REGINA v. CAMPBELL AND MLYNARCHUK

*District Court, Judicial District of Edmonton, Alberta, Kerans, D.C.J.*

*December 5, 1972.*

*L. B. Prodor*, for accused, appellant.

*D. N. Costigan*, for the Crown.

KERANS, D.C.J, (orally) :—This is an appeal by Darlene Agatha Campbell from conviction and sentence.

On a charge before the summary conviction Court that she did, between February 9, 1972, and February 21, 1972, at the City of Edmonton, in the Province of Alberta, unlawfully take part as a performer in an immoral performance at Chez Pierre's situated at 10615-Jasper Ave., Edmonton, contrary to s. 163 (2) of the Criminal Code.

This matter, therefore, comes before me by way of a trial de novo. That section provides, in s-s. (2) :

> (2) Everyone commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

The facts before me are relatively straightforward. On the dates in question, at the place in question, the appellant danced on stage, before an audience. At the start of her performance, she was wearing some clothes. By the end of her performance, she was not wearing any clothes. The dance was described to me as a "go-go dance" which, I understand, is a violent movement of almost all parts of the body, more or less in time to strongly rhythmic music.

I have no doubt in coming to the conclusion that this is a performance within the meaning of the section, and that, in doing what she did, the appellant took part as a performer in that performance. On the question of whether or not the performance was immoral, both counsel have agreed that I am bound to follow the recent decision of the Appellate Division of the Supreme Court of Alberta in R. v. Johnson (No. 1) (1972), 8 C.C.C. (2d) 1, [1972] 5 W.W.R. 638. This was a stated case before the learned Riley, J. [6 C.C.C. (2d) 462, [1972] 3 W.W.R. 226], and appealed from him to the Appellate Division.

In that case, McDermid, J.A., speaking for the Court, said, after drawing attention to the fact that s. 170 of the Criminal Code makes it a crime for anyone to appear nude in a public place, that he understood the enactment of that offence, by the Parliament of Canada, and, I quote, "declared that it is a breach of a moral standard in Canada". And he goes on, "We know of no better way of establishing a moral standard than a declaration by the Parliament of Canada, and so the Provincial Judge was justified in accepting this as his standard in finding that the dance by the respondent in the nude was an immoral performance." I understand, therefore, that since, to be nude in a public place is itself an offence; to perform in the nude, therefore, is an immoral performance within the meaning of the charging section. Therefore, I must conclude that the performance here was immoral within the meaning of that section.

I have been told that the decision of the Appellate Division has been appealed to the Supreme Court of Canada [8 C.C.C. (2d) 279n]. In some cases it is considered appropriate to adjourn or reserve, pending the outcome of an appeal. In my view, this rule should not be followed in the case of appeals from the Appellate Division to the Supreme Court of Canada, for various reasons. One is the delay of time involved. Therefore, on this point, the position of the parties would have to be that, should the Appellate Division decision not be upheld, my decision must also be appealed.

It was argued for the appellant that the place in which this performance took place was not a theatre within the meaning of the charging section. The facts, in that respect, were these : the place in question was on the second floor of a building in down town Edmonton ; the patrons were seated ; there was accommodation for approximately 200 persons ; meals and soft drinks were served, but not liquor; an entrance fee was charged at the door, $3 per person. I find that there was a sign outside the front of this establishment, indicating that minors would not be allowed admission, but that all others, who were prepared to pay the sum of $3, would by implication be allowed admission.

I understand that there was a practice, on the part of the management, to refuse entrance, also, to persons whose attendance was thought undesirable by reason of their being impaired, or unsuitably dressed. The patrons could eat, they could dance on the dance floor, and they could also, of course, watch the performance, earlier described, which was put on from time to time in the course of the evening.

I regret that I am using Tremeear's Annotated Criminal Code, 6th ed. (1964), and I am quoting, therefore, the old section numbers. But s. 130 (c) [now s. 138], defines, for the purpose of the charging section, a theatre as including "any place that is open to the public where entertainments are given, whether or not any charge is made for admission". I have no difficulty in describing the services offered by the management of this place as an entertainment, and the only question, therefore, is whether or not it was open to the public. If it was, it was a theatre; if it was not, it was not a theatre, and the offence could not have occurred in it.

It is argued for the appellant that the restriction, by the management, of free access, was so limiting that it could be said that the premises were not open to the public. Reliance was placed, in support of this argument, on R. v. Keddy, which is found in 3 Grim. L.Q. 271 (1960), which I have read. I understand the decision there, of the learned trial Judge, where he was considering the Ontario Liquor Control Act, R.S.O. 1950, c. 210, simply was to say that it could not be said that a section prohibiting the keeping or consuming of alcohol in a place where, under the authority of another section in the Act, a licence had been obtained for that purpose, could be described as an offence under that Act. I quote from p. 276 :

> A beverage room has a licence to sell liquor and is permitted to sell liquor under the law. It would seem therefore that it cannot be considered as "a public place". The Legislature must have considered it not "a public place" unless so declared.
>
> It would also appear that the type of place set forth in the definition of "public place" is the type of place where liquor is not permitted.

I understand this is authority only for the proposition that, in construing a statute, the various sections of the statute must be construed so as not to be contradictory. And that case is of no help to me.

In Tegstrom v. The Queen, [1971] 1 W.W.R. 147, the learned District 'Court Judge, in Saskatchewan, was considering a similar question, but did consider it from the point of view of what is meant under the Criminal Code as a public place. He said, and I quote from pp. 149-50:

> To constitute a "public place" does not, in my view, require that all segments of the public have a right of access thereto. The word "public" is capable of being broken down into groups or divisions, some examples of which immediately come to mind, being the "buy-ing public", the "book-reading public", the "travelling public" and, without attempting to be facetious. the "drinking public". Many groups that can be identified by habits or pursuits, or other things that distinguish them, are often described as "public", the only qualifications appearing to be that the number constituting the group is substantial and that all possessing the same common interest are included.

Now, it is correct that I am considering the expression, "open to the public", rather than the expression, "a public place", but the expression, "public place" is defined in a previous section as any place to which the public have access. So there seems to be very little difference between them.

In my view, a place is open to the public when the public, as such, is invited to come, even though certain restrictions are placed in their way, and even though certain small sections of the public are not invited. I understand the use of the word "public" here as being in distinction to the word "private". A place that is open to the public is a place that is open to persons generally, rather than open to certain specific individuals.

It is not necessary, in my view, for the application of that section, that the entire world be allowed access. Therefore, I come to the conclusion that this place was a theatre within the meaning of the Criminal Code.

The next argument raised on behalf of the appellant is that the appellant lacked the necessary mens rea for this offence. The facts in this respect were these : she engaged to do this performance, where, earlier, she had refused to engage to do this performance, because she relied upon the statement made to her, by Pierre Couchard, that he, in turn, had been informed that a Supreme Court Judge had, to use his words because he also gave evidence, "Ruled that we could go ahead with bottomless dancing." That decision arose out of a charge in the City of Calgary, of a business acquaintance of Couchard, who was the manager of the place where this performance took place. Ironically, the decision to which Couchard and the appellant referred is the decision at the Trial Division level in R. v. Johnson (No. 1), to which I earlier referred, and which, the witnesses tell me, obtained some newspaper publicity. It was a decision then, that subsequently was reversed on appeal.

Mistake of fact is a defence to a criminal charge, where it can be said that the facts believed by the accused, if true, would have afforded him a defence. It is also said that a mistake of mixed fact and law is a defence. I understand that proposition to be correct, simply because, if there is a mistake of mixed fact and law, then there is a mistake of fact. In my view, there was no mistake of fact by the appellant here. What she was told had happened, in fact, did happen.

Her mistake, if she made any mistake, was in concluding that a statement of law, expressed by the learned Riley, J., was the law. That is not a mistake of fact, that is a mistake of law. It is a mistake of law to misunderstand the significance of the decision of a Judge, or of his reasons. It is also a mistake of law

to conclude that the decision of any particular Judge correctly states the law, unless that Judge speaks on behalf of the ultimate Court of Appeal.

This is not a situation like others, where a mistake of law can be a defence, not because a mistake of law is a defence, but because a mistake of law can negative a malicious intent required for that crime. Thus, for example, where the law requires that a person wilfully, or maliciously, or knowingly, does something wrong, it could conceivably be a defence as negativing intention, to show that, because of the mistake in the understanding of the law, there was no wilful intent or malice. This is not one of those situations, as no such special intention is required for this offence. The only mens rea required here is that the appellant intended to do that which she did. And there is no suggestion, for a moment, that she lacked that mens rea.

This statement, that mistake of law is no defence, is contained in the Criminal Code, in s. 19, under the old numbering, which says :

> 19. Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

Excuse, or legal justification, is a defence at law, and I understand that defence to mean that it is a defence to a criminal charge to show that the act complained of was authorized by some other law. Section 19 says that defence is not available, in effect, when a person has made a mistake as to whether or not this act is excused by another law or authorized by another law.

Properly understood, in my view, the section removing ignorance of the law as a defence, in criminal matters, is not a matter of justice, but a matter of policy. There will always be cases, not so complicated as this, where honest and reasonable mistakes as to the state of the law will be the explanation of the conduct of an accused. In such a circumstance, one cannot help but have sympathy for the accused. But that situation, traditionally, is not a defence. It is not a defence, I think, because the first requirement of any system of justice, is that it work efficiently and effectively. If the state of understanding of the law of an accused person is ever to be relevant in criminal proceedings, we would have an absurd proceeding. The issue in a criminal trial would then not be what the accused did, but whether or not the accused had a sufficiently sophisticated understanding of the law to appreciate that what he did offended against the law. There would be a premium, therefore, placed upon ignorance of the law.

Our Courts, following the traditions of English jurisprudence, have closed that avenue from consideration in the criminal court-room. I respectfully disagree with the learned American Judges in those cases cited by the counsel for the appellant.

The defence should not be allowed as a matter of public policy, contrary to the statement of those learned Judges. Indeed, it cannot be allowed because of public policy. This is the case, notwithstanding the sympathy evoked by the situation of an accused person.

Kenny, in his book, Outlines of Criminal Law, and I am quoting from the first edition, said at p. 69 :

> ... although mistakes of law, unreasonable or even reasonable, thus leave the offender punishable for the crime which he has blundered into, they may of course afford good grounds for inflicting on him a milder punishment.

That is the only relevance, in my view, of the situation in which the appellant finds herself.

I have given some consideration as to whether or not this position varies at all, because of the unique circumstances here, where the appellant relied upon a specific judgment of a Court very immediate in terms of time and place, as opposed to a solicitor's opinion or some understanding as to the law. There is no question that there is something of an anomaly here. Reliance on a specific order, of a specific Judge, granted at a specific time and place, seems, at first sight, not to be ignorance of the law, but knowledge of the law. If it turns out that that Judge is mistaken, then, of course, the reliance on that Judge's judgment is mistaken. The irony is this: people in society are expected to have a more profound knowledge of the law than are the Judges. I am not the first person to have made that comment about the law, and while it is all very amusing, it is really to no point.

The principle that ignorance of the law should not be a defence in criminal matters is not justified because it is fair, it is justified because it is necessary, even though it will, sometimes produce an anomalous result.

When this appellant relied on the decision of the learned trial Judge, she relied on his authority for the law. As it turns out, that reliance was misplaced, as misplaced as reliance on any statement as to the law I might make. Less so, I am sure.

Like counsel, I have had difficulty finding any authorities on this -point. I was referred to Conway v. The King (1943), 81 C.C.C. 189, [1944] 2 D.L.R. 530, [1944] Rev. Leg. 27, by counsel for the appellant. I have read that case. This issue, in my view, is not discussed in that case.

I have also read R. v. Brinkley (1907), 12 C.C.C. 454, 14 O.L.R. 434, in which the matter isdiscussed, although not this specific situation. In that case, a man had received advice from his counsel that a decree of divorce, made by a foreign Court, validly dissolved his marriage in the eyes of the Courts of Canada, and that he was, therefore, free to remarry without fear of bigamy. That opinion was mistaken. He was charged with bigamy, and he was convicted, notwithstanding his reliance on that opinion.

I have also read Kokoliades v. Kennedy (1911), 18 C.C.C. 495, 40 Que. S.C. 306, 13 Que. P.R. 20, which, to me, comes as close as can be to the situation here. This was a case in the Quebec Supreme Court, and arose in 1911. In that case, the accused was charged in the City of Montreal, with selling candy on a Sunday, contrary to a provision in a federal statute. His defence was that he relied on a municipal by-law licensing him to sell candy on a Sunday.

It would appear that this strange situation arose because there was some doubt as to the validity of the federal legislation which had been removed from the revised statutes, although not repealed. Subsequently, the Province of Quebec and the City of Montreal passed regulatory legislation purporting to permit in certain cases sales on the Lord's Day forbidden in the federal statute. The magistrate hearing the trial heard argument from the Crown that the federal legislation was constitutionally valid, and the Montreal City by-law was constitutionally invalid, and therefore an excuse was not available to the accused because the law authorizing him to do what he did, and upon which he relied, although enacted by a Legislature, or under the authority of the Legislature, was ultra vires.

The learned magistate in that case, found that the Mont-real by-law was ultra vires, and the federal statute intra vires; a decision which, in another case, was subsequently confirmed by the Privy Council, as we all know.

The learned magistrate went on to say that, because the law upon which the accused relied was unconstitutional, it was no law at all. He had nothing to rely upon, and he was guilty. This matter was appealed to Quebec Supreme Court. The Supreme Court Judge said that a statute authorizing an act should give rise to the defence of excuse, even though that statute may be ultra vires, and that the defence of excuse should be available in such a situation until there has been a judgment declaring the statute to 'be ultra vires spoken by a Court of high jurisdiction "after the gravest consideration". That is a strange remark. I would have thought that Courts of high or low jurisdiction give every case grave consideration.

The situation there is not unlike the situation here. The accused there, saw a city by-law, seemingly authorizing him to do what he did, and relied upon it. It turned out the by-law had no validity. But it would take sophistication in the law to appreciate that.

Similarly, here, the appellant relied upon a statement of law, by a Supreme Court Judge in Alberta. It would take the greatest of sophistication of knowledge of the law to conclude that he was or might be mistaken. In the first case, a Judge, on appeal, held that the defence of excuse ought to be allowed. I respectfully disagree with the Judge in that case, for the reasons I have mentioned, and also for this reason, he relies upon what used to be s. 15 of the Criminal Code, and which says:

> 15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in de facto possession of the sovereign power in and over the place where the act or omission occurs.

It was his view that that section ought to be interpreted to mean that, where any law-making authority has purported to exercise its authority, the public is entitled to obey that law and rely upon that law as an excuse in a criminal case. In effect, he found that the Montreal City Council was a person in de facto possession of sovereign power, and I suppose one would have to argue by analogy that the learned Riley, J., was a person in de facto possession of sovereign power.

Well, Riley, J., is a person in de jure possession of certain powers. In any event, I disagree strongly with the construction placed upon that section by the learned Judge in the Kennedy case.

I understand s. 15 is in the Criminal Code for one purpose, and one purpose only, and that is to create a defence on a criminal charge for a person who has obeyed a law, or order, made by a person who, in some place and time, had some physical control over some portion of Canada, and purported to exercise a sovereign power which the Government of Canada did not recognize. In short, the section is intended to protect persons who have been subjected to the exercise of power by an enemy alien power in our society, or some group inside of our society who has achieved, momentarily or otherwise, de facto sovereignty, such as a revolutionary.

I have no hesitation in saying that that section has no application in the sort of situation before me. I, therefore, conclude that the mistake of law of the appellant affords no defence to her on this charge. There being no other defences, and the facts necessary having been made out, the conviction of the Court below, in my opinion, was correct. The appeal as to conviction is dismissed.

. . . .

I should have been more careful in my language a moment ago, when I said the appeal as to conviction was dismissed. Under the new law, I should have more properly said that I find the appellant guilty of the charge, and will hear argument as to whether or not to allow or dismiss the appeal as to conviction.

. . . . .

Well, I have already indicated, in a quotation from Kenny, that, in this awkward situation, the matter does not afford a defence, but should certainly be considered in mitigation of sentence. Indeed, there are several cases, not as awkward as this, in the law reports, involving a person who had an honest and reasonable mistake in belief as to the law, and for whom the Courts expressed sympathy, and, in respect of whom, sentence was mitigated.

It is at this stage where the scales of justice are balanced. Clothed with very recent power to refuse to enter a conviction, I can now balance the scales of justice even more delicately. I have read a note in vol. 14 of the English and Empire Digest, at p. 51 of an old case, R. v. Bailey (1800), Russ & Ry. 1, 168 E.R. 651. It goes back to 1800. In that case, the Government of England had passed a statute, making something a crime which was not previously a crime. Subsequently, the accused did the forbidden act. The Courts found that, in fact, in the district in which this crime was committed, no news had yet reached anyone of the passage of this Act. Nor could any news have reached this district of the passage of this Act. And that the accused, therefore, had to be convicted of an offence which he did not and could not have known was an offence. And they said there that the proper way of dealing with the matter was to give a pardon, which I understand to be a conviction followed immediately by the wiping out of a conviction.

I have no power to give a pardon, but I do have power to give an absolute discharge. In my view, this is the proper case. I have considered the fact that this lady apparently also committed the crime of being nude in a public place. I say apparently, carefully, as I do not wish to accuse her of something wrongly. But it is difficult not to come to that conclusion.

However, it is not my function here to sentence her for crimes that she may have been guilty of, but which she is not charged with today, and, therefore, I do not take that into consideration. It perhaps can also be argued that no reasonable person could find, in the judgment of Riley, J., justification for some of the things that this lady is alleged to have done. But to argue that would be to argue that she would have to have a rather sophisticated knowledge of what he said, and the significance of what he said, and that is unreal. She understood, as she said, that some Judge had said dancing bottomless is now okay, and I cannot reasonably test her understanding on that too closely. Also, I have given consideration to whether or not there ought to be deterrent here.

I am not aware, perhaps I am naive, but I am not aware that these tawdry nude night-club acts, of this sort, have become a prevalent problem in our community. Therefore, I think, out of the sense of justice, and certainly not out of any sense of approval for what this lady did, it would be appropriate for me to grant her an absolute discharge, and that is what I do.

*Accused discharged absolutely.*