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*Jun. 28
*Jun. 29

IN RE HAROLD SAMUEL GERSON

IN RE MATT SIMMONS NIGHTINGALE

Habeas corpus—Petitioners charged with criminal offence and committed for trial—Called as witnesses in another trial—Refused to be sworn and give evidence—Fear to incriminate themselves—Contempt of court—Sentence to term in jail "under common law"—Pronounced after trial terminated—Alleged illegalities of sentence and committal—Inability to prepare defence in their own trials—No conflict with section 165. Cr. C.—Section 5 Canada Evidence Act.

In March 1946, the accused were charged with violation of the *Official Secrets Act* and conspiracy to violate that Act. They were committed for trial and subsequently entered a plea of not guilty. Their trials were to take place in September, 1946. In June, 1946, they were called as witnesses by counsel for the Crown in a case of The King *v.* Rose. They refused to be sworn and give evidence on the ground that their testimony may tend to incriminate themselves, although

*PRESENT:—The Chief Justice in Chambers.

they were told by the trial judge that their refusal was in contradiction with the very wording of section 5 of the *Canada Evidence Act*. The petitioners were told to remain in attendance at the trial, and, being recalled later, still refused to give evidence. The trial judge then declared them in contempt of court and they were told to remain at the disposal of the Court. Some five days after the Rose trial terminated, the trial judge sentenced the petitioners "under the common law" to three months in jail, where they have been detained since. The petitioners moved for writs of *habeas corpus*, alleging that their detention was illegal and they were thus unable to prepare their full defence to the charges laid against them. The alleged illegalities are based on several grounds stated in the judgment now reported.

Held that the petitioners have not proved any illegality in the sentences and committals of the trial judge, who had full competence and jurisdiction to act as he did. There is no ground shown by the petitioners which would justify the ordering of the issue of the writs prayed for and the petitions, therefore, should be dismissed.—The refusal by the petitioners to be sworn was a direct defiance of a lawful order of the Court and an attempt to frustrate the course of justice: it was, moreover, a contempt in the face of the Court.—The explanation for their refusal cannot justify their conduct, because they could not then know that their answers might incriminate them and, moreover, they were acting in direct opposition to the very wording of section 5 of the *Canada Evidence Act*.—The power to punish for contempt is inherent in courts of superior original jurisdiction, quite independent of enactments in codes or statutes relating to their disciplinary powers.—The trial judge, when imposing the sentence, meant evidently to exercise that inherent power, when he stated he was proceeding "under the common law".—Section 165 Cr. C. does not conflict or interfere with such inherent power.—The trial judge was not compelled, either by the Criminal Code or the jurisprudence concerning contempt of court, to render his sentence immediately: he had the power of delaying it until the end of the Rose trial.

MOTION before The Chief Justice of Canada in Chambers, for the issue of a writ of *habeas corpus*, the petitioners alleging that they were illegally detained in gaol.

Marcel Marcus K.C. for the motion.

F. P. Varcoe K.C. and *Oscar Gagnon K.C. contra.*

THE CHIEF JUSTICE:—These are two petitions for the issue of a writ of *habeas corpus*, based on identical grounds and which therefore can be disposed of upon the same reasons.

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The petitioners allege that they are at present illegally detained in the common jail at Bordeaux, in the city and district of Montreal, under the following circumstances:

On or about the 15th of March, 1946, the petitioners were charged in the Ottawa Police Court with violation of the *Official Secrets Act* and conspiracy to violate the *Official Secrets Act* and they were committed for trial, after preliminary hearing.

They were subsequently arraigned before the Honourable the Chief Justice McRuer of the Supreme Court of Ontario, at Ottawa, and they entered a plea of not guilty. It is stated that their trial is to take place at Ottawa, on the 9th day of September, 1946.

On the 13th day of May, 1946, they were served with a subpoena to attend as witnesses and give evidence in the case of Rex *vs* Fred Rose. They attended the trial and remained in attendance from the 20th day of May, 1946, until they were called as witnesses by counsel for the Crown, the petitioner Gerson on the 8th of June and the petitioner Nightingale on the 12th of June, 1946.

The Honourable Mr. Justice Lazure was presiding in the trial by jury in the case of Rose.

The petitioners refused to be sworn and give evidence. In doing so, each of them explained to the learned trial judge that his refusal to answer questions was not because he wished to show any disrespect to the Court, nor did he desire to obstruct the course of justice in any way, but because he was afraid of incriminating himself.

The petitioners further explained that they had already been examined by the R.C.M.P. and the Royal Commissioners inquiring into certain matters of spies, when, as they alleged, they were refused the benefit of counsel, either before or during said examination. Further, they said, the report of the Royal Commissioners dealing with the petitioners' evidence, given before them, had been widely publicized and the petitioners had been prejudged as guilty even before they had their trial by jury, as they had elected.

The learned trial judge pointed out to the petitioners that, under section 5 of the *Canada Evidence Act,* no witness could be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

That section further adds that if, with respect to any question, a witness objects to answer upon the ground that his answer may tend to criminate him, and if, but for the *Canada Evidence Act,* the witness would therefore have been excused from answering such question, then although the witness is, by reason of this Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

The learned trial judge however denied Crown counsel's application to commit *instanter* the petitioners for contempt of court, but he required them to remain in attendance at the trial during its pendency.

On June 12, at the request of Crown counsel, the petitioners were recalled to the witness stand. The learned trial judge told them that, under section 5 of the *Canada Evidence Act,* they were compelled to answer the questions put to them.

The petitioners reiterated to the learned trial judge that they themselves were awaiting trial upon charges not dissimilar to those on which the accused Rose was being tried, and that they could not give evidence without serious danger of further criminating themselves and putting their liberty in jeopardy.

The learned trial judge then declared the petitioners in contempt of court and told them to remain at the disposal of the Court until the Rose trial terminated when he would tell them "what he would do with them". The petitioners were not detained.

The Rose trial terminated on the 15th day of June, 1946, and the petitioners were told to report to the Court on the 20th day of June, when the learned trial judge, without

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asking the petitioners whether they had anything to say or whether they had any lawful excuse or justification for refusing to obey the order of the Court to testify as required of them under section 5 of the *Canada Evidence Act,* sentenced the petitioners "under the common law" to three months in jail.

The petitioners were then taken to the Bordeaux jail and they have been detained there ever since.

They now allege in support of their petitions for the issue of a writ of *habeas corpus* that they are charged with the most serious offence of conspiracy, as well as the substantive offences under the *Official Secrets Act,* that their trial is set for September 9, 1946, and that while they are illegally detained at Bordeaux jail, they are unable to take the necessary steps to prepare their full defence to the charges laid against them and to make the necessary efforts to prove their innocence.

They claim that they are being detained illegally and without legal cause or justification and that the learned trial judge had no jurisdiction to sentence them to three months in jail, or at all, and that the sentence is illegal, irregular and invalid, and has no foundation in either law or in fact for the following reasons:—

A) In imposing the sentence of three months for contempt of court upon the petitioners, the learned trial judge stated that he was proceeding under the common law. Yet, under the common law, the petitioners were not compelled to give evidence which would criminate them.

B) If petitioners committed an offence at all, it was in refusing to obey an order of the Court to answer questions as required under section 5 of the *Canada Evidence Act.*

C) That such an offence is an indictable offence and is expressly covered by the Canadian Criminal Code.

D) That under the provisions of the Canadian Criminal Code, the petitioners were not committing an offence if they had a lawful excuse for not obeying such order.

E) That the petitioners should have been charged and tried under the provisions of the Canadian Criminal Code in that behalf, and on the hearing of such charge, the petitioners would have had the right to make a full defence

showing their justification or lawful excuse, which in fact they have, for refusing to obey such order of the Court.

F) That such justification and lawful excuse would be a complete defence as well under the Code as the common law.

G) That the learned trial judge never asked the petitioners before passing sentence upon them whether they had justification or a lawful excuse for refusing to obey the order of the Court to testify under section 5 of the *Canada Evidence Act.*

H) That inasmuch as the petitioners can be said to have committed an offence, it was in refusing to answer questions under the said section 5 of the *Canada Evidence Act,* and as the Canadian Criminal Code contains statutory provisions covering the offence of contempt of court, common law principles and practices did not apply in the premises.

I) That if the learned trial judge had jurisdiction to sentence the petitioners, by reason of their refusal to testify as aforesaid, upon the ground that there was urgency or expediency, to sentence them *instanter,* once the trial was over, and Rose had been convicted, such expediency and urgency had disappeared. The learned trial judge no longer had jurisdiction to summarily dispose of the contempt of court charge *instanter,* but should have proceeded in the manner prescribed by the provisions of the Canadian Criminal Code in that behalf.

I have no hesitation to say that the refusal of the petitioners to be sworn was a direct defiance of a lawful order of the Court and an attempt to frustrate the course of justice. Moreover, it was a contempt in the face of the Court.

The petitioners called as witnesses were not justified in refusing to be sworn or to be examined. The explanation of their refusal: that their testimony might tend to incriminate them, cannot be invoked in justification of their conduct for at least two reasons:—

(*a*) At that point in the case, the witnesses could not know that the answer to any question which might be put to them might incriminate them.

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(*b*) Section 5 of the *Canada Evidence Act* specifically enacts that no witness shall be excused from answering any question upon the grounds advanced by the petitioners as witnesses. Subsection 2 of section 5 of the *Canada Evidence Act* is clearly to the effect that, notwithstanding such circumstances, the witness is compelled to answer, but it adds that

> the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

The petitioners in refusing even to be sworn, notwithstanding the order of the Court, were in flagrant violation of the law and in designed contempt of the Court.

The power to punish for contempt is inherent in courts of superior original jurisdiction, quite independent of enactments in codes or statutes relating to their disciplinary powers.

As was said by Cross J. in *Fournier* v. *The Attorney-General* (1),

> It is to be observed that the power to punish for contempt by summary process is conceded on all hands to be a power inherent in every court of record.

(And see also what was said by Archambault J. in the same case, at page 459.)

It was, no doubt, to the existence of such inherent power, independent of enactments in codes or statutes, that Mr. Justice Lazure meant to refer by stating that he was proceeding "under the common law" and not under section 165 of the Criminal Code, which provides for the indictable offence of disobedience to the orders of a court. The imposition of the sentence was the exercise of the inherent power which exists independently of codes and statutes, but the contempt itself was the violation of section 5 of the *Canada Evidence Act,* which clearly state that the so-called explanation, put forward by the petitioners of their refusal to be sworn at all, constituted no lawful excuse.

Section 165 of the Criminal Code does not conflict or interfere with the inherent power to punish for contempt by summary process. That section provides for contempt in

(1) (1910) Q.R. 19 K.B. 431, at 436.

its criminal aspect and disobedience of orders of the court is thereby made an indictable offence if the procedure there referred to is resorted to, but section 165 itself contains the proviso

unless some penalty is imposed, or other mode or proceeding is expressly provided, by law.

Giving to section 165 the meaning suggested by counsel for the petitioners would do away with the inherent power.

In *Ex Parte Jose Luis Fernandez* (1), upon the trial at the assizes of an information against one C. for bribery alleged to have been committed by him at the election of a member of Parliament, a witness was called, on the part of the Crown, who had been examined before a Royal Commission about to inquire into alleged corrupt practices at that election, and who had received from the Commissioners a certificate indemnifying the witness from

all penal actions, forfeitures, punishments, disabilities and incapacities, and all criminal prosecutions to which he may become liable or subject at the suit of Her Majesty etc. for anything done by him in respect of such corrupt practice

—and being asked

Did you in the month of April 1859, receive any sum of money from Mr. C.?

declined to answer the question on the ground that his answer might tend to criminate himself; and, though told by the presiding judge that the certificate was a complete protection to him, and that he was bound to answer the question, he persisted in his refusal. The judge thereupon committed him to York Castle for six months

for having wilfully and in contempt of the Court refused to answer the said question

and further imposed upon him a fine of 55 pounds. It was held by the Court of Exchequer that, the Court of Assize being a superior court, the judge had jurisdiction to commit and was not bound to set out at length in his warrant the cause of his commitment, his decision not being subject to review by the Court above.

I find no substance in the contention of the petitioners that they were not, before sentence, asked whether they had any justification or lawful excuse for refusing to obey the

(1) (1861) 10 C.B. N.S. 3.

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order of the Court to be sworn and to testify. On the two occasions when the petitioners were called as witnesses, they had full opportunity to put forward any pretended excuse for their refusal and whatever justification they claimed was of no avail in view of section 5 of the *Canada Evidence Act*.

Nor was there anything wrong in delaying the sentence until the end of the Rose trial. There is nothing either in the Criminal Code itself or in the jurisprudence concerning contempt of court which compels the judge to render his sentence immediately.

In the case of *State* vs. *Morrill*, (1) referred to with approval by Mr. Justice Marshall in *Re Shepherd*, (2) at p.p. 261, 262, in the Supreme Court of Missouri, in 1903, it was stated, at p. 399 of *Morrill* case (1), in words which I wish to make my own:

> The cases above cited (and many more might be cited if deemed at all necessary), abundantly show that, by common law, courts possess the power to punish, as for contempt, libellous publications of the character of the one under consideration upon their proceedings, pending or past, upon the ground that they tend to degrade the tribunals, destroy public confidence and respect for their judgments and decrees, so essentially necessary to the good order and well being of society, and most effectually obstruct the free course of justice.

Before having cited the above passage, Mr. Justice Marshall said (3):

> The power to punish for contempt is as old as the law itself, and has been exercised so often that it would take a volume to refer to the cases. From the earliest dawn of civilization, the power has been conceded to exist. It has been exercised, or not, as a matter of public policy, but its existence has never been denied. * * * In fact, so well settled is the law of England in this regard that it is said in 3 Enc. of Laws of England, p. 313: "A Court of justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are instructed to its care, would be an anomaly which could not be permitted to exist in any civilized community . . . . without such protection, courts of justice would soon lose their hold upon public respect, and the maintenance of law and order would be rendered impossible."

I do not find therefore that the petitioners have proved any illegality in the sentences and committals by Mr. Justice Lazure. The learned trial judge had full competence

(1) (1855) 16 Ark. 384.
(2) (1903) 177 Mo. 205.
(3) (1903) 177 Mo. 205, at pp. 218 and 226.

and jurisdiction to act as he did and the petitioners show no ground upon which I would be justified in ordering the issue of the writs prayed for; and for the above reasons, their petitions should be dismissed.

Petition dismissed.

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