1920

*FEB. 25.
*MAY 4.

NICHOLAS PETROPOLIS.....APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Jurisdiction—Criminal law—Bail—Estreat of recognizance—Criminal matter.

The judgment of a provincial court of final resort on an application to set aside on order estreating a recognizance given by a person charged with a criminal offence for his appearance to stand trial is a judgment in a "criminal case" from which no appeal is given by the Criminal Code. Idington J. dissents.

APPEAL from a judgment of the Supreme Court of Nova Scotia (1) refusing to set aside an order estreating a recognizance.

Petropolis was committed for trial on a charge of indecent assault and gave bail for his appearance. The Grand Jury preferred an indictment for rape and he failed to be present when the case was called for trial. By order of the trial judge his recognizance was estreated, and an application to another judge to set aside the order was referred to the full court which refused to do so. An appeal was then taken to the Supreme Court of Canada. Respondent moves to quash.

Subject to the motion, argument was heard on the merits.

Power K.C. for the appellant.

Mathers K.C. for the respondent.

THE CHIEF JUSTICE.—I concur with my brother Anglin.

IDINGTON J.—The appellant entered into a recognizance, taken before a stipendiary magistrate in and for the county of Halifax, who had committed one

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

(1) 53 N.S. Rep. 309.

Basil Mandakos for trial upon a charge of indecent assault, for the sum of one thousand dollars which was made upon the following condition:—

The condition of the within recognizance is such, that whereas the said Basil Mandakos was this day committed for trial to stand his trial at the next term of the Supreme Court of Criminal Jurisdiction to be holden in and for the county of Halifax on the 6th day of October, A.D. 1918 for that he did at Dartmouth in the county of Halifax on the 1st day of May, A.D. 1918 unlawfully and indecently assault one Jennie Young.

If, therefore, the said Basil Mandakos will appear at the next court of Criminal Jurisdiction to be holden in and for the county of Halifax and there surrender himself into the custody of the Keeper of the common jail there and plead to such indictment as may be found against him by the Grand Jury for and in respect to the charge aforesaid, and take his trial upon the same, and does not depart the said court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue.

The judge who was first applied to for an order enforcing the same, directed it to be estreated because the accused did not appear and plead to an indictment for rape found by the Grand Jury.

Thereupon another judge was applied to by the appellant to set aside the order and the writ of *fieri facias* issued thereon.

Due notice was given of said motion by service on the Attorney General of Nova Scotia.

The learned judge, so applied to, referred the motion to the Supreme Court of Nova Scotia at the November sittings of 1919.

The court entertained the motion without making any question of such a course of procedure being correctly adopted as the mode of relief, so far as hearing of argument and deciding it.

The majority of the court held (Mr. Justice Longley dissenting) that the motion should be dismissed because upon their construction of the recognizance and conditions, the accused having been presented by the

1920

PETROPOLIS v. THE KING.

Idington J.

Grand Jury in a true bill accusing him of rape, and failed to plead thereto, the surety was liable.

It is objected by counsel for the Attorney General that the appeal here, though allowed by the court below, admittedly the court of last resort in the province, is not within our jurisdiction.

The question must be determined by the interpretation and construction of section 36 of the Supreme Court Act which reads as follows:—

36. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, in cases in which the court of original jurisdiction is a superior court: Provided that,—

(*a*) there shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus*, *certiorari* or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of *habeas corpus*, arising out of any claim for extradition made under any treaty; and,

(*b*) there shall be no appeal in a criminal case except as provided in the Criminal Code. R.S., c. 135, ss. 24 and 31; 54-55 V, c. 25, s. 2; 55-56 V, c. 29, ss. 742 and 750.

I am unable to understand how proceedings for the recovery of the alleged debt due the respondent can be as urged either a criminal case or within any of the other exceptions in foregoing.

The Crown rules made 2nd February, 1901, by the judges of the Supreme Court of Nova Scotia, seem to substitute for all earlier procedure a clear and explicit method of dealing with all such debts by rule 83, rendering it the duty of any one taking a recognizance to transmit it to the office of the Clerk of the Crown in the county in which the proceedings are instituted and file same there.

The procedure for enforcing same does not in any way savour of a criminal charge nor in any respect does the judgment enforcing the recognizance consti-

tute the surety a criminal,or the motion to set aside the judgment against him a criminal case, within the meaning of the section 36 quoted above.

I, therefore, have no doubt of our jurisdiction. The provisions in the Criminal Code relative to the enforcement of such an obligation are obviously made to adopt the local court and officers who may be applied to therefor, and the legal machinery provided thereby as it were, as that through which such enforcement is made as that which is most appropriate.

The case of those claims arising in Nova Scotia would seem to fall under section 1099 of the Code which is supplemented by the rules I have already referred to.

The power and procedure are what the province may have furnished by virtue of its legislative authority under the British North America Act.

The motion on its merits ought, I think, to have been allowed.

The language of the instrument seems to me, with great respect, incapable of any other meaning than what it says.

Hagarty C. J. is good enough authority for me and his several judgments on behalf of the Queen's Bench hearing a motion of same nature as that in question herein in the cases of *The Queen* v. *Wheeler* (1) and *The Queen* v. *Ritchie* (2) I should abide by.

The high regard I hold for the late Mr. Justice Killam should induce me also to give heed to his in *The Queen* v. *Hamilton* (3) but that case he decided is not so clearly in point.

All these cases, however, clearly indicate that the

(1) 3 Can. Cr. C. 7. (2) 3 Can. Cr. C. 8.
(3) 3 Can. Cr. C. 1

1920

PETROPOLIS v. THE KING.

Idington J.

law for relief for an improper forfeiture of recognizance is recognized elsewhere in Canada as well as in Nova Scotia to be the same.

If the converse case had been made to appear and a recognizance taken to ensure the accused answering the higher charge of rape and an indictment found for only indecent assault, the respondent's contention herein might be more arguable, but we need not follow that, I submit, further or pass any opinion thereon.

I may point out, however, that the Criminal Code by section 856, seems to authorize any number of counts in an indictment save in the case of murder, and hence the Crown officer retained in such a case as this might be well advised to meet the difficulty which has arisen here by following a count for rape with one for indecent assault.

I would therefore allow the appeal with costs.

DUFF J.—This appeal should be quashed for want of jurisdiction.

ANGLIN J.—In my opinion this is an "appeal in a criminal case" within clause (b) of the proviso to s. 36 of the Supreme Court Act, which enacts that

there shall be no appeal in a criminal case except as provided in the Criminal Code.

This court quite recently determined in *Mitchell* v. *Tracey* (1) in accordance with the view expressed by three of its members in *Re McNutt* (2) that the word "criminal" in clause (a) of the same proviso is used in a very wide sense—in contradistinction to the word "civil." I think the words "criminal case" in clause (b) should receive a similar construction. These words in my opinion were used to signify what is more artfully expressed in section 47 of the

(1) 58 Can. S.C.R. 640. (2) 47 Can. S.C.R. 259.

English Judicature Act of 1877 in the words "any criminal cause or matter." These latter words have, time and again, been held to extend to all the various proceedings incidental to a criminal prosecution. *Ex parte Alice Woodall* (1); *The Queen* v. *Steel* (2); and *Rex* v. *Governor of Brixton Prison* (3) cited by Mr. Mathers in his excellent argument, are instances. As put by Fletcher-Moulton L. J. in the case last cited discussing the scope of the words quoted from the English section:

> If any portion of an application or order involves the consideration of a criminal cause or matter, it arises out of it and in such a case this court (the English Court of Appeal) is not competent to entertain an appeal.

Lord Esher in the *Woodhall Case* (1) had said:—

> I think that the clause of section 47 in question applies to a decision by way of judicial determination of any question raised or with regard to proceedings the subject matter of which is criminal, at whatever stage of the proceedings the question arises.

He repeated this language in *Reg.* v. *Young* (4). See also *Ex parte Schofield* (5). The Criminal Code makes no provision for the appeal before us, (s. 1024). It therefore does not lie.

In substance what is sought—what the appellant must obtain in order to succeed—is the setting aside of the order for the estreat or forfeiture of the recognizance given by him for the appearance of one Mandakos to answer

> such indictment as may be found against him by the Grand Jury in respect to the charge aforesaid—viz., a charge "that he * * * unlawfully and indecently assaulted one Jennie Young.

The information laid was for rape. The magistrate holding the preliminary investigation thought the evidence would not support that charge and committed the accused for trial "for the lesser charge

(1) 20 Q.B.D. 832.
(2) 2 Q.B.D. 37.
(3) [1910] 2 K.B. 1056.
(4) 66 L.T. 16.
(5) [1891] 2 Q.B. 428.

1920

PETROPOLIS v. THE KING.

Anglin J.

of indecent assault" and thereupon took the recognizance of himself and the present appellant for his appearance to stand his trial. The Grand Jury in due course presented an indictment for rape. Mandakos failed to appear for trial. By an order, dated the 14th April, 1919, intituled

> In the Supreme Court; March Criminal Sittings, 1918 (a manifest mistake for 1919) Between 'The King,' plaintiff, and Basil Mandakos, defendant,

the recognizance was ordered "forfeited and estreated" and directed to be placed upon the estreat roll." The roll prepared by the Clerk of the Court is produced and after setting out the recognizance proceeds:—

> And afterwards the said Basil Mandakos did not fulfil the conditions of the said recognizance but failed to surrender himself and take his trial as therein provided and after having been duly called in open court the said recognizance was on the 14th day of April A.D. 1919, at Halifax aforesaid, declared and adjudged by the court to be forfeited and estreated. Therefore it is considered that 'Our Sovereign Lord, the King,' do recover, etc.

These proceedings were all taken under the Criminal Code, and (except possibly the final adjudication on the roll) in the discharge by the Supreme Court of its duties as a court of criminal jurisdiction.

The contention of the appellant on the merits is that the condition of the recognizance did not require the principal to appear to answer an indictment for rape, but only for indecent assault; and that there was therefore no breach justifying estreat.

The forfeiture and estreat of bail always was a function of the criminal courts. No other court has judicial cognizance of the fact of the default on which the estreat is based, which occurs *in facie curiae*. Sec. 1100 of the Criminal Code enacts that the forfeiture and estreat of recognizance is to be made

by the court before which the principal party thereto was bound to appear.

That court was in this instance the Supreme Court of Nova Scotia at its criminal sittings. In adjudicating the recovery by the Crown of the debt resultant upon the forfeiture or estreat and directing the levy of execution therefor it may be that the Supreme Court of Nova Scotia was exercising a civil jurisdiction (*Re Talbot's Bail*, (1), but see *The King* v. *Harvie*, (2), that formerly belonged to the Court of Exchequer in England, into which it was the duty of the Clerk of the Crown, sitting in the Criminal Court, to "estreat" the recognizance duly certified. (Archbold's Criminal Pleading and Evidence, 21st ed., 101). The practice followed in the present case under the Criminal Code and the Nova Scotia Crown rules appears to be similar to that prescribed by 22 & 23 Vic. (Imp.) c. 21, s. 32, whereby the return of recognizance into the Court of Exchequer is done away with and the Clerk of Assize is directed instead to enroll forfeited recognizance, fines, etc., and to send a copy of the roll, accompanied by a writ of execution in a prescribed form, to the sheriff, whose duty it is to levy thereupon.

The appellant's motion in the Nova Scotia courts was to set aside the order for estreat and forfeiture. Unless he can obtain that relief his appeal cannot succeed. He has no good ground of complaint against the subsequent proceedings assuming the validity and regularity of the estreat itself. That the estreat and forfeiture of the recognizance was a proceeding in a criminal case, taken in a criminal court, and governed

(1) 23 O.R. 65, 72. (2) 20 Can. Cr. C. 369, 370).

1920

PETROPOLIS v. THE KING.

Anglin J.

by criminal procedure, and, as such, not appealable to this court I have no doubt.

I would therefore quash the appeal.

MIGNAULT J.—I concur with my brother Anglin.

Appeal quashed with costs.