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*Jun. 26
*Jun. 28

IN RE FRED BROWN

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 1078 and 1079 Cr. C.

The petitioner was convicted on September 22, 1944, in respect of three separate charges under section 436 Cr. C. and was sentenced on each charge to be fined $5,000 or, in default of payment, to serve consecutively two years in gaol and, in addition, was further sentenced on each charge to serve one year in gaol, such sentence to run concurrently. The petitioner paid the fines and served the additional sentence of one year. On October 18, 1944, the Attorney General for Ontario gave notice of appeal against the additional sentence; but the appeal was not heard until May, 1946, at which time the petitioner, having served the sentence, had been released from gaol. The appellate court ordered that the sentence be increased on each of the charges for a further term of one year to run consecutively. The petitioner was re-arrested and incarcerated. He then moved for the issue of a writ of *habeas corpus,* claiming that he is detained illegally because there was no longer jurisdiction in the appellate court to increase the sentence imposed on him. The ground raised by the petition is that, under sections 1078 and 1079 Cr. C., the petitioner having undergone his sentence, this had "the like effect and consequences as a pardon under the great seal" and that, from that moment, he was "released from all further or other criminal proceedings for the same cause".

Held that the petition is not well founded and that the writ should not issue.

Held, further, that, as the same point has been submitted to the appellate court and that court had dismissed it, there would appear to be *res judicata* on the subject matter by a court competent to dispose of the objection; and the present petition, under the circumstances, might well be considered as an attempt to appeal indirectly from the judgment of the appellate court, where no direct right of appeal lies.

MOTION before The Chief Justice of Canada in Chambers, for the issue of a writ of *habeas corpus,* the petitioner claiming that he was illegally detained in gaol on the grounds stated in the head-note and in the judgment now reported.

S. A. Hayden K.C. for the motion.

John J. Robinette K.C. contra.

THE CHIEF JUSTICE:—The petitioner was convicted on a plea of guilty on the 22nd day of September, 1944, in respect of three separate charges, under section 436 of the

*PRESENT:—The Chief Justice in Chambers.

Criminal Code, as amended by 1939, chapter 30, section 8, and was sentenced on each charge to be fined $5,000 or, in default of payment, to serve two years in gaol, such sentence of two years to be served consecutively, and, in addition, was further sentenced on each charge to serve one year in gaol, such additional sentence to run concurrently.

The petitioner has paid the said fines and has served the said additional sentence of one year concurrently on each of the said charges.

On the 5th day of October, 1944, the Attorney-General for Canada gave notice of appeal against the sentence imposed, and, on the 18th day of October 1944, the Attorney-General for the province of Ontario gave similar notice. But through circumstances about which the petitioner does not complain, the appeal was not heard by the Appellate Division of the Supreme Court of Ontario, until the 3rd day of May, 1946, at which time the petitioner had served the sentence of one year imposed on him, and had been released from the gaol where he had served his term of imprisonment.

The Supreme Court of Ontario, Appellate Division, ordered that the additional sentence of one year in gaol on each of the above charges be varied by increasing the sentence on each of the said charges by a further term of one year, and the said increased sentence to run consecutively. The petitioner was re-arrested on the 6th day of June, 1946, and is presently confined at Kingston penitentiary, serving the increased sentence imposed on him as the result of the appeal.

It is now claimed that the petitioner is being detained illegally because there was no longer jurisdiction in the Supreme Court of Ontario, Appellate Division, to increase the sentence imposed on Brown as a result of which the arrest was made on the ground that, under sections 1078 and 1079 of the Criminal Code, the petitioner having undergone his sentence and having endured the punishment adjudged by the trial judge, this had "the like effect and consequences as a pardon under the great seal" and that,

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from that moment, he was "released from all further or other criminal proceedings for the same cause" and the court of appeal could no longer deal with the matter.

After having heard the very able argument on behalf of the petitioner pleading for the issue of a writ of *habeas corpus,* I am of opinion that the petition is not well founded and that the writ should not issue.

Under subsection (2) of section 1013 of the Criminal Code, the Attorney-General could, with leave of a court of appeal or a judge thereof, appeal to that court against the sentence passed by the trial court, unless that sentence was one which was fixed by law. This was done within the required delay.

Under section 1015, subsection (2), a judgment whereby the court of appeal increased the punishment of an offender, as happened in the premises,

shall have the same force and effect as if it were a sentence passed by the trial court.

Reading that section 1015 (2), together with sections 1078 and 1079, as they should be, my opinion is that the "punishment" referred to in section 1078 and the "imprisonment" referred to in section 1079 mean the punishment or the imprisonment as finally determined by the court of appeal, in cases where there has been an appeal, and which, by force of section 1015 (2),

shall have the same force and effect as if it were a sentence passed by the trial court.

Otherwise, to my mind, in very many cases, the recourse to the court of appeal would be rendered useless and inoperative.

Here, the notice of appeal was effectively served upon the petitioner, the Appellate Division of the Supreme Court of Ontario was regularly seized of the appeal, and that Court could either refuse to alter the sentence or diminish or increase the punishment imposed by that sentence. It increased that punishment and it had full jurisdiction to do so, under section 1015 of the Criminal Code.

The sentence or punishment so increased and imposed by the court of appeal had the same force and effect as if it were a sentence passed by a trial court; and the sentence,

punishment or the imprisonment to which sections 1078 and 1079 have reference, is the sentence, punishment or imprisonment which was substituted by the Appellate Division to the sentence, punishment or imprisonment awarded in the first instance. They, in fact, became the sentence, punishment or imprisonment awarded in the first instance, and it had the same force and effect as if it were passed by the trial court. It is only the enduring of that sentence as finally determined by the Appellate Division which, according to the true meaning of the two sections 1078-79 is stated to "have a like effect and consequences as a pardon under the great seal."

It cannot be held that there was any lack of jurisdiction in the Appellate Division to render the judgment it has rendered in the present case.

The above is really sufficient to dispose of the matter, because it contains a final answer to the petition for *habeas corpus* and it defines the limit to which I am entitled to go on such petition for the writ.

I have carefully read the authorities referred to by the learned counsel for the petitioner. (*Le Roi* v. *Levy* (1); *Rex* v. *Lee Park*, (2); *Rex* v. *Kirkham*, (3); *Rex* v. *Jarvis*, (4); *Rex* v. *Jarvis*, (5); and *Ex parte Boucher*, (6)) and either they support the opinion just expressed by me or, with respect, I feel bound to disagree with them.

I fully concur with the passage in Chief Justice Rowell's judgment in the second *Jarvis* case, (5) at page 197, that

> Sections 1078-79 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.

As for the passage in Sir Lyman Duff's judgment re: *Royal Prerogative of Mercy upon Deportation Proceedings* (7), where the opinion is expressed

> that the phrase "punishment adjudged" in Section 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,

(1) (1923) Q.R. 35 K.B. 541.
(2) (1924) 43 Can. Cr. C. 66.
(3) (1935) 64 Can. Cr. C. 255.
(4) (1936) 66 Can. Cr. C. 20.
(5) (1937) 68 Can. Cr. C. 188.
(6) (1928) 50 Can. Cr. C. 161.
(7) [1933] S.C.R. 269, at 274; 59 Can. Cr. C. 301.

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I think it should be read in the way suggested by Chief Justice Rowell just mentioned, or suggested in the present reasons, that, when there is an appeal, the "punishment adjudged" is necessarily that finally determined by the court of appeal and which, under section 1015 (2), is substituted for the original sentence and thus becomes the original sentence.

Of course, I need not add that *habeas corpus* is not applicable to review the judgment whereby sentence was imposed, more particularly in this case where the appeal to the Appellate Division was limited to the sentence; and no appeal in respect of the sentence lies to the Supreme Court of Canada.

It should be pointed out that the point on which the application for *habeas corpus* is based was submitted to the Appellate Division and that Court passed upon it. I cannot see that it had no jurisdiction to dismiss the point and, now that it has done so, there would appear to be *res judicata* on the subject matter by a Court which was competent to dispose of that objection.

Indeed, the present proceedings, under the circumstances, might well be considered as an attempt to appeal indirectly from the judgment of the Appellate Division, where no direct right of appeal lies.

The latter objection would be fatal to the petitioner's present application, even if the point on which I am now deciding and which is based on the construction that, in my view, should be given to sections 1078-79, was not decisive. (See *In re Sproule,* (1)).

The petition will accordingly be dismissed (2).

Petition dismissed.

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(1) (1886) 12 Can. S.C.R. 140, at p.p. 190, 194 to 205, 211, and 245 to 248.

(2) REPORTER'S NOTE:—An appeal to the Full Court is now pending.