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* April 28
* May 18

ART. J. SMITH..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

JACK B. BLACKMAN..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Criminal law—Habeas corpus—Common law offences—Section 57 of the Supreme Court Act—Construction—Jurisdiction of the Supreme Court of Canada.

The jurisdiction of the Supreme Court of Canada in respect of *habeas corpus* extends only to cases of commitment following upon charges of offences which are criminal by virtue of statutes enacted by the Parliament of Canada; it does not extend to cases of commitment for offences at common law or under statutes enacted prior to Confederation which are still in force, even if these last offences have also been declared to be criminal by a federal statute. *In re Charles Dean* (48 Can. S.C.R. 235) approved, Lamont J. dissenting.

APPEAL from the judgment of Newcombe J., in Chambers, dismissing the applications of the two appellants for writs of *habeas corpus*.

PRESENT:—Anglin C.J.C., and Rinfret, Lamont, Smith and Cannon JJ.

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The appellants, in a trial before a magistrate on a charge of attempted theft, were convicted and sentenced to three years' imprisonment. They appealed to the Court of Appeal upon the ground *inter alia* "that the said sentence (was) excessive". The Court of Appeal, by a majority judgment (1), ordered that the sentence "be reduced * * * to the term of two years and six months* * * *." The appellants then made an application before Newcombe J. in Chambers for the issue of a writ of *habeas corpus* on the ground that the term of imprisonment was in excess of the maximum punishment prescribed by law for the offence.

The judgment of Newcombe J. was as follows:

These two applications coming before me this morning, when it was explained by the prisoners' counsel that each of the prisoners had appealed from his conviction, under the provisions of the Criminal Code, to the Court of Appeal for British Columbia, and that the Court had dismissed these appeals, subject to a reduction of the term by six months in each case,— I reject both applications, upon the view that a judge in British Columbia would have been bound by the law of the case, as interpreted by the provincial Court of Appeal; and that, as my jurisdiction under the Supreme Court Act is concurrent with that of a single judge in British Columbia, I am equally bound, and cannot in this proceeding review the conclusion of the Court of Appeal.

H. R. Bray for the appellants.

C. M. O'Brian K.C., for the respondent.

ANGLIN C.J.C.—I fully concur in the judgment of Mr. Justice Rinfret, who holds this court has no jurisdiction because the offences charged exist under the common law independently of the code.

However, had it been competent for us to deal with that aspect of these cases, I would have been disposed to think Mr. Justice Newcombe right, in deferring, as he did, to the Court of Appeal of British Columbia as to the right of the magistrate to impose two years in addition to the six months. I doubt if it would have been competent for any judge in British Columbia to have ignored the judgment of the Court of Appeal dealing with the matter; and, for that reason, I am inclined to think my brother Newcombe right in considering that he was bound thereby.

(1). [1931] 2 W.W.R. 111.

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The judgment of Rinfret, Smith and Cannon JJ. was delivered by

RINFRET J.—The petitioner was arraigned before George Jay, Police Magistrate in and for the district of Victoria, on the 24th day of November, 1930, on the charge that he, at the city of Victoria, in the province of British Columbia, between, on or about the 8th day of November and the 23rd day of November, 1930, both dates inclusive, did unlawfully attempt to steal the sum of $8,765.33, the moneys of Reginald Pierce, contrary to the Criminal Code.

The petitioner consented to be tried before the Police Magistrate on the said charge, pursuant to the provisions contained in Part XVI of the Criminal Code dealing with the summary trial of indictable offences. After hearing evidence and argument, the Police Magistrate found that the petitioner was guilty, that he "must be convicted on this charge", and sentenced him to three years' imprisonment, as appears by a true copy of the warrant of commitment attached to the application.

The petitioner appealed to the Court of Appeal of British Columbia upon several grounds, the most important of which was "that the said sentence (was) excessive". The Court of Appeal, by a majority judgment, (1) ordered that the sentence

be reduced from three years' imprisonment, as set out in the conviction by the Magistrate, to the term of two years and six months * * * and as and from the 4th day of December, 1930; and that the appellant be imprisoned for such term.

Whereupon the petitioner made this application for the issue of a writ of *Habeas Corpus ad Subjiciendum* on the ground that the term of imprisonment was in excess of the maximum punishment prescribed by law for the offence, and that the jurisdiction of the magistrate in respect thereof was limited to the imposition of a sentence for a term not exceeding six months. Mr. Justice Newcombe, following the view already expressed by Sedgewick, J., in *In re Patrick White* (2) and by Girouard, J., in *In re Chas. Seeley* (3), refused to interfere with the decision of the provincial court of appeal. The petitioner now appeals to the court from the order made by Mr. Justice Newcombe in chambers.

(1) [1931] 2 W.W.R. 111 (2) [1901] Can. 31 S.C.R. 383
(3) [1908] Can. 41 S.C.R. 5.

At the hearing before the court, counsel for the Crown, *in limine,* raised the objection that the Supreme Court of Canada, or any of the judges of the court, was without jurisdiction to entertain the present application because, as he contended, the commitment was not " in a criminal case under any Act of Parliament of Canada ", as required by section 57 of the *Supreme Court Act.*

In *In re J. H. Roberts* (1), the present Chief Justice of this Court pointed to the fact that

> both in its constitution and in its jurisdiction, the Supreme Court is a purely statutory court * * * subject to certain qualifications and restrictions specified in * * * the *Supreme Court Act;*

that, in *habeas corpus* matters the jurisdiction of a judge of the court is limited to commitments in criminal cases under an Act of Parliament of Canada and that, except for that purpose,

> a judge of this court possesses none of the original powers and is subject to none of the duties in regard to *Habeas Corpus* of the ordinary courts of common law, whether arising under the common law itself, or conferred by Imperial or Provincial statutes.

That view of section 57 of the Act was approved by the full court in *Doherty* v. *Hawthorne* (2), where the decision of Mr. Justice Mignault, based on the judgment in *In re Roberts* (1), was unanimously confirmed.

The appellant was convicted of the offence of attempt to steal. Stealing or theft was a common law offence. The Criminal Code defines that offence, but it did not create it. An attempt to steal was also a common law offence. (*Regina* v. *McPherson* (3).) Every attempt to commit a felony or a misdemeanour was a misdemeanour at common law, whether the crime attempted was one created by statute or at common law. Archbold's *Criminal Pleadings,* 28th ed., p. 3 And, now, the distinction between felony and misdemeanour has been abolished (Criminal Code, s. 14).

In the present case, the magistrate has, in the warrant of commitment, described the offence, of which the prisoner was found guilty, as " contrary to the Criminal Code ", presumably intending thereby to indicate, in view of section 15, that the offence was one " liable to be prosecuted and punished under " the code. Whether or not such was the

(1) [1923] S.C.R. 152. (2) [1928] S.C.R. 559
(3) [1857] 7 Cox's Cr. Law Cases, 281.

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intention, it does not affect the fact that theft and attempt to steal are not criminal offences by virtue of the Criminal Code. They were criminal offences at common law; and, by force of the Ordinance introducing the Criminal Law of England into British Columbia, they were criminal offences in that colony prior to Confederation and prior to its union with Canada. (See sec. 11 of the Criminal Code).

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* (1), and *In re Robert Evan Sproule* (2), in each of which cases the commitment was for murder). In the *Sproule* case (2), we draw particular attention to the reasons at pages 184, 203 and 240.

In *In re Charles Dean* (3), Mr. Justice Duff, having to deal with an application for *habeas corpus* in a case of house-breaking, came to the conclusion that he had no jurisdiction; and, speaking of section 57, then section 62, he said:

> The language indicates an intention on the part of Parliament to confer only a strictly limited jurisdiction. Anything like frequent interposition in the administration of the criminal law in the provinces by the judges of the Supreme Court of Canada, through the instrumentality of the writ of *habeas corpus*, would obviously lead to the most undesirable results; and, before exercising the authority in a given case, I think it is my duty to scrutinize most carefully the terms in which that authority is given to ascertain whether or not the case is clearly one of those in which it was intended to be exercised.
>
> 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.

The opinion thus enunciated by Mr. Justice Duff sitting in chambers may now be stated as being the opinion of the court. In our view, his judgment is a correct expression of the law, and we approve of it. As a result, in the present case, the objection by counsel for the Crown to the

(1) [1881] Cassels' Digest, 327. (2) [1886] 12 Can. S.C.R. 140
(3) [1913] 48 Can. S.C.R. 235.

jurisdiction of any judge of this court is well taken; the application of the petitioner cannot be entertained, and the appeal must be dismissed.

This judgment likewise disposes of the appeal on identical grounds from a similar order of Mr. Justice Newcombe in the case of Blackman.

LAMONT J. (dissenting).—In this case I find myself unable to reach the conclusion arrived at by the other members of the court. The question involved in the appeal is the right of a convicted person on an application for *habeas corpus*.

On the 4th day of December, 1930, the accused in each of the above cases was convicted by George Jay, Police Magistrate in and for the city of Victoria, B.C., for the offence stated in the Blackman warrant of commitment as follows:

> For that he, the said Jack B. Blackman, between, on or about the 8th day of November, 1930, and the 23rd day of November, 1930, both days inclusive, at the city of Victoria aforesaid, did unlawfully attempt to steal the sum of $8,765.33, the moneys of Reginald Pierce, contrary to the Criminal Code.

The accused, in each case, was sentenced to three years' imprisonment.

Contending that the police magistrate had no jurisdiction in a summary trial with the accused's consent, under part 16 of the Criminal Code, to impose, for the offence charged, a sentence of more than six months' imprisonment, the accused appealed to the Court of Appeal of British Columbia. That court reduced the sentence to imprisonment for two years and six months, holding that the police magistrate had jurisdiction to award that sentence.

Being still of opinion that the sentence imposed was in excess of the maximum punishment prescribed by law for the offence on summary trial, the accused in each case made an application to Mr. Justice Newcombe of this court for an order that a writ of *habeas corpus ad subjiciendum* do issue.

The application was refused on the following ground:

> I reject both applications, upon the view that a judge in British Columbia would have been bound by the law of the case, as interpreted by the provincial Court of Appeal; and that, as my jurisdiction under the *Supreme Court Act* is concurrent with that of a single judge in British Columbia, I am equally bound, and cannot in this proceeding review the conclusion of the Court of Appeal.

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From the refusal of the application the accused appeal to this court.

The jurisdiction of a judge of this court on an application for *habeas corpus* is set out in section 57 of the *Supreme Court Act,* as follows:

57. Every judge of the court shall, except in matters arising out of any claim for extradition under any treaty, have 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 shall lie to the court.

Two questions are before us in this appeal:

(1) Is a judge of this court who has only concurrent jurisdiction with the courts or judges of the several provinces bound by the views of a provincial court of appeal as to the jurisdiction of a magistrate to impose the sentence which he in fact imposed?

(2) Where the offence charged is an offence both under the Criminal Code and at common law, but is expressly laid and the commitment made under the Criminal Code, is the commitment made thereunder a commitment in a criminal case under an Act of the Parliament of Canada within the meaning of section 57 of the *Supreme Court Act?*

Dealing with the first of these questions I incline to the view that the argument on behalf of the accused is sound. That there is considerable authority for the view adopted by my brother Newcombe I admit. That view was taken by Gwynne J. in *In re Boucher* (1), where that learned judge said :

The decision of the Court of Appeal should be considered conclusive, and should not be interfered with by a single judge of any court sitting in chambers, but the applicant must be left to any recourse he might have against the adjudication of the Court of Appeal for Ontario.

This view was also given effect to by Sedgwick J. in *In re Patrick White* (2), and by Girouard J. in *In re Charles Seely* (3). These views, however reasonable they may be, seem to me to be inconsistent with the judgment of the House of Lords in *Cox* v. *Hakes* (4), where Lord Halsbury, at page 514, said :

My Lords, probably no more important or serious question has ever come before your Lordships' House. For a period extending as far back

(1) [1879] Cassels' Dig., 327.
(2) (1901) 31 Can. S.C.R. 383.
(3) (1908) 41 Can. S.C.R. 5.
(4) (1890) 15 App. Cas. 506.

as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might—see *Ex parte Partington* (1), make a fresh application to every judge or every court in turn, and each court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question.

In the same case Lord Herschell at page 527, said:—

> It was always open to an applicant for it, if defeated in one court, at once to renew his application to another. No court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty.

Again in *Eshugbayi Eleko* v. *Government of Nigeria* (2), the Privy Council, at page 442, said:—

> If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule and every judge must hear the application on the merits.

The writ of *habeas corpus ad subjiciendum* is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. It is a prerogative writ by which the King has a right to inquire into the causes for which any of his subjects are deprived of their liberty. 10 Halsbury, 39.

The law of England has always been very jealous of any infringement of personal liberty and has been most assiduous in its preservation. In view of the fact that the great object of the writ is to give the person restrained of his liberty an immediate hearing so that the legality of his contention may be inquired into and determined, and in view of the statements contained in the judgments above quoted, I am led to the conclusion that a judge of this court, on an application for a writ of *habeas corpus,* to inquire into the validity of a commitment by which a person is detained in custody, has cast upon him the duty of determining for himself whether such detention is in accordance with the law. In giving effect to his own view as to the validity of the detention I am unable to see how the judge

(1) (1845) 13 M. & W. 679 at 684. (2) [1928] 3 W.W.R. 437.

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can be said to be reviewing the conclusion of a provincial court of appeal. He is merely exercising the primary jurisdiction vested in him. This I think is clear from the language of Lord Bramwell in the *Cox* case (1), where, at page 523, his Lordship said:—

> I cannot agree that going first to a judge of one court, and then, on being refused by the judge, going to a court, and, on being refused by one court, going to another, was or is an appeal. The court applied to after refusal by a judge or other court was not exercising an appellate jurisdiction in entertaining the application. It was exercising a primary jurisdiction.

The concurrent jurisdiction exercised by a judge of this court is jurisdiction to issue the writ for the purpose of inquiring into the validity of the commitment. That such jurisdiction does not oblige him to accept the view of the Court of Appeal in any province is, I think, clear when we consider the position he would be in if the Court of Appeal in some other province had interpreted the sections of the Criminal Code in question in this appeal as meaning something different from the meaning placed upon them by the Court of Appeal of British Columbia, and an application were made by the person convicted in each province for a writ of *habeas corpus*. Could a judge of this court say to the petitioner from one province that the relevant sections of the Code mean one thing in his province, and to the other that the same sections mean, in his province, something entirely different? In my opinion, he could not. It is obvious that the sections of the Code must be construed the same way for all provinces by a judge of this court. This consideration, in my opinion, makes it impossible to hold that he is bound by the construction placed upon the particular sections by any provincial court of appeal.

So far as this particular case is concerned the point is not of vital importance because the accused have taken advantage of section 57 (2), above quoted, and have appealed to this court, and no one suggests that this court is bound by the view of the Court of Appeal. Our duty is to state what, in our opinion, is the true interpretation of the sections.

Counsel for the Crown, however, has raised a preliminary objection to our jurisdiction to pass upon the merits of the

(1) (1890) 15 App. Cas. 506.

appeal. He puts forward the contention that the appellants were not "committed" in a criminal case under any Act of the Parliament of Canada. His argument is that the offence of attempting to steal was an offence at common law in British Columbia prior to the enactment of the Criminal Code and that the jurisdiction of a judge of this court, under section 57 of the *Supreme Court Act,* is limited to cases in which the offence charged was not an offence in the province at common law or under a pre-confederation statute but *became a criminal offence solely by virtue of the provisions of an Act of the Parliament of Canada.* In support of his contention he cited the following cases: *In re Sproule* (1); *In re Roberts* (2); *In re Dean* (3); and *Doherty* v. *Hawthorne* (4).

With reference to these authorities, only one, the *Dean* case (1), in my opinion, is in point, although *dicta* may be found in the others which support the argument.

The case of *In re Sproule* (1) was tried in 1886, before the enactment of the Criminal Code which came into force in 1892. The charge was murder. At the date of the conviction there was no Dominion statute making murder a crime. It was a crime at common law and the common law had been introduced into the province of British Columbia, but the only existing Dominion statute dealing with offences against the person (32 and 33 Vict. c. 20), dealt merely with the punishment and not with the offence. As there was no Act of the Parliament of Canada at that time which made murder a criminal offence there was no jurisdiction in a judge of this court to entertain an application for a writ of *habeas corpus,* as the court held.

In the case of *In re Roberts* (2) the appellant was in custody at Quebec under the authority of a special Act of the legislature for an alleged offence against the privileges, honour and dignity of the provincial legislature of Quebec. It was an offence under a provincial law and, as the present Chief Justice of this court pointed out on an application to him for a writ of *habeas corpus,* there was

> no ground whatever for suggesting that it was a crime under any Act of the Parliament of Canada.

In *Doherty* v. *Hawthorne* (4), the petitioner was confined in the common gaol in the county of York, N.B.,

(1) (1886) 12 Can. S.C.R. 140.
(2) [1923] Can. S.C.R. 152.
(3) (1913) 48 Can S.C.R. 235.
(4) [1928] Can. S.C.R. 559.

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under a warrant of commitment following his conviction for selling intoxicating liquor contrary to section 56 of the *Intoxicating Liquor Act*—a provincial statute. He made an application for a writ of *habeas corpus* to Mr. Justice Mignault of this court, in chambers. That learned judge dismissed the application on the gound that the commitment was made under a provincial statute and not under an Act of the Parliament of Canada and he had, therefore, no jurisdiction. An appeal was taken to this court which affirmed the dismissal of the application for the reasons given by Mr. Justice Mignault.

None of these cases, in my opinion, are any authority for the contention made here by counsel for the Crown, for in none of them was the offence, for which the petitioner was committed, a criminal offence under a Dominion statute at the date of the conviction.

The case of *In re Dean* (1), is, however, squarely in point. In that case the petitioner had been tried and convicted of house breaking and committed to gaol. He made an application to my brother Duff in chambers for a writ of *habeas corpus ad subjiciendum*. My learned brother dismissed the application on the ground that as a judge of this court he had no jurisdiction to entertain the application. He held that the jurisdiction given to a judge of the court by section 57 (then s. 62) of the *Supreme Court Act* was limited 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 statute of the Parliament of Canada and did not 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.

With great deference I find myself unable to so construe the language of section 57. To give a judge of this court jurisdiction there must be a "commitment" and that commitment must be made in a criminal case under an Act of the Parliament of Canada. That is the language of the section. In this case the appellants were committed. Their commitments followed on a charge of attempting to steal. Attempting to commit theft is an indictable offence

(1) (1913) 48 Can. S.C.R. 235.

under the Criminal Code (ss. 386 and 773) for which an accused person with his consent may be tried summarily. It is also an offence at common law. Section 15 of the Criminal Code provides:

> 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.

This section makes it clear that the appellants might have been prosecuted and punished either at common law or under the Code. Both the charge and the commitment, however, shew that they were prosecuted and convicted for the offence of unlawfully attempting to steal "contrary to the Criminal Code." As the Criminal Code is a Dominion statute I am of opinion that the appellants were committed "in a criminal case under an Act of the Parliament of Canada." The fact that they might have been tried and punished for the offence at common law is, to my mind, immaterial, for they were not so tried and punished. The appellants, therefore, are entitled to have the merits of their appeal determined.

In view of the conclusion reached by the other members of the court that we have no jurisdiction to hear this appeal on the merits, it is unnecessary that I should consider the merits at greater length than to say that I find myself in accord with the views expressed by Mr. Justice Martin in his dissenting judgment in the court below, and that the sentence should be reduced to imprisonment for six months.

Appeals dismissed.

Solicitor for the appellants: *H. R. Bray.*

Solicitor for the respondent: *C. M. O'Brian.*