CONTEH v. REGEM

Full Court (Purcell, C.J., Sawrey-Cookson, J. and McDonnell, Ag. J.): January 29th, 1923

[1] **Administrative Law — habeas corpus — jurisdiction of courts — Circuit Court has no jurisdiction to issue writ:** The Circuit Court has no inherent or statutory jurisdiction to issue a writ of *habeas corpus* since the court was created by the Protectorate Courts Jurisdiction Ordinance, 1903 which conferred upon it only limited jurisdiction the terms of which must therefore be strictly complied with; the effect of s. 37 of the Ordinance is that the court has jurisdiction only in cases within the terms of ss. 38 and 39, and possesses the powers and authorities of the Supreme Court only in the exercise of that limited jurisdiction (page 56, lines 31—40; page 57, lines 9—21; page 58, lines 3—17).

[2] **Constitutional Law — fundamental rights — protection from arbitrary detention — habeas corpus — Circuit Court has no jurisdiction to issue writ:** See [1] above.

[3] **Courts — Circuit Court — jurisdiction — derived solely from statute and limited by ss. 37, 38 and 39 of Protectorate Courts Jurisdiction Ordinance, 1903 — court possesses powers of Supreme Court only in exercise of limited jurisdiction:** See [1] above.

[4] **Courts — Circuit Court — jurisdiction — habeas corpus — no jurisdiction to issue writ of habeas corpus:** See [1] above.

[5] **Statutes — interpretation — statutes conferring jurisdiction — conditions to be strictly complied with:** See [1] above.

The applicant applied to the Circuit Court for a writ of *habeas corpus.*

The application for a writ of *habeas corpus* was refused on the ground that the Circuit Court (Prior, Ag. J.) had no jurisdiction to issue the writ.

A further application was made, when the Circuit Court was not sitting, to the Chief Justice (Purcell, C.J.) under the Protectorate Courts Jurisdiction Ordinance, 1905, s. 11. He granted a rule nisi, subject to the opinion of the Full Court and stated a case asking whether the Circuit Court has jurisdiction to issue a writ of *habeas corpus.*

In the Full Court the applicant contended that there is an inherent jurisdiction in all superior courts of record to issue the writ and that the Circuit Court must have such jurisdiction since the statutory instrument fixing Circuit Court fees under s. 66 of the Protectorate Courts Jurisdiction Ordinance, 1903, expressly provides for the payment of a fee on the issue of the writ.

In reply the respondent contended that the jurisdiction of the Circuit Court is strictly limited by statute and that in the absence of any express provision in the Protectorate Courts Jurisdiction Ordinance, 1903, the court had no authority to issue such a writ.

The court held that the Circuit Court had no jurisdiction to issue the writ of *habeas corpus.*

Cases referred to:

(1) *Ex p. Anderson* (1861), 121 E.R. 525; 3 E. & E. 487.

(2) *R. v. Earl of Crewe*, [1910] 2 K.B. 576; (1910), 102 L.T. 760.

(3) *R. v. Lefroy* (1873), L.R. 8 Q.B. 134; *sub nom. Ex p. Jolliffe* (1873), 42 L.J.Q.B. 121.

Legislation construed:

Protectorate Courts Jurisdiction Ordinance, 1903 (No. 6 of 1903), s. 37: "The Circuit Court shall be a Court of Record and .... shall have jurisdiction in all cases arising before it under the provisions of this Ordinance. In the exercise of any of the jurisdiction hereby conferred on it the Circuit Court shall possess all the powers and authorities of the Supreme Court of the Colony .... Provided that the Court shall have no jurisdiction in divorce and matrimonial causes and that all causes shall be heard summarily."

s. 68: The relevant terms of this section are set out at page 57, lines 38—41.

Protectorate Courts Jurisdiction Ordinance, 1905 (No. 33 of 1905), s. 11: "Whenever the Circuit Judge shall be absent on leave and no Acting Judge or Commissioner . . . shall have been appointed by the Governor, it shall be lawful for the Chief Justice to hear and determine all such . . . matters as may appear to him to be urgent."

Taylor for the applicant;
C.E. Wright for the Crown.

McDONNELL, Ag. J.

The case stated by Purcell, C.J. is as follows:

"On December 22nd, 1922, an application was made to Prior, Ag. J. whilst sitting as judge of the Circuit Court at Moyamba — by Mr. Thomas Taylor on behalf of the defendant, Lamina Conteh, for a rule nisi for a writ of *habeas corpus*, and in support of such application an affidavit was filed.

Prior, Ag. J. decided that the Circuit Court had no jurisdiction to issue a writ of *habeas corpus* and refused the application.

On January 10th, 1923, Mr. Prior being then *functus officio* so far as the Circuit Court was concerned, Mr. Thomas Taylor made a similar application to me as Chief Justice of the Supreme Court of Sierra Leone under the provisions of s. 11 of the Protectorate Courts Jurisdiction Ordinance, 1905, on behalf of Lamina Conteh, for a rule nisi for a writ of *habeas corpus*.

I entertained the application and granted a rule nisi subject to the opinion of the Court of Appeal now sitting in Freetown.

The question the Court of Appeal is invited to express its opinion upon is — whether the judge of the Circuit Court or the Chief Justice when sitting to hear applications, etc., under the provisions of s. 11 of the Protectorate Courts Jurisdiction Ordinance, 1905, has jurisdiction to grant a rule nisi for a writ of *habeas corpus* and when necessary to make such rule absolute."

The Full Court is asked to decide whether the Circuit Court has jurisdiction to grant a rule nisi for a writ of *habeas corpus ad subjiciendum* and, when necessary, to make such rule absolute.

On the one hand it is urged that there is an inherent jurisdiction in all superior courts of record to issue this writ and that the Order in Council of February 11th, 1904, fixing Circuit Court fees under s. 66 of the Protectorate Courts Jurisdiction Ordinance, 1903, expressly provides for the payment of a fee of 10s. on the issue of such a writ.

On the other hand it is said that the Circuit Court is a court created by statute in a protected territory, the jurisdiction of which is strictly limited by the Ordinance to which it owes its birth.

With regard to the alleged inherent jurisdiction to issue the writ, an analogy has been suggested with the power of committal for contempt incident to courts of justice.

On the question of contempt, Cockburn, C.J., in *R. v. Lefroy* (3) says (L.R. 8 Q.B., at 137; 42 L.J.Q.B. at 123):

"In the case of the superior courts at Westminster, which represent the one superior court of the land, this power was coeval with their original constitution, and has always been exercised by them. These courts were originally carved out of the one supreme court, and are all divisions of the aula regis, where it is said the king in person dispensed justice, and their

power of committing for contempt was an emanation of the royal authority, for any contempt of the court would be a contempt of the sovereign."

This, I think, clears up any false idea of analogy between the two. Committal for contempt is a prerogative of the Crown; the right to *habeas corpus* is a privilege of the subject. It is a common law privilege, but it has been confirmed and regulated by various statutes of which the Habeas Corpus Act, 1679 is the most famous. This Act and its amending Acts if, as seems undoubted, they are statutes of general application, are imported into the statute book of the Colony by s. 8 of the Supreme Court Ordinance, 1904.

At common law the writ of *habeas corpus* being a prerogative writ could be issued by the English courts to any part of the dominions of the Crown. In consequence of the decision in *Ex p. Anderson* (1) that a writ could issue to Canada, there was passed the Habeas Corpus Act, 1862, which enacted that no writ should issue out of England "into any Colony or Foreign Dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having Authority to grant and issue the said Writ, and to ensure the due Execution thereof throughout such Colony or Foreign Dominion."

In *R v. Earl of Crewe* (2) to which our attention was drawn by Mr. Sawyerr as *amicus curiae*, it was held by Vaughan Williams and Kennedy, L.JJ. that the Bechuanaland Protectorate was not a foreign dominion of the Crown within the meaning of the section just cited. It is not in this connection, however, that the case is of chief importance for our present purpose. Its value lies, as I consider, in the following *dictum* by Vaughan Williams, L.J., who said ([1910] 2 K.B. at 602, 102 L.T. at 775):

> "[I]t is convenient here to note that in my opinion, even if the Act of 1862 did apply, there would be considerable difficulty as to the existence of a Court with authority to grant a habeas, for I do not find anything in the statutes, Orders in Council, or proclamations which satisfies me as to the existence of such a Court with such power to ensure due execution of a writ of habeas. . . ."

This I think disposes of the question of inherent authority. In plain English you must find the authority in the legislative instrument creating the court. Mr. Taylor points to the Order in Council expressly prescribing a fee for this writ. If this table of

fees formed a schedule to the Ordinance creating the court; if, to use an expressive phrase, it were thereby clear that it had had the eye of the legislature upon it, it would have had much more weight as indicating the intention of the legislature in creating the Circuit Court; standing as it does alone, as a subordinate legislative instrument made subsequently to the coming into operation of the Ordinance, it is liable, like all such subordinate legislation, to be impugned as *ultra vires.*

We must now consider the statute to which the Circuit Court owes its genesis, and particularly ss. 37 to 39 of this Ordinance, the Protectorate Courts Jurisdiction Ordinance, 1903. Mr. Wright properly contrasted those sections with the corresponding s. 4 of the Supreme Court Ordinance, 1904.

The points of ss. 37 to 39 of the Protectorate Courts Jurisdiction Ordinance, 1903, as seem apparent to me, are:

(i) That the court has jurisdiction only in cases arising under the provisions of the Ordinance. These provisions are ss. 38 and 39.

(ii) That the powers and authorities of the Supreme Court are possessed by the Circuit Court *only* in the exercise of jurisdiction conferred by the Ordinance.

(iii) That the court has no jurisdiction in divorce and matrimonial causes.

(iv) That it has no civil jurisdiction as between two natives.

(v) That it cannot try a non-native on a capital charge, nor can it try a native for the murder of a non-native.

It will be seen then that the jurisdiction of the court is in both civil and criminal matters expressly limited, both as to the civil actions or criminal cases which it can determine, and as to the nature of the persons amenable to its jurisdiction. Consideration has clearly been given in ss. 38 and 39 to the rights of native courts in civil suits between natives, to native marriage customs and to the rights of British subjects charged with capital offences, to trial by jury of their peers. Sections 38 and 39 set out the classes of civil and criminal cases which the court can try and the only other relevant section that I can find is s. 68, which I may well call a monument of ambiguous draftmanship:

> "In hearing and determining matters or causes, the Circuit Court and the Courts of the District Commissioners shall as far as possible be guided in arriving at a decision by the laws in force in the Colony."

Mr. Wright cited from *Maxwell on the Interpretation of Statutes* a *dictum* as to the principle of construction applied to enactments creating new jurisdiction. The rule of construction is, I think, well expressed by Craies in *Statute Law*, 2nd ed., at 255 (1911):

> "[W]hen a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with."

The Circuit Court owes its origin to the Protectorate Courts Jurisdiction Ordinance, 1903; its authority is limited by ss. 37, 38 and 39.

As was stated in Mr. Wright's able and interesting argument upon which I cannot improve, an application for a writ of *habeas* is not a criminal case under s. 39; it is not an action or suit, or, if it is such, it is not one as contemplated under s. 38.

The only conclusion then to which one must come is that the Court has no jurisdiction to issue the writ in question.

PURCELL, C.J. concurred.

SAWREY-COOKSON, J.:

I am of the same view and will only add the following: Much has been heard in the course of the arguments of learned counsel of the inherent powers of a superior court of record and the analogy right or wrong, between the power to commit, by virtue of that right, for contempt of court and the power to issue a writ of *habeas corpus.*

I cannot find that any such analogy exists, the power to issue the writ being given by statute but the power to commit having accrued, as shown in my learned brother McDonnell's very able and lucid judgment, from the earliest days, quite independent of any statute.

There may or may not be something to be said for the position that the legislature should or should not have allowed natives in the Protectorate to share a right common to all His Majesty's subjects, but with that aspect this court is very clearly not concerned in the least. But supposing this court could properly be concerned with that question, Mr. Wright's contention that writs of *habeas corpus ad subjiciendum* should not issue from the Circuit Court into the Protectorate so as to interfere with the jurisdiction of chiefs over natives, has probably a good deal to be said for it. In any event it is only with the intention of the

legislature, as is to be gathered from the Ordinance, that this court can deal, and I am clear, for the reasons given by my brother McDonnell that such writs were not intended to be issued.

Case stated answered in the negative.

SOLOMON v. REGEM

Full Court (Purcell, C.J., Sawrey-Cookson, J. and McDonnell, Ag. J.): January 29th, 1923

[1] **Banking — accounts — larceny — servant's misappropriation of money unlawfully drawn by him from employer's banker not larceny by servant because employer has no property in money in bank account:** The property in money deposited in a bank account passes to the bank, the banker being merely the debtor of his customer and not accountable to him as a trustee; so that if a servant, who has authority to draw money from his employer's bank account, misappropriates the money he withdraws, he does not commit the offence of larceny by a servant since the property in the money withdrawn passed from his employer to the bank when it was deposited (page 63, lines 11—38; page 64, line 40 — page 65, line 6).

[2] **Banking — banker and customer — relationship that of debtor and creditor — money paid into bank becomes bank's property:** See [1] above.

[3] **Criminal Law — larceny — elements of offence — taking without consent — no larceny if owner intends property to pass even if would not so intend if knew real facts:** It is an essential element of the offence of larceny that goods should be taken against the owner's will so that if the owner intends the property in the goods to pass the offence cannot amount to larceny, even if he would not so intend had he knowledge of the real facts (page 65, lines 6—15).

[4] **Criminal Law — larceny — larceny by servant — employer's goods in custody of servant can be subject of larceny by servant — employer has constructive possession and retains property in them:** Since an employer retains the property in his goods and has constructive possession of them while they are in the custody of his servant, it is possible for the servant to steal goods which are in his custody (page 63, lines 1—4).

[5] **Criminal Law — larceny — larceny by servant — principal's money in possession of agent — misappropriation from agent by principal's servant is larceny by servant:** The property in money deposited with his agent by a principal remains in the principal, so that if his servant, who has authority to draw money from the agent, misappropriates that money, he commits the offence of larceny by a servant (*per* Purcell, C.J. page 68, lines 4—28).

[6] **Criminal Law — larceny — larceny by servant — servant's misappropriation of money drawn by him from employer's bank account not**