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IN RE JACK GOLDHAR

Courts—Jurisdiction—Habeas corpus—Criminal law—Common law offences—Section 57 of the Supreme Court Act, R.S.C. 1952, c. 259—Jurisdiction of a judge of the Supreme Court of Canada—Sufficiency of commitment order—The Penitentiary Act, R.S.C. 1952, c. 206, ss. 49(1), 51.

A judge of the Supreme Court of Canada has jurisdiction under s. 57 of the *Supreme Court Act* to issue a writ of *habeas corpus ad subjiciendum* in cases of commitment for the offence of conspiracy.

As it is no longer possible to prosecute a person for an offence at common law, there can no longer be a commitment in a criminal case for such an offence, and any offence now charged under the *Criminal Code* must be considered as a criminal case under an Act of the Parliament of Canada, within the meaning of s. 57 of the *Supreme Court Act*.

Held: The application should be refused. There was adequate authority for the detention of the applicant.

APPLICATION for the issuance of a writ of *habeas corpus ad subjiciendum*. The applicant was sentenced in May 1956 to 12 years' imprisonment after being convicted by a jury of conspiracy to have in his possession a drug for the purpose of trafficking, an indictable offence under the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, contrary to the *Criminal Code*. Application refused.

M. Robb, Q.C., for the applicant.

D. H. W. Henry, Q.C., and *L. E. Levy*, for the Attorney-General of Ontario.

MARTLAND J. (in Chambers):—Application has been made on behalf of Jack Goldhar, under s. 57 of the *Supreme Court Act*, for the issuance of a writ of *habeas corpus*. That section provides as follows:

57. (1) Every judge of the Court, except in matters arising out of any claim for extradition under any treaty, has concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of habeas corpus ad subjiciendum, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

(2) If the judge refuses the writ or remands the prisoner, an appeal lies to the Court.

The applicant was convicted and sentenced, at the City of Toronto, in the County of York, on April 27, 1956, and May 4, 1956, respectively, by His Honour Judge Macdonell and a jury, of conspiring to have in his possession a drug, to wit, diacetylmorphine, for the purpose of trafficking.

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an indictable offence under the *Opium and Narcotic Drug Act,* contrary to the Criminal Code. He is presently a prisoner in Kingston Penitentiary under a sentence of 12 years' imprisonment.

Notice of the application was served upon the Attorney-General of Ontario and the Director of Public Prosecutions for the Province of Ontario and the Crown was represented at the hearing of this application.

At the outset counsel for the Crown submitted that there is no jurisdiction for the issuance of the writ in this case. He contended that conspiracy was an offence at common law and that, therefore, there was no authority under s. 57 to issue a writ of *habeas corpus* because there had been no commitment in a criminal case under an Act of the Parliament of Canada. He relied upon the decision of the Supreme Court of Canada in *Smith v. R.*[1] as authority for this proposition. In that case Rinfret J. (as he then was), delivering the judgment of the majority of the Court, said at p. 582:

> That the jurisdiction of the judges of the Supreme Court of Canada in respect of habeas corpus extends only to offences which are criminal by virtue of statutes of the Parliament of Canada and not to offences which were criminal at common law is, we think, the true effect of section 57 of the Supreme Court Act. (See In re Pierre Poitvin, 1881 Cassels' Digest, 327, and In re Robert Evan Sproule, (1886) 12 S.C.R. 140, in each of which cases the commitment was for murder). In the Sproule case we draw particular attention to the reasons at pages 184, 203 and 240.

He cited, with approval, the opinion enunciated by Duff J. (as he then was), sitting in chambers in *In re Charles Dean*[2]:

> The jurisdiction extends only, I think, to those cases in which the "commitment" has followed upon a charge of a criminal offence which is a criminal offence by virtue of some statutory enactment of the Parliament of Canada; it does not, in my opinion, extend to cases in which the "commitment" is for an offence which was an offence at common law or under a statute which was passed prior to Confederation and is still in force.

I must, however, consider the impact of the amendments of the Criminal Code enacted since these cases were decided. Section 15 of the *Criminal Code,* as it existed prior to April 1, 1955, provided as follows:

[1] [1931] S.C.R. 578, 4 D.L.R. 465, 56 C.C.C. 51.
[2] (1913), 48 S.C.R. 235 at 236, 9 D.L.R. 364, 20 C.C.C. 374.

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15. Where an act or omission constitutes an offence, punishable on summary conviction or on indictment, under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence.

It recognized the possibility of prosecution for offences at common law. The offences in question in *In re Charles Dean* and *Smith v. R.* were offences at common law.

However, s. 8 of the *Criminal Code,* which became effective on April 1, 1955, specifically provides as follows:

8. Notwithstanding anything in this Act or any other Act no person shall be convicted

(*a*) of an offence at common law,

(*b*) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(*c*) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the coming into force of this Act, to impose punishment for contempt of court.

Section 7 preserves the criminal law of England that was in force in a province before the new *Criminal Code* came into force, except as altered, varied, modified or affected by the new *Criminal Code,* or any other Act of the Parliament of Canada.

It would appear that, although the rules and principles of the common law respecting crimes, including defences to charges of crime, were preserved by s. 7, it is no longer possible to prosecute a person for an offence at common law. Consequently it appears to me that a person can no longer be committed in a criminal case for a common law offence and that any offence now charged under the *Criminal Code* must be considered as a criminal case under an Act of the Parliament of Canada, within the meaning of s. 57 of the *Supreme Court Act.*

I, therefore, hold that there is jurisdiction under s. 57 to issue a writ of *habeas corpus* on this application, if, in the circumstances, the applicant is entitled to it, and I proceed to consider the merits.

The applicant has filed, on this application, an affidavit of Ernest Valerie Swain, a solicitor of the City of Kingston, to which is annexed a copy of a document entitled "Calendar of Sentences-Sessions". In it J. W. Copeland, Deputy Clerk of the Peace, York, certifies, under the seal of the Court of General Sessions of the Peace in and for the County of York, that "at a General Session of the Peace held at the Court House in the City of Toronto in and for the County of York the following prisoner, having been duly convicted of the crime set opposite his name, was sentenced as hereunder stated by His Honour Judge Ian M. Macdonell". The certificate is dated May 4, 1956. Beneath this certificate there follow four column headings entitled respectively: "Name of Prisoner", "Offence", "Date of Sentence" and "Sentence". Beneath these respective column headings there appears the following material: "Goldhar, Jack", "Conspiracy (to have in possession a drug for the purpose of trafficking)", "4th May, 1956" and "Twelve years in the Kingston Penitentiary".

The affidavit states on information that the said Calendar of Sentences-Sessions is the only document received at the Records Office of the Kingston Penitentiary when a person is convicted by a judge at a Court of General Sessions of the Peace or by a judge at a County Court and that there was no warrant of committal held by the keeper of Kingston Penitentiary against Jack Goldhar.

Counsel for the applicant contended that this document was not an adequate authority for the detention of the applicant and referred to s. 49(1) and s. 51 of the *Penitentiary Act*.

Section 49(1) reads as follows:

> 49. (1) The sheriff or deputy sheriff of any county or district, or any bailiff, constable, or other officer, or other person, by his direction or by the direction of a court, or any officer appointed by the Governor in Council and attached to the staff of a penitentiary for that purpose, may convey to the penitentiary named in the sentence, any convict sentenced or liable to be imprisoned therein, and shall deliver him to the warden thereof, without any further warrant than a copy of the sentence taken from the minutes of the court before which the convict was tried, and certified by a judge or by the clerk or acting clerk of such court.

The relevant portions of s. 51 provide:

> 51. The warden shall receive into the penitentiary every convict legally certified to him as sentenced to imprisonment therein, unless certified by the surgeon of the penitentiary to be suffering from a danger-

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ously infectious or contagious disease, and shall there detain him, subject to the rules, regulations and discipline thereof, until the term for which he has been sentenced is completed, or until he is otherwise legally discharged, . . .

Subsection (1) of s. 49 relates to the conveyance of a convict to a penitentiary. Section 51 relates to the authority for his detention at the penitentiary.

It would seem to me that the document in issue does legally certify that the applicant is sentenced to imprisonment at Kingston Penitentiary for a term of twelve years.

The authorities establish that on an application of this kind I am not entitled to enter into the merits of the case, but am limited to an inquiry into the cause of commitment as disclosed by the documents which authorize the detention. There is nothing disclosed in the document in question to indicate that the commitment of the applicant to Kingston Penitentiary was in any way irregular.

If, however, I am wrong in my opinion as to the adequacy of this document under s. 51 of the *Penitentiary Act*, I should go on to say that counsel for the applicant acknowledged that, if inadequate, it would be in order for the warden of Kingston Penitentiary to be permitted to obtain a proper minute. His chief objection to the questioned document was that the offence was not properly described in it in that the description of the offence failed to follow the wording of the indictment.

A copy of the indictment was filed on the application and the relevant portions of it allege that Jacob Rosenblat, Jack Goldhar, Leonuell Joseph Craig and Hennelore Rosenblum, at the City of Toronto, in the County of York, and elsewhere in the Province of Ontario, between March 19 and August 6, 1955, unlawfully did conspire together the one with the other or others of them and persons unknown to commit the indictable offence of having in their possession a drug, to wit, diacetylmorphine, for the purpose of trafficking, an indictable offence under the *Opium and Narcotic Drug Act*, contrary to the *Criminal Code* of Canada.

The main point argued on behalf of the applicant is that the indictment alleges a conspiracy between March 15 and August 6, 1955. Part of the period mentioned (*i.e.*, that portion prior to April 1) was prior to the coming into force of the new *Criminal Code*.

Under s. 573 of the old *Criminal Code* the maximum penalty for conspiracy to commit an indictable offence was seven years. Under s. 408(1)(*d*) of the new *Criminal Code* the maximum penalty for conspiracy to commit an indictable offence (other than conspiracy to murder, conspiracy to bring a false accusation or conspiracy to defile) is the same as the penalty imposed in respect of the particular indictable offence regarding the commission of which there has been a conspiracy. In the case of having in possession a drug for the purpose of trafficking, the maximum penalty, under s. 4(3)(*b*) of the *Opium and Narcotic Drug Act,* is fourteen years.

Counsel for the applicant then refers to s. 746(2)(*b*), which provides that:

> (2) Where proceedings for an offence against the criminal law are commenced after the coming into force of this Act the following provisions apply, namely,
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> * * *
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> (*b*) if the offence was committed before the coming into force of this Act, the penalty, forfeiture or punishment to be imposed upon conviction for that offence shall be the penalty, forfeiture or punishment authorized or required to be imposed by this Act or by the law that would have applied if this Act had not come into force, whichever penalty, forfeiture or punishment is the less severe;

He contends that, applying this subsection, the maximum penalty which could be imposed upon the applicant was seven years.

In order to succeed on this argument it would have to be established upon the material before me that the offence for which the applicant was convicted was actually committed before April 1, 1955. There is nothing to establish that it was. The material does establish that the applicant was convicted and sentenced by a Court of competent jurisdiction of the offence charged. I was informed by counsel that an appeal had been taken against the conviction to the Court of Appeal of Ontario and was dismissed. It appears that there was no appeal against sentence and that the point now taken in argument was not raised.

In *In re Sproule*[1], Strong J. (as he then was) says:

> If any proposition is conclusively established by authorities having the support of the soundest reasons, it is that, after a conviction for felony by a court having general jurisdiction of the offence charged,

[1](1886), 12 S.C.R. 140 at 204.

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a habeas corpus is an inappropriate remedy, the proper course to be adopted in such a case, being that to which the prisoner in the present case first had recourse, viz.: a writ of error. The anomalous character of such an interference with the due course of justice, in intercepting the execution of the judgment of a court of competent jurisdiction, and by which a single judge in chambers might reduce to a dead letter the considered judgment of the highest court of error, would to my mind be itself sufficient even without authority to induce a strong presumption that such a state of the law could not possibly exist.

For the above reasons the application is refused.

Application refused.