36, and further holding that if the statute did infringe upon S. 498 this section was ultra vires of the Dominion Parliament. It is unnecessary to discuss in detail the circumstances giving rise to the second appeal. The appeals-which have been consolidated-raise the same point.

The appellant, Chung Chuck, appealed to the Court of Appeal, and on 8th January 1929, the appeal was unanimously dismissed. In Wonq Kit's case, the appellant's acquittal by the Police Magistrate having been upheld by the Supreme Court, the Crown was the appellant in the Court of Appeal, and that appeal was allowed.

As already stated, the Court of Appeal granted leave to the appellant in both cases to appeal to His Majesty in Council. The Attorney-General of the Province of British Columbia put in a petition in which he denied the competency of the Court of Appeal to give leave. He says in para. 12 of his petition :

"That your petitioner respectfully submits that the conviction of the appellant by the said stipendiary Magistrate on the said 8th day of August 1928, was a conviction in a criminal case in respect of a breach of a statute passed by the legislature of the Province of British Columbia."

Then he cites the case of Nadan v. King (1) and says :

"It was held by the Lords of the Judicial Committee of the Privy Council that such a conviction was within S. 1025, Canadian Criminal Code, Revised Statutes of Canada, 1906. Chap. 146."

Then he says in para. 14 :

"That the said S. 1025, Canadian Criminal Code provides inter alia as follows : ' No appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.' "

Then he submits that by reason of the matters set forth in the paragraphs referred to the Court of Appeal of British Columbia had no jurisdiction to make the order under which they gave leave to appeal. That particular contention is supported by the Attorney-General of the Dominion of Canada, and a preliminary objection is taken that these appeals are not competent because the Court of Appeal of British Columbia had no power to give leave to appeal. In those circumstances it is incumbent upon the appellants to show two things, and they took two points. First of all they say :

"This matter was not a criminal matter at all, and therefore we have a right to appeal, it being a civil matter, or at any rate, not a criminal matter;" and secondly :

"Even if it is a criminal matter still, under the Order in Council of 23rd January 1911, the Court of Appeal of British Columbia had power to give us leave to appeal and we are entitled to prosecute the appeal.

With regard to the first point, was this a criminal matter The relevant section of the Act in question, which is "an Act respecting the marketing of fruit and other produce,"

is S. 20, which provides:

"Every shipper guilty of an offence against this Act shall on summary conviction, be liable, if an individual, to a penalty not exceeding $1,000 or to imprisonment for

a term not exceeding one year, and if a corporation to a fine not exceeding $10,000; and every other person guilty of an offence against this Act shall be liable on summary conviction to a fine not exceeding $1,000."

Are an offence under S. 20 and the proceedings consequent upon the offence criminal matters It appears to their Lordships that they are criminal matters. The section speaks about an offence punishable on summary conviction, exposing an individual who has been found guilty of an offence not only to a fine but to imprisonment, and in this respect it does not differ from the facts in Nadan v. King (1) where Viscount Cave, then Lord Chancellor, in giving judgment in a similar matter, said this at p. 489 of the report:

"It was argued on behalf of the appellant that neither of these appeals was brought in a "criminal case" within the meaning of the above section; but in their Lordships' opinion this argument cannot prevail. In each of the cases the appellant was charged with an offence against the public law and a sentence of imprisonment could be and was imposed."

The particular law in question in that case was not a law of this particular province; it was a law of the Province of Alberta, but the reasoning is the same, and it appears to their Lordships that the first point made by Mr. Wood, counsel for the appellants, namely that this was not a criminal matter, but was a civil matter, in which they therefore had a right to appeal, fails.

The next point to be considered is whether Mr. Wood has shown that it is competent for the Court of Appeal of British Columbia to have given leave to appeal. He quite rightly points out that in the petition of the learned Attorney-General for the Province of British Columbia supported, as it was, by the learned Attorney-General for the Dominion of Canada, S. 1025 of the Canadian Criminal Code is relied upon, and Nandan's case (1) is cited, but the view which their Lordships take of the present circumstances renders it unnecessary for them to go into those points or into any question as to a conflict between the Dominion and the Provincial Legislatures in respect of that section. As already stated it is for Mr. Wood to satisfy the Board that it is competent for him to appeal, that is to say, that it was competent for the Court of Appeal of British Columbia to give the leave to

appeal in question. The way in which he seeks to show that is by citing the Order in Council to which reference has been made. That Order in Council was passed in pursuance of the Privy Council Act of 1844 which provides that

"it shall be competent to Her Majesty by any order or orders that may from time to time for that purpose be made, with the advice of Her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty in Council from any .

Attention is called to these words:

"judgments, sentences, decrees or orders of any Court of justice within any British colony or possession abroad, although such Court shall not be a Court of error or Court of appeal within such colony or possession."

Their Lordships pause for a moment to observe that the word "decision" is not one of the words used in that section. The words are :

"judgments, sentences, decrees or orders of any Court of justice."

By an Order in Council referring to British Columbia, passed on 12th July 1887, not the present Order in Council, but the one which preceded it, it is provided :

"Whereas it is expedient that provision should be made by this Order to enable parties to appeal from the decisions of the said Supreme Court of British Columbia to Her Majesty in Council, it is hereby ordered: (1) Any person or persons may appeal to Her Majesty, her heirs and successors in her or their Privy Council from any final judgment, decree, order or sentence of the said Supreme Court of British Columbia in such manner, within such time and under and subject to such rules, regulations and limitations as are hereinafter mentioned ;

that is to say

"In case any such judgment, decree, order or sentence' "-----

Again, their Lordships pause here for a moment to point out that the word "decision" is not used in the operative part, although it is used in the recital.

-----" 'shall be given or pronounced for or in respect of any sum or matter at Issue above the amount or value of 300 sterling, or in case such judgment, decree, order or sentence shall involve, directly or indirectly, any claim, demand or question to or respecting property or any civil right amounting to or of the value of 800 sterling, the person or persons feeling aggrieved by any each judgment, decree, order, or sentence may within fourteen days next after the same shall have been pronounced, made or given apply to the said Court by motion or petition for leave to appeal therefrom to Her Majesty.' "

That being the position of affairs on and after 12th July 1887, a subsequent Order in Council was passed, which is the Order in Council to be interpreted in the present case, on 23rd January 1911. As to that Mr. Wood's contention is as follows: He says, after the passing of the last recited Order in Council, an Act was passed in British Columbia constituting the Court of Appeal, that is, the Act of 1907 of the Statutes of the Province of British Columbia, Chap. 10, which provides in S. 6 :

" The Court of Appeal hereby constituted shall be a superior Court of record. . . . And without restricting the generality at the foregoing an appeal shall lie to the Court of Appeal." then,

" (4) from every decision of the Supreme Court or a Judge thereof ... in any of the following matters or in any proceeding in connexion with them or any of turn ; "

then (e) is:

" Case stated under the "Summary Convictions Act."

Then by S. 8 it is provided :

" For all the purposes of and incidental to the hearing and determination of any matter within its jurisdiction and the amendment, execution and enforcement of any judgment or order, and for the purpose of every other authority expressedly or impliedly given to the Court of Appeal by this Act, the Court of Appeal shall have the power, authority and Jurisdiction rested in the Supreme Court. "

The way in which Mr. Wood uses that Act is this. He says the word "decision" there evidently refers to a case stated under the Summary Convictions Act, and therefore the meaning of the word "decision"-putting his argument generally-will embrace or will include a criminal cause or matter.

Their Lordships now come to the section of the new Order in Council itself. It says, subject to the provisions of these rules an appeal shall lie in certain cases which are set out in (a) and (b) of S. 2, and it is necessary to read both of those : (a) is :

" As of right from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of 500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of 500 sterling or upwards. "

It is not contended that a criminal matter is provided for in S. 2 (a), but Mr. Wood's point is it is provided for in S. 2 (b), which says :

" Subject to the provisions of these rules an appeal shall lie at the discretion of the Court, "

which Mr. Wood says has happened in this case; he says that the discretion of the Court of Appeal of British Columbia has been exercised in his favour "from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court the question involved in the appeal is one which by reason of its great general or public importance or otherwise, ought to submitted to His Majesty in Council for decision. "

"That," says Mr. Wood,

" is my charter; the Court of Appeal of British Columbia was entitled under S. 2 (b) to give me leave to appeal; they did give me leave to appeal, and therefore the preliminary objection ought to fail. "

Their Lordships have been assisted by learned counsel on all sides, Mr. Wood, Mr. Macmillan and Mr. Robert, son, by being referred to a number of cases, but in

the view that they take of the cases it is hardly necessary for them to go into them at any length, and they do not propose to do so. The first case cited was The Canadian Pacific Wine Company v. Tuley (2), which decided that the British Columbia Prohibition Act of 1916 and the Summary Convictions Act of 1915 were both valid and within the competence of the Legislature of British Columbia. The next case cited was The King v. Nat Bell Liquors (3), where their Lordships think Mr. Macmillan was right in saying that the Board decided towards the close of the judgment delivered by Lord Sumner that there was a part of the criminal law which was within the competence of the Provincial Legislature. Finally there was the case of Nadan v. King (1), where it was held that S. 1025 of the Criminal Code of Canada did not exclude the prerogative of the Crown to give leave to appeal.

None of those cases really touched the point which their Lordships have to decide, which is a very short one, that is to say, does S. 2 (b) of the Order in Council of 23rd January 1911, give the authority to the Court of Appeal which Mr. Wood claims that it does give?

First of all it is necessary to look at the recital to the Order in Council to see whether any hint can be derived from that. It appears rather as if Mr. Wood would have to contend that the Order in Council of 1911 goes further than the Order in Council of 1887, but in the recital it is said :

" And whereas it is expedient, with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the seas shall have a right of appeal to His Majesty in Council and to promoting uniformity in the practice and procedure in all such appeals, that the rules regarding appeals from the said Supreme Court contained in the said Order in Council should be revoked and provision should be made for appeals from the said Court of Appeal to His Majesty in Council. "

That appears from the recital to be an Order in Council dealing with practice and procedure and to unify the practice and procedure, as it says, in the British Dominions beyond the seas, and, if that is right, it would be a rather strong thing to give an interpretation to that Order in Council under which the new Order in Council, purporting to unify the practice, should in addition to that confer fresh

rights.

But Mr. Wood's argument proceeds in this way. He says there are two words in the definition of "judgment" which are in his favour. It will be recollected, the words are

" subject to the provisions of those rules an appeal shall lie as of right from any final judgment of the Court, "

or "at the discretion of the Court from any other judgment," and "judgment" means decree, order, sentence or decision. Their Lordships think when Mr. Wood made his first submission with regard to the word "sentence" he rather relied upon the fact that the word "sentence" was a word which was appropriate to some procedure in criminal law, but when he replied to Mr. Macmillan he did not put his case quite as high as that, nor, indeed, could he have done so. Although the word "sentence" no doubt in the minds of some people is peculiarly appropriate to criminal cases and is chiefly heard in criminal trials, there is a great difference between verdict and a sentence, and it would be very strange if leave to appeal was to be given only against a sentence and not against a conviction. As has been pointed out in the course of the argument, " sentence " is a well-known word in common law, and their Lordships do not think the word " sentence" carried Mr. Wood the distance he would like to be carried, so as to give the right to give leave to appeal in a criminal case. With regard to the word " decision," Mr. Wood says that is the word used in the Act which constitutes the Court of Appeal of British Columbia and includes reference to matters under the Summary Convictions Act, but it does not seem to their Lordships, having regard to the whole of the legislation, that any serious argument can be built upon that foundation. It has already been pointed out how the word " decision " is used. Sometimes it is used in the recital as it was used in the recital to the first of the two Orders in Council ; it is not in the original Act of Parliament, it is not in the operative words of the first Order in Council, and, although it might be said that the word " decision," if it stood alone, might possibly embrace matters both of civil and criminal law, the word " decision " is not used alone here. One cannot take one word out of the Order in Council and say it may include criminal law ; one must look at the whole of the Order in Council itself. It being perfectly clear that S. 2 (a) refers to civil matters,

when we come to S. 2 (b) the words are :

" Subject to the provisions of these rules an appeal shall lie at the discretion of the Court,"

from any other judgment, and it looks as if the word " other " refers and relates back to the same sort of judgments as those which are referred to in S. 2 (a), that is to say, a judgment.

" where the matter in dispute amounts to or is of the value of 500 sterling or upwards "- that is clearly not a criminal matter- " or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right."

The words can be satisfied in this way. It may well be contended in normal cases there is to be no appeal and no leave to appeal where the matter in dispute is under 500, but there may be some cases in the nature of a test action where, although the value of the question involved is a few shillings or a few pounds only, it may involve many thousands of pounds over the whole of the province. S. 2 (b) would involve a case like that. Finally, if one looks through the Order in Council itself one sees there a great number of provisions for the purpose of dealing with cases where leave to appeal is given which are entirely appropriate in civil matters; and not only not appropriate in criminal matter's but criminal matters do not appear to be provided for if they are included within the word " decision." Take, for example, S. 6, Order in Council. It is pointed out by Mr. Macmillan that it provides for a stay of execution which is entirely appropriate in a civil case, if leave is given to appeal, but it is not appropriate, nor indeed is there any provision made as to what is to happen to a man who has been sent to prison and special leave is given to him to appeal to His Majesty in Council.

To sum up : (1) Although the word " decision " standing merely by itself might be sufficient to cover a decision either in a civil or in a criminal case, the word does not stand by itself, but is in an Order in Council containing a number of other provisions working out the procedure ; (2) the Order in Council itself recites that it is passed for the promotion of uniformity in practice and procedure of all such

appeals, and one would not expect to find it conferring new rights of appeal when it only purports to deal with practice and procedure in appeals ; (3) the way in which S. 2 is drafted first of all in (a), where it merely relates to civil cases, and in (b), where it says that there is an appeal at the discretion of the Court from any other judgment, again points to the fact that 2 (b) is simply referring to the same class of case as 2 (a), namely to civil cases and not to criminal cases.

In those circumstances their Lordships have arrived at the conclusion that Mr. Wood has not made out either of his points. He has not made out point (1), that this is not a criminal matter. Their Lordships think it is a criminal matter. He has not made out point (2), that the Order in Council of 23rd January 1911 gave a right to the Court of Appeal to give leave to appeal in criminal matters. In the result the preliminary objection succeeds, not, indeed for the reasons already given, upon the point which is in the petition of the learned Attorney-General of British Columbia, supported by the learned Attorney-General of Canada, but upon the point that Mr. Wood has not satisfied their Lordships that it is a civil matter or that there was a right in the Court of Appeal of British Columbia to give leave to appeal in a criminal case. That being so it is unnecessary to proceed with the hearing of the appeal, the preliminary objection being a good one which must prevail.

At the last moment Mr. Wood detailed to their Lordships the great importance of this case, and he told them, and they entirely accept his statement, that there is a number of matters in British Columbia which are depending upon the decision in this case, and he asks whether their Lordships could not here and now advise His Majesty to grant him special leave to appeal. In their Lordships' opinion that would be a very inconvenient course, and they do not think it would be right to accede to it. It must be remembered that their Lordships have decided that this is a criminal matter. They do not wish in any way to decide a question which has only been mentioned at the last moment and upon which they have not heard the respondent. Their Lordships would however point out, without in any way prejudging or discountenancing any further steps which the parties may desire to take, that the final words in the report of the case of Nadan v. King (1) will make it very difficult to induce this Board to advise the granting of special leave to appeal in a criminal case.

In the result, in their Lordships' opinion, the preliminary objection succeeds, and they will accordingly humbly advise His Majesty that both appeals ought to be dismissed ; but, the respondents and the intervener not asking for them, without costs.

Appeal dismissed.