HIS MAJESTY THE KING (DEFENDANT)..... } APPELLANT;

1919
*Oct. 14.
*Oct. 15, 16.

AND

JEU JANG HOW (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FROM BRITISH COLUMBIA.

Appeal—Jurisdiction—Habeas corpus—"Criminal charge"—Person at large—R.S.C., c. 139, ss. 39 (c.) and 48 "Supreme Court Act,"—8 & 9 Geo. V., c. 7, s. 3.

A Board of Enquiry, proceeding under the "Immigration Act," ordered the deportation of the respondent, who thereupon applied for a writ of *habeas corpus*. The writ was refused by the trial judge; but the Court of Appeal granted it and ordered the respondent's discharge.

Held, that an appeal from the court of final resort in any province except Quebec in a case of *habeas corpus* under sec. 39 (c) of the "Supreme Court Act" will not lie unless the case comes within some of the provisions of sec. 48, as amended by 8 & 9 Geo. V., ch. 7, sec. 3. *Mitchell* v. *Tracey* (58 Can. S.C.R. 640; 46 D.L.R. 520, followed.

Per Duff and Anglin JJ.—The words "criminal charge" in sec. 39 (c) of the "Supreme Court Act" mean a charge preferred before a tribunal authorized to hear such a charge either finally or by way of preliminary investigation; and the Board of Enquiry under the "Immigration Act" is not a tribunal by which the respondent could have been convicted of a criminal offence.

Per Duff and Anglin JJ.—The right of appeal given by sec. 39 (c) in cases of *habeas corpus*, does not exist where the court below has ordered the release of the person, the legality of whose custody was in question in the court below and that person is at large. *Cox* v. *Hakes* (15 App. Cas. 506), followed(1). Mignault J. *dubitante.*

APPEAL from the judgment of the Court of Appeal for British Columbia(2), reversing the judgment of

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) REPORTER'S NOTE.—See also *Fraser* v. *Tupper* (Cout. Dig. 104).
(2) 47 D.L.R. 538; (1919) 3 W.W.R. 271.

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the trial judge, Murphy J.(1), allowing an application for a writ of *habeas corpus* and ordering that the respondent should be accorded his liberty and freed from the order for deportation issued by the Board of Enquiry under the "Immigration Act" (9 & 10 Edw. VII., ch. 27, sec. 73, sub-s. 7, as amended by 1 & 2 Geo. V. ch. 12).

A motion was made to quash the appeal on three grounds: (1) That the right of appeal is taken away by section 48 of the "Supreme Court Act," as amended by 8 & 9 Geo. V. ch. 7, sec. 3; (2) That the proceedings for *habeas corpus* arise out of a criminal charge and are therefore not within clause (c) of section 39 of the "Supreme Court Act"; (3) That the fact that the respondent was at large under an order for his discharge precludes any right of appeal.

Sir Charles Tupper K.C. for the motion, referred to *Cox* v. *Hakes*(2), and *Barnardo* v. *Ford*(3).

R. V. Sinclair K.C. contra.

THE CHIEF JUSTICE.—We were all of the opinion at the close of the argument on this motion that it must succeed.

The appeal sought to be quashed clearly does not come within any of the classes of enumerated cases stated in section 48 of the "Supreme Court Act" as amended, within which an appeal as of right to this court is given, and as no special leave to appeal as provided for in sub-section (e) of that section was obtained, we are clearly without jurisdiction to hear the appeal.

This objection being, in my opinion, a fatal one,

(1) (1919) 2 W.W.R. 844. (2) 15 App. Cas. 506.
(3) [1892] A.C. 326.

I do not discuss the other important points raised at the hearing of that motion.

As to the question of allowing costs, we were of the opinion that, as the case was not one within the rules requiring a notice of motion to quash to be given within the definite time prescribed by Rule 4 of the Supreme Court Rules (it being a *habeas corpus* appeal in which no security is required), the motion was in order; the applicant was not in fault or default, and was entitled to costs of his motion.

The order of the court, therefore, is to grant the motion to quash the appeal for want of jurisdiction, with costs both of the appeal and of the motion to quash.

IDINGTON J.—Under and by virtue of the amendment of section 48 of the "Supreme Court Act" it seems to me hopeless to contend that, without leave, this case is appealable. The appeal should, therefore, be quashed for want of jurisdiction, with costs.

The suggestion of Mr. Sinclair to let the case stand on the docket until the Crown had applied to the Court of Appeal for British Columbia to allow an appeal, seems at first sight, in view of what we have done in some cases, plausible, but after due consideration of all the facts leading up to this appeal and to the hearing of this motion, and no attempt having been made to invoke the sanction of the Court of Appeal, until now, I think we should not encourage such neglect or even suggest that it is a proper case for now giving leave to appeal.

DUFF J.—A fatal objection to the jurisdiction arises out of the provisions of the recent amendment of section 48, the appeal clearly not coming within any of

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the classes enumerated in that section and leave to appeal not having been granted; but it is desirable, I think, to deal with another exception to the jurisdiction of this court taken by Sir Charles Tupper which appears to be well founded. Section 48 is a negative section which prescribes essential conditions, but it does not in any way dispense with the conditions prescribed by other provisions of the Act. A ground for jurisdiction must therefore be found under the enabling sections and the provision to which appeal is made 39(c). It is argued that the proceedings in this case arise out of a criminal charge but it is plain enough that "criminal charge" in this provision means a charge preferred before a tribunal authorized to hear such a charge either finally or by way of preliminary investigation. The board which directed the deportation of Jeu Jang How is clearly not a tribunal of that description.

Another objection, however, is advanced by counsel for the respondent, to which I think effect must be given, and that is that the right of appeal given by section 39(c) in cases of *habeas corpus* does not exist where the court below has ordered the release of the person, the legality of whose custody was in question in the court below and that person is at large. In *Barnardo* v. *Ford*(1), it was held unanimously by the House of Lords that an order directing the issue of a writ of *habeas corpus* to test the right to the custody of a child was an order within the meaning of section 19 of the "Judicature Act" of 1873 and as such appealable to the Court of Appeal. This view of section 19 that orders and judgments in matters of *habeas corpus* were appealable under that section, was not considered incompatible with the decision of the House

(1) [1892] A.C. 326.

of Lords in *Cox* v. *Hakes*(1), to the effect that under the same section no appeal would lie to the Court of Appeal from an order in *habeas corpus* proceedings discharging a detained person from custody.

The decision last mentioned was based upon two grounds which are best expressed in the judgments of Lord Herschell and Lord Halsbury.

Section 19 gives to the Court of Appeal general jurisdiction and power to hear appeals from "any judgment or order." It was not denied that an order for the discharge of a person in custody was *primâ facie* an order to which the section applied, but it was held that the provision following this general provision (a provision which has its analogue in section 39 of the "Supreme Court Act") is obviously intended to make the power of review complete and effectual by furnishing the means of enforcing it. As in such a case—when the person in custody has been discharged—the order made by the High Court could not be effectively interfered with by the Court of Appeal, it was considered that such an order did not belong to the class of orders within the intendment of section 19 in respect of which a right to hear and determine appeals is given.

The other reason for the decision was that the granting of the right of appeal in such cases would, to adopt the language of Lord Halsbury, amount to a sudden reversal of the policy of centuries in regard to the summary determination of the right of personal freedom and that such a reversal of policy ought not to be inferred from general language which, having regard to the context, was reasonably open to another view as to its effect.

(1) 15 App. Cas. 506.

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These reasons appear to me to govern the construction of section 39(c).

ANGLIN J.—A Board of Enquiry proceeding under sec. 73, sub.-sec. 7, of the "Immigration Act" (ch. 27, 9 & 10 Edw. VII., as amended by ch. 12, 1 & 2 Geo. V.), ordered the deportation of the respondent and an appeal by him to the Minister of Immigration and Colonization was unsuccessful. Thereupon he applied for a writ of *habeas corpus* which was refused him by Murphy J. On appeal the Court of Appeal of British Columbia granted the writ and ordered the prisoner's discharge. He is now at large in the Province of Alberta. The Crown and the Controller of Immigration at Vancouver appeal to this court from the judgment of the Court of Appeal.

The respondent moves to quash the appeal on three grounds:

(1) That the right of appeal is taken away by section 48 of the "Supreme Court Act," as amended by 8 & 9 Geo. V. ch. 7, sec. 3;

(2) That the proceedings for *habeas corpus* arise out of a criminal charge and are therefore not within clause (c) of section 39 of the "Supreme Court Act";

(3) That the fact that the respondent is at large under an order for his discharge precludes any right of appeal.

On the opening of the motion counsel for the appellant admitted (very properly, having regard to our recent decision in *Mitchell* v. *Tracey*(1)), that section 48 presents a fatal obstacle to the appeal unless leave to appeal can be obtained from the British Columbia Court of Appeal and he asked that the motion to quash

(1) 58 Can. S.C.R. 640; 46 D.L.R. 520.

and the hearing of the appeal should be adjourned to permit of his making application for such leave. While it is not unusual to grant this indulgence, before doing so the court should be satisfied that in the event of leave being granted the appeal would lie. It therefore becomes necessary to consider the second and third objections taken by counsel for the respondent.

I am satisfied that the proceedings for the writ of *habeas corpus* do not arise out of a criminal charge. The respondent could not have been convicted on the proceeding before the Board of Enquiry of any criminal offence. Provision for that purpose is made by section 7(b) of the "Chinese Immigration Act," ch. 95 of R.S.C., 1906, as amended by 7 & 8 Geo. V. ch. 7.

But I think the third ground on which counsel for the respondent claims that the appeal should be quashed is well taken. The principle of *Cox* v. *Hakes*(1), would seem to me to be applicable to section 39(c) of the "Supreme Court Act." I concur in what my brother Duff has said on this aspect of the case.

Since, therefore, leave to appeal if obtained would be futile, the application to adjourn the motion to quash and the hearing of the appeal to permit of such leave being asked for should be refused and the motion to quash should now be granted.

BRODEUR J.—Concurs with the Chief Justice.

MIGNAULT J.—I would not care to say that in my opinion the principle laid down in *Cox* v. *Hakes*(1), and especially in the passage from Lord Herschell's judgment at p. 527, quoted in the decision of this court *In re Charles Seeley*(2), has the effect of restricting

(1) 15 App. Cas. 506. (2) 41 Can. S.C.R. 5.

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or cutting down the generality of the terms of section 39(c) of the "Supreme Court Act." This section, which is not found in any English statute that I know of, gives (subject of course to the other sections of the "Supreme Court Act") a right of appeal from the judgment in any case of proceedings for or upon a writ of *habeas corpus* not arising out of a criminal charge. But the policy of the law seems to me to be clearly against interfering with an order of discharge or release obtained by means of the writ of *habeas corpus*. On that ground I concur in the judgment quashing the appeal, which of course must be quashed in view of section 48 of the "Supreme Court Act," without suspending our adjudication so as to permit the appellant to apply for leave to appeal. Had the appellant applied to this court for leave to appeal, I would not, under the circumstances of this case, have granted him leave, and had he obtained leave from the Court of Appeal, for the reason I have stated, I would not have interfered with the judgment discharging the respondent. I therefore simply concur in the judgment quashing this appeal in view of the terms of section 48 of the "Supreme Court Act."

Appeal quashed with costs.