IN RE

SAMUEL HAROLD GERSON

1946

*Sept. 4
*Sept. 5

Habeas corpus—Petitioner charged with criminal offence—Refused to be sworn as witness in another trial—Fear to criminate himself—Contempt of court—Sentence "under common law"—Legality of sentence or committal—Sections 165 and 180 Criminal Code.

The petitioner, charged with a criminal offence, being called as a witness in a criminal trial, refused to be sworn and give evidence. The trial judge declared him in contempt of court and sentenced him "under the common law" to a term of imprisonment. The petitoner applied for the issue of a writ of *habeas corpus* before The Chief Justice of this Court, and the application was dismissed. The petitioner then appealed to the Full Court from that order.

Held that the appeal should be dismissed.—The trial judge had the power and authority to make the committal order and, in proceeding to do so, had not infringed any rule of law.

APPEAL from an order of The Chief Justice of Canada, in Chambers, (1) refusing an application by the petitioner for the issue of a writ of *habeas corpus*.

Marcel Marcus K.C. for the appellant.

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

The judgment of the Court was delivered by

KERWIN J.:—This is an appeal from an order of the Chief Justice of this Court refusing an application for the issue of a writ of *habeas corpus*. Apparently no question was raised before the Chief Justice and certainly it was not raised before us as to his power, or ours, to order the issue of such a writ under section 57 of the *Supreme Court Act* and nothing, therefore, is said upon the point.

(1) See *ante* p. 538.

*PRESENT:—Kerwin, Hudson, Rand and Estey JJ.

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The circumstances attending the committal of the applicant to three months in jail are set forth in the reasons for judgment of the Chief Justice and need not be repeated. It is sufficient to state that the applicant declined to be sworn as a witness for the Crown in a criminal trial against a third party although subpoenaed so to do, on the ground that the answer he might give to any question that might be put to him might tend to criminate him, and this notwithstanding the provisions of section 5 of the *Canada Evidence Act*:—

5. No witness shall 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.

2. If with respect to any question a witness objects to answer upon the ground that his answer 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, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial 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.

It was argued that because Mr. Justice Lazure, before whom the trial was proceeding, stated that he sentenced the applicant under the common law the order for committal was void. The argument was, that since at common law the applicant would not have been compelled to answer any question that might tend to criminate him, and that it was only by the above section that this privilege was removed, the common law had no application. However, as the Chief Justice of this Court pointed out in effect, it was the common law as to contempt of court to which Mr. Justice Lazure referred.

Reference was then made to section 165 of the Criminal Code:—

Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any lawful order other than for the payment of money made by any court of justice, or by any person or body of persons authorized by any statute to make or give such order, unless some penalty is imposed, or other mode or proceeding is expressly provided, by law.

And to section 180 (*d*):—

Every one is guilty of an indictable offence and liable to two years' imprisonment who

* * *

(*d*) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice.

The argument on this point was that the applicant could be prosecuted under either of these sections and that these proceedings being available the right of the Court to punish for a contempt of court had been abrogated. Without deciding whether either of these sections would apply in the circumstances, we are of opinion that even if that were so it is a necessary incident to every superior court of justice to imprison for a contempt of court committed in the face of it: *Ex Parte Jose Luis Fernandez* (1), a judgment of the Court of Common Pleas in which judgments were delivered by Chief Justice Erle, Willes J. and Byles J. That right persists and has not been abrogated by either of the sections of the Criminal Code referred to and the mere fact that the trial of the third party had been completed did not deprive the Court of the power to exercise its authority.

Mr. Marcus next argued that even if he admitted that a contempt of court had been committed by the applicant and that Mr. Justice Lazure had the power to punish the applicant for that contempt, no opportunity was given the applicant to make any representations as to what order should, under all the circumstances, be made. This is not like the case of *In Re Pollard* (2), because, undoubtedly, the present applicant took a position from the very commencement in direct conflict with the provisions of section 5 of the *Canada Evidence Act* and there was no doubt as to this being the basis of the order of committal made against him. Reliance, however, was placed upon another decision of the Privy Council in *Chang Hang Kiu* v. *Piggott* (3), but there what was in question was a section of an Ordinance and it was held that as it did not dispense with giving the appellants an opportunity before sentence of

(1) (1861) 10 C.B. n.s. 3.
(2) (1868) L.R. 2 P.C. 106.
(3) [1909] A.C. 312.

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explaining or correcting misapprehensions of their statements, it was essential that it should be accorded to them. It was also held that the judge who had committed for contempt should, before sentencing the appellants,

> have given them an opportunity of giving reasons against summary measures being taken.

That, however, must be read in connection with the Board's subsequent statement

> it would have given an opportunity of explanation and possibly the correction of misapprehension as to what had been in fact said or meant

and also in connection with the Board's reference to the *Pollard* case (1). Here, accepting what is stated in the petition for the writ of *habeas corpus* that the applicant in a polite manner expressed his respect for the Court and the presiding Justice and his desire not to obstruct the course of justice in any way, it is apparent from the petition itself that the applicant adhered to his original position that he would not answer any question because such answer might tend to criminate him. Mr. Justice Lazure had already been apprised that Gerson had been indicted and had pleaded not guilty; that he was at liberty on bail and that his trial would take place early in the following September; and it is not suggested that there was anything else that the applicant desired to say or in fact could say.

Reliance was placed upon the fact that in another prosecution in Ontario, Chief Justice McRuer had declined to make an order of committal against one Lunan for refusing to answer certain questions on the ground that they tended to criminate him. As Chief Justice McRuer stated, he was there dealing only with the cricumstances of that particular case. This decision was brought to the attention of Mr. Justice Lazure but it has no application to the circumstances of any other case, including this. In fact, in this connection and also in connection with the suggestion that the applicant, instead of being imprisoned, might have been dealt with in some other way, it should be pointed out that these circumstances have nothing to do with the original application before the Chief Justice of this Court for a writ of *habeas corpus* or the present appeal. Neither proceeding is an appeal from the order

(1) (1868) L.R. 2 P.C. 106.

for committal. The Chief Justice was, and the Court is, restricted to an inquiry as to whether Mr. Justice Lazure had the power and authority to make the committal order and whether in proceeding so to do he infringed any rule of law. We are of opinion that he had the power and that he did not transgress any rule of law and the appeal must be dismissed.

Appeal dismissed.