FREDERICK WILMER FAWCETT .....APPELLANT;

1964
*May 6
June 10

AND

THE ATTORNEY-GENERAL FOR ONTARIO .... RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA .... INTERVENER.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Habeas corpus—Constitutional law—Appellant committed to mental hospital for examination—Certification—Whether relevant sections of The Mental Hospitals Act authorized appellant's confinement—Whether ultra vires of the Legislature—The Mental Hospitals Act, R.S.O. 1960, c. 236—Criminal Code, 1953-54 (Can.), c. 51, s. 524(1a) [*enacted 1960-61, c. 43, s. 22*].

On October 18, 1961, the appellant, as an accused person, was remanded by a magistrate to a mental hospital for a period not exceeding thirty days for examination, pursuant to s. 524(1*a*) of the *Criminal Code*. On November 16, 1961, two medical practitioners certified that the appellant was mentally ill and a proper person to be confined in an Ontario Hospital; he was confined continuously thereafter as a certificated patient pursuant to the provisions of *The Mental Hospitals Act*, R.S.O. 1960, c. 236. The appellant applied for a writ of *habeas corpus*, and following the trial of an issue, he was found to be mentally ill and dangerous to be at large. The trial judge having decided that his confinement was according to law dismissed his application. An appeal from the trial judgment was dismissed by the Court of Appeal and the appellant then appealed to this Court.

Held: The appeal should be dismissed.

The magistrate derived the power to make the order requiring the superintendent of the hospital to admit and detain the appellant from s. 524(1*a*) of the *Criminal Code*; the terms of s. 38 of *The Mental Hospitals Act* obligated the superintendent to admit the appellant. The appellant "was admitted under section 38" within the meaning of that expression as used in s. 27 of the Act, the section under which the respondent sought to support the confinement of the appellant.

The Mental Hospitals Act was legislation in relation to the subject-matter described in head 7 of s. 92 of the *British North America Act* and not in relation to criminal procedure. The relevant provisions of the Code and those of the Act were complementary to, and not in conflict with, each other. Accordingly, the relevant sections of *The Mental Hospitals Act* were *intra vires* of the Legislature.

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*PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Hall JJ.

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v.
ATTORNEY-GENERAL FOR ONTARIO

APPEAL from an order of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Spence J. Appeal dismissed.

W. B. Williston, Q.C., and *John Sopinka,* for the appellant.

R. A. Cormack, Q.C., and *E. G. Hachborn,* for the respondent.

T. D. MacDonald, Q.C., for the Attorney General of Canada.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from an order of the Court of Appeal for Ontario[1], made on September 16, 1963, dismissing an appeal from a judgment of Spence J. pronounced on December 17, 1962, following the trial of an issue, finding the appellant mentally ill and dangerous to be at large, dismissing his application for a writ of *habeas corpus* and deciding that his confinement was according to law.

The appellant is a farmer; prior to his confinement he resided on a farm in the Township of Euphrasia in the County of Grey. On October 18, 1961, the appellant appeared before His Worship Magistrate Stewart at Meaford. The appellant at that time was in custody charged with the following offences: (i) that on August 28, 1961, he did without lawful excuse point a firearm at George Seabrook contrary to s. 86 of the *Criminal Code*; (ii) that on August 28, 1961, he did wilfully and without legal justification commit damage to certain personal property under the value of $50 belonging to Stuart Howey, to wit: an automobile tire contrary to s. 373(1) of the *Criminal Code*; (iii) that on August 28, 1961, he did strike George Seabrook with his arm and thereby commit a common assault contrary to s. 231(1) of the *Criminal Code*; (iv) that on September 18, 1961, he did unlawfully assault W. J. E. Ferguson a peace officer engaged in the execution of his duty, contrary to s. 232(2)(*a*) of the *Criminal Code*; (v) that on September 18, 1961, he did unlawfully and wilfully obstruct W. J. E. Ferguson, a peace officer in the

[1] [1964] 1 C.C.C. 164.

execution of his duty, contrary to s. 110(*a*) of the *Criminal Code*; and (vi) that on September 10, 1961, he did unlawfully drive a motor vehicle upon a highway carelessly contrary to s. 60 of *The Highway Traffic Act* of Ontario. All of these offences were charged as having been committed in the Township of Euphrasia.

On each of the informations relating to the first five of the charges set out in the preceding paragraph there appears the following endorsement:

October 18, 1961.

After hearing medical evidence of Dr. M. D. Tuchtie, Dr. Ronald E. Stokes, Dr. J. Moldofsky, and Dr. Alex. S. Szatmari, and at the request of the Crown Attorney, I remand Fred Fawcett for 30 days to The Ontario Hospital at Penetanguishene, Ontario, for observation and treatment, under the authority vested in me under Section 451-c(al) C.C.C., until Nov. 17/61 at 10 a.m.

(Sgd.) Alan S. Stewart
P.M.

Section 451(*c*) of the *Criminal Code* deals with the powers of a justice holding a preliminary inquiry, and was not the appropriate section as the appellant was before Magistrate Stewart not for preliminary inquiry but for trial. On October 18, 1961, the learned magistrate signed a warrant of remand in accordance with section 524(1*a*) of the *Criminal Code,* which so far as relevant provides:

(1*a*) A court, judge or magistrate may, at any time before verdict or sentence, when of the opinion, supported by the evidence of at least one duly qualified medical practitioner, that there is reason to believe that

(*a*) an accused is mentally ill, . . .

remand the accused, by order in writing, to such custody as the court, judge or magistrate directs for observation for a period not exceeding thirty days.

This warrant of remand was in respect of the charge of obstructing a peace officer which is numbered (v) above.

On October 31, 1961, an application made on behalf of the appellant for a writ of *habeas corpus* came before Donnelly J. and was dismissed. The recitals in the order read as follows:

Upon the application of Counsel on behalf of Frederick Fawcett, upon hearing read the affidavit of Frederick Fawcett and the transcript of evidence herein, and the material filed in the presence of Counsel for the said Frederick Fawcett and the Attorney General for Ontario, and upon hearing what was alleged by Counsel aforesaid, it appearing that there was ample evidence before the Learned Magistrate to justify a finding that the said Frederick Fawcett was mentally ill; and it appearing that the Learned Magistrate has now substituted a warrant of committal pursuant to Sec-

tion 524(1*a*) of the Criminal Code for the original warrant of committal pursuant to Section 451(*c*) of the Criminal Code;

On November 16, 1961, two medical practitioners certified that the appellant was mentally ill and a proper person to be confined in an Ontario Hospital. The appellant was never returned before Magistrate Stewart and has ever since November 16, 1961, been confined in an Ontario Hospital as a certificated patient pursuant to the provisions of *The Mental Hospitals Act,* R.S.O. 1960, c. 236, hereinafter referred to as "the Act". He is at present confined in the Ontario Hospital at 999 Queen Street, West, in the City of Toronto.

On September 25, 1962, pursuant to an order of Ferguson J. a writ of *habeas corpus* was issued directed to the superintendent of the Ontario Hospital at 999 Queen Street, West, Toronto. The return to this writ came on before Landreville J. and on October 9, 1962, he directed the trial of an issue as to the appellant's sanity and as to whether he was dangerous to be at large and adjourned the motion to be disposed of by the judge presiding at the trial of the issue. The issue so directed was tried and the matter disposed of by Spence J. as set out in the opening paragraph of these reasons.

The Court of Appeal agreed with the findings made by Spence J. that the appellant was mentally ill and dangerous to be at large. Before this Court counsel for the appellant did not seek to have us interfere with these concurrent findings of fact; he attacked the judgments below on the ground that the confinement of the appellant in the Ontario Hospital at Penetanguishene was not according to law.

It is submitted for the appellant that on their true construction the relevant sections of the Act do not authorize the confinement of the appellant in the circumstances of this case and, alternatively, that if they purport to do so they are *ultra vires* of the Legislature of the province.

Section 27 of the Act is as follows:

27(1) Notwithstanding anything in subsection 2 of section 21, any mentally ill person who has been admitted as a voluntary patient or a habituate patient, or any person admitted under section 22 or 38, or any person detained under section 57, may be continued as a certificated patient upon the certificates of two medical practitioners with the accompanying history record in the prescribed form.

(2) At least one of the certificates required by subsection 1 shall be issued by a medical practitioner who is not an officer of the Department,

and a certificate upon which any patient was admitted to an examination unit is not a certificate for the purpose of this section.

(3) Upon a person being certificated under this section, he is thereafter during the time he is a patient a certificated patient within the meaning of this Act and is subject to the provisions of this Act and the regulations respecting certificated patients.

It is under this section that the respondent seeks to support the confinement of the appellant. It is clear that the appellant was certified in accordance with the terms of this section if at the time he was certified he should properly be described as "a person admitted under section 38".

Section 38 is as follows:

38(1) Any person may be admitted to an institution upon the order of a judge or magistrate if the person has been apprehended either with or without warrant and charged with any offence, if the order is accompanied by the prescribed history form and if the order is for a period of not more than sixty days, and any order made under this section shall direct that the person shall be conveyed to the institution most conveniently situated to the place where the order is made.

(2) Before the expiration of the time mentioned in such order, the superintendent shall report in writing as to the mental condition of the person to the judge or magistrate.

(3) Where in the opinion of the superintendent the person is mentally ill or mentally defective, he shall direct the examination of the person as provided for by section 27, and if the examining medical practitioners certify the person to be mentally ill or mentally defective, he shall be detained as a certificated patient and is subject to all the provisions of this Act and of the regulations respecting certificated patients.

(4) Where in the opinion of the superintendent the person is neither mentally ill nor mentally defective and where the superintendent has failed to obtain certificates in the prescribed form, he shall discharge the person to the custody of the court by which he was ordered to the institution.

From the recital of facts given above it appears that the appellant was admitted to the Ontario Hospital at Penetanguishene upon the order of Magistrate Stewart, that the appellant had been apprehended and charged with an offence and that the order was for a period of not more than sixty days. The record is silent as to whether the order was "accompanied by the prescribed history form" referred to in s. 38(1); but no point seems to have been made of this in the Courts below and I did not understand any argument to be founded on the fact, if it be the fact, that the history form did not accompany the order of the magistrate.

Under these circumstances I agree with the view expressed by Schroeder J.A. that the magistrate derived the power to make the order requiring the superintendent of the Ontario

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Hospital at Penetanguishene to admit and detain the appellant from s. 524(1*a*) of the *Criminal Code*; and that the terms of s. 38 of the Act obligated the superintendent to admit the appellant. It may well be that even if s. 38 had not been enacted the provisions of the *Criminal Code* would have been sufficient to impose the obligation on the superintendent but, be that as it may, when the Act is read as a whole it is my opinion that the appellant was "admitted under section 38" within the meaning of that expression as used in s. 27 of the Act.

On the constitutional question also I am in agreement with the view of Schroeder J.A. that the Act is legislation in relation to the subject-matter described in head 7 of s. 92 of the *British North America Act* and not in relation to criminal procedure, that the relevant provisions of the *Criminal Code* and those of the Act are complementary to, and not in conflict with, each other. It follows that the sections of the Act impugned by the appellant are *intra vires* of the Legislature.

I agree with the submission of counsel for the Attorney General of Canada that if a particular case should arise in which the circumstances were such that the provisions of the *Criminal Code* would bring about one result and those of the Act would bring about a different result then the provisions of the *Criminal Code* would prevail; but there are no such circumstances in the case at bar.

The case of *Trenholm v. Attorney-General of Ontario*[1] does not assist the appellant. In that case it was sought to justify the detention of the appellant by the production of a warrant signed by the Lieutenant-Governor, which, under the relevant statutory provisions, he had the power to issue only if the person ordered to be detained were imprisoned for an offence or "imprisoned in safe custody charged with an offence". At the time the Lieutenant-Governor's warrant was signed the appellant was not so imprisoned and this Court held that for that reason the warrant was not legally issued.

I would dismiss the appeal but would make no order as to costs.

Appeal dismissed.

Solicitor for the appellant: Sol. Gebirtig, Toronto.

Solicitor for the respondent: R. A. Cormack, Toronto.

[1] [1940] S.C.R. 301, 1 D.L.R. 497.