IN RE FRED BROWN

1946
*Nov. 18
*Dec. 20

Habeas corpus—Criminal law—Accused sentenced to one year's imprisonment—Notice of appeal by Crown—Accused served sentence and released from gaol before hearing of appeal—Appellate court increasing sentence—Accused re-arrested and incarcerated—Whether illegally detained—Sections 1013, 1015, 1078 and 1079 Cr. C.

The petitioner pleaded guilty to three charges under section 436 Cr. C. and was sentenced to one year's imprisonment on each charge, to run concurrently and, in addition, he was fined $5,000 upon each charge. The petitioner paid the fines and served the additional sentence of one year. Notices of appeal against the sentence were given by the Attorneys General for Canada and for Ontario, but the appeal was not heard until after the petitioner's release from imprisonment. The appellate court ordered that the sentence be increased on each of the charges for a further term of one year to run concurrently. The petitioner was re-arrested and incarcerated. The petitioner then moved, before the Chief Justice of this Court, for the issue of a writ of *habeas corpus,* claiming that he was detained illegally as there was no longer jurisdiction in the appellate court to increase the sentence imposed on him in view of the provisions of sections 1078 and 1079 Cr. C. Counsel for the petitioner contended that, the sentence having been served, this had "the like effect and consequences as a pardon under the great seal" and that the petitioner was "released from all further or other criminal proceedings for the same cause". The application was dismissed by the Chief Justice of this Court and the applicant appealed to the Full Court from that decision.

Held, affirming the judgment of the Chief Justice of this Court ([1946] S.C.R. 532), that the appeal should be dismissed.

*Present: Kerwin, Taschereau, Rand, Kellock and Estey J.J.

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Sections 1078 and 1079 Cr. C. must be read in connection with the right of appeal against sentence conferred by section 1013 (*c*) Cr. C. and with the power of a court of appeal under section 1015 Cr. C. to consider the fitness of the sentence appealed against and increase the punishment imposed by that sentence within the limits of the punishment prescribed by law for the offence of which the offender has been convicted. So read, a judgment of a court of appeal, increasing the punishment imposed by a trial court, has the same force and effect as if the latter had imposed it (subsection 2 of section 1015 Cr. C.). The "punishment endured", mentioned in section 1078 Cr. C., must refer to the punishment finally adjudged by the courts having jurisdiction.

Comments on a statement contained in the opinion of the then Chief Justice of this Court (Sir Lyman P. Duff), speaking for the Court, *in re Royal Prerogative of Mercy upon Deportation Proceedings* ([1933] S.C.R. 269, at 274).

APPEAL from the judgment of the Chief Justice of this Court (1), refusing an application by the petitioner for the issue of a writ of *habeas corpus* for the purpose of an inquiry into the cause of commitment of the applicant.

S. A. Hayden K.C. and *J. W. Blain* for the appellant.

J. J. Robinette K.C. for the Attorney General for Canada.

W. B. Common K.C. for the Attorney General for Ontario.

The judgment of Kerwin, Rand and Kellock JJ. was delivered by

KERWIN J.:—This is an appeal from the judgment of the Chief Justice of this Court (1) refusing to issue a writ of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment of the applicant. Assuming that we have jurisdiction, the appeal fails.

The applicant pleaded guilty to three charges under section 436 of the Criminal Code as enacted by chapter 30, section 8 of the statutes of 1939. He was sentenced by the presiding magistrate to one year's imprisonment on each charge, to run concurrently, and in addition thereto he was fined five thousand dollars upon each charge. He paid the fines and served one year in prison from which he was thereupon released. Notices of appeal against the sentence had been given by the Attorney General for Canada and

(1) [1946] S.C.R. 532.

by the Attorney General for Ontario within the time limited by the rules, and leave to appeal from the sentence had been duly obtained but, for reasons with which the applicant does not quarrel, the appeal was not heard by the Court of Appeal for Ontario until after the applicant's release from imprisonment. Because of this fact, it is argued that the Court of Appeal had no jurisdiction in view of the provisions of sections 1078 and 1079 of the Criminal Code, which read as follows:

1078 (1). When any offender has been convicted of an offence not punishable with death, and has endured the punishment adjudged, or has been convicted of an offence punishable with death and the sentence of death has been commuted, and the offender has endured the punishment to which his sentence was commuted, the punishment so endured shall, as to the offence whereof the offender was so convicted, have the like effect and consequences as a pardon under the great seal.

2. Nothing in this section contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other offence.

1079. When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice in any case in which such justice may discharge such person, he shall be released from all further or other criminal proceedings for the same cause.

These sections must be read in connection with the right of appeal against sentence conferred by section 1013 of the Criminal Code; the power of the court of appeal under section 1015 Cr. C. to consider the fitness of the sentence appealed against and increase the punishment imposed by that sentence within the limits of the punishment prescribed by law for the offence of which the offender has been convicted; and particularly subsection 2 of section 1015 Cr. C.:

2. A judgment whereby the court of appeal so diminishes, increases or modifies the punishment of an offender shall have the same force and effect as if it were a sentence passed by the trial court.

So read, the judgment of the Court of Appeal, increasing the punishment imposed by the magistrate upon the applicant, has the same force and effect as if the latter had imposed it. The "punishment adjudged", referred to in section 1078 Cr. C., must refer to the punishment ultimately adjudged on the appeal.

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Nothing in any of the cases referred to by Mr. Hayden bears precisely upon the point, and the statement in the opinion of Sir Lyman Duff, speaking on behalf of the Court *In the Matter of a Reference as to the effect of the exercise by His Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings* (1)

> we think it is clear that the phrase "punishment adjudged" in s. 1078 of the Criminal Code does not describe a punishment reduced by an act of the royal clemency but is intended to designate the punishment nominated by the original sentence

must be read in connection with the matter there under discussion, and "original sentence" is not confined to the sentence as in the present case of the convicting magistrate but to the ultimate disposition of the matter in accordance with the right of appeal given by the other sections of the Criminal Code.

The appeal is dismissed.

The judgment of Taschereau and Estey JJ. was delivered by

TASCHEREAU J.:—On the 22nd of September, 1944, the appellant, on a plea of guilty, was convicted at Toronto by Magistrate R. J. Browne on the following charges:

1. During the years 1941, 1942 and 1943, at Toronto in the said county and province, and elsewhere within the jurisdiction of this honourable court, unlawfully knowingly cause to be sold and delivered by Canada Comforter Company Limited to His Majesty in the right of his Government of Canada defective air stores, to wit, mattresses, contrary to section 436 of the Criminal Code as amended by 1939, chapter 30, section 8.

2. During the years 1941, 1942 and 1943, at Toronto in the county of York and province of Ontario, and elsewhere within the jurisdiction of this honourable court unlawfully knowingly cause to be sold and delivered by Canada Comforter Company Limited to His Majesty in the right of his Government of Canada defective military stores, to wit, mattresses contrary to section 436 of the Criminal Code, as amended by 1939, chapter 30, section 8.

3. During the years 1941, 1942 and 1943, at Toronto in the county of York and province of Ontario and elsewhere within the jurisdiction of this honourable court unlawfully knowingly cause to be sold and delivered by Canada Comforter Company Limited to His Majesty in the right of his Government of Canada defective naval stores, to wit, mattresses contrary to section 436 of the Criminal Code as amended by 1939, chapter 30, section 8.

(1) ([1933] S.C.R. 269, at 274.

Brown was sentenced to one year's imprisonment on each charge to run concurrently, and he was also fined $5,000 on each charge, or in default of payment of each fine two years' imprisonment, the imprisonment in default of the payment of the fine to run consecutively. The appellant paid the fines amounting to $15,000 and served the term of imprisonment imposed on him, being released from confinement in the month of July, 1945. In the meantime, in October, 1944, the Attorney General for Canada and the Attorney General for Ontario appealed to the Court of Appeal for Ontario, from the sentence imposed by Magistrate Browne. The appeal was not heard until May 1946, by which time Brown had then served the term of imprisonment imposed on him, and had been released from gaol.

On May 10, 1946, the Court of Appeal for Ontario ordered that the sentence of one year on each of the three charges be varied, and increased it on each of the said charges by a further term of one year. As a consequence of this judgment, the appellant was re-arrested, and is now confined in the Kingston Penitentiary, to serve the increased sentence.

In June 1946, counsel for the accused made an application to the Chief Justice of Canada, for a writ of *habeas corpus* under the provisions of section 57 of the *Supreme Court Act*. This application was dismissed, and the accused now appeals to the full Court from the decision of the Chief Justice of Canada (1), pursuant to section 57 (2) of the *Supreme Court Act*.

It is submitted by the appellant that the Court of Appeal for Ontario had no jurisdiction to increase, or otherwise deal with the sentence imposed on him, in view of the provisions of sections 1078 (1) and 1079 of the Criminal Code.

These sections provide as follows:

1078. (1). When any offender has been convicted of an offence not punishable with death, and has endured the punishment adjudged, or has been convicted of an offence punishable with death and the sentence of death has been commuted, and the offender has endured the punishment

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to which his sentence was commuted, the punishment so endured shall, as to the offence whereof the offender was so convicted, have the like effect and consequences as a pardon under the great seal.

1079. When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice in any case in which such justice may discharge such person, he shall be released from all further or other criminal proceedings for the same cause.

It is argued that the Court of Appeal for Ontario was without jurisdiction to hear the appeal of the Crown against the sentence imposed after the convicted man had served the imprisonment adjudged against him, and had been released from prison. It is further said that the imprisonment adjudged having been served and the equivalent of a pardon under the great seal having thereby been obtained under section 1078 (1) of the Criminal Code, the attempt to proceed with the appeal in these circumstances was barred by section 1079 of the Criminal Code.

The appeal by the Attorney General for Canada and of the Attorney General of Ontario was made pursuant to section 1013 (2) of the Criminal Code, which says:

1013 (2). Appeal against sentence.—A person convicted on indictment, or the Attorney General, or the counsel for the Crown in the trial, may, with leave of the Court of Appeal or a judge thereof, appeal to that Court against the sentence passed by the trial court, unless that sentence is one fixed by law.

Section 1015 (2) of the Criminal Code reads:

1015 (2). Effect of judgment.—A judgment whereby the court of appeal so diminishes, increases or modifies the punishment of an offender shall have the same force and effect as if it were a sentence passed by the trial court.

These two sections must of course be read in conjunction with sections 1078 and 1079 Cr. C. It is clear that where an offender has "endured the punishment adjudged", the imprisonment or payment of the fine has the same effect "as a pardon under the great seal", and that he cannot be prosecuted a second time for the same cause. But the "punishment endured" must be the one which is *finally adjudged* by the courts having jurisdiction. Section 1015

(2) Cr. C. can leave no possible doubt, and when a judgment of a court of appeal increases a punishment, it has the same effect as if given by a trial court. It is when the rights provided in section 1013 (2) Cr. C. have been exhausted or have not been taken advantage of, that it can be said that the punishment is finally determined. And it is consequently only when this punishment ordered by the court of appeal has been satisfied that it has the effect of a pardon under the great seal.

Any other interpretation given to these sections would defeat the right given to the Crown to appeal against the pronouncement of too light sentences, for, if an offender is sentenced to one day in gaol and serves his punishment, the Crown would be barred from appealing against such a sentence, unless the appeal is lodged, argued and determined within that period of time.

Dealing with these sections, Chief Justice Rowell said in *Rex* v. *Jarvis* Sr. (1):

> Sections 1078-9 should receive if possible a construction which would not deprive either the Crown or the accused of the right of appeal given by the Code. This would be achieved by construing them as being subject to the right of appeal. If these sections can be so construed it removes the difficulty as to the power of the Court to grant a new trial in the case of an appeal where the fine has been paid or the punishment endured, and—though not without grave doubts—I have reached the conclusion they should be so construed.

And in *Rex* v. *Kirkham*, (2) Martin J.A. said:

> Upon a careful consideration of the question, which is one of importance, no other conclusion is, to my mind, open than that s. 1079 does not come into operation until the question of what is the proper term of imprisonment to be "suffered" has been finally decided by the proper tribunal for that purpose, and therefore I should exercise the jurisdiction conferred upon me by said s. 1013 (2) by granting the motion.

Mr. Hayden has relied upon the following passage in Sir Lyman Duff's reasons in *re: Royal Prerogative of Mercy upon Deportation Proceedings* (3):

> As to the second Interrogatory, we think it is clear that the phrase "punishment adjudged" in s. 1078 of the Criminal Code does not describe a punishment reduced by an act of the royal clemency but is intended to designate the punishment nominated by the original sentence.

I do not think that the appellant can find any comfort in this citation. The words "original sentence" were not used for the purpose of conveying the idea that a judgment

(1) (1937) 68 C.C.C. 188, at 197.
(2) (1935) 64 C.C.C. 255, at 257.
(3) [1933] S.C.R. 269, at 274.

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of a court of appeal, varying a sentence of a trial court, is not the "original sentence", but merely to emphasize that the words "punishment adjudged", found in section 1078 of the Criminal Code, is the punishment imposed by the courts, and not the punishment as reduced by an act of the royal clemency.

I am clearly of opinion that this appeal fails and should be dismissed.

Appeal dismissed.