

Regina v. Rafael

[1972] O.J. No. 1842

[1972] 3 O.R. 238

7 C.C.C. (2d) 325

Ontario
Court of Appeal

Gale, C.J., McGillivray and Arnup, J.J.A.

April 24, 1972

John Sopinka and Edward J.S. Martin, for accused, appellant.

Douglas J.A. Rutherford, for the Crown, respondent.

1 ARNUP, J.A.: -- The accused was convicted by His Honour Judge Couture at Toronto on July 19, 1971, upon an indictment reading that the accused:

Unlawfully did, at the Municipality of Metropolitan Toronto in the Judicial District of York and elsewhere in the Province of Ontario, between the 1st day of January in they year of 1966 and the 1st day of January 1971, by decit, falsehood or other fraudulen means, defraud certain persons of certain amounts of money by holding out to them that he would obtain for them Landed Immigrant Status in Canada, contrary to Section 323(1) of the Criminal Code of Canada.

2 The Crown voluntarily delivered particulars of the charge which might be described as in the form of a schedule and showing the name of an individual, the place, the approximate date and the amount involved with respect to each individual of whom there were 24 listed.

3 Some 20 persons were called as witnesses by the Crown at the trial to prove that the accused in the course of a business operated by him as an immigration consultant had defrauded them by representations made to each of them and by charging them a fee in various amounts for the services which were to be provided. While the precise language of the prepresentations varied and was divided by Mr. Sopinka into four categories of representation, the general import of the representations fell within the language of the indictment that the accused held out to these persons that he would obtain for them landed immigrant status. Because of the disposition which we are making of the case I propose to refer to as little of the evidence as possible, but on this point it is sufficent to say that in some instances the accused used such language as "I will legalize you" or "I will get you landed immigrant status" and in some cases he is alleged to have said that he "guaranteed" that he would get them the status which they sought.

4 No objection was made at the trial before or after plea, to this incitment on the ground that it was duplicitous or multifarious. Nevertheless, we are in agreement with view expressed by Chief Justice Culliton in *R. v. Brunet* [1968] 2 C.C.C. 74, 2 C.R.N.S. 264, 61 W.W.R. 162; reversed on other grounds [1968] S.C.R. 713, [1969] 1 C.C.C. 297, 69

D.L.R. (2d) 177, that if the indictment is in law bad for duplicity the objection to it may be made on appeal notwithstanding that no such objection was made at the trial.

5 The question as to the validity of the indictment turns in the first instance upon the provisions of s. 510(1) of the Criminal Code which reads:

510(1) Each count in an indictment shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the accused committed an indictable offence therein specified.

6 The cases in which this section and its predecessors have been discussed have turned largely upon a discussion of the words "shall in general apply to a single transaction".

7 In *R. v. Flynn*, [1955] O.R. 402, 111 C.C.C. 129, 21 C.R. 1, this Court had to deal with the point, where the accused was charged that between October 31, 1953, and March 26, 1954, at namely, electrical appliances, the property of Kelvinator of Canada Limited of a value in excess of \$25. The evidence led by the Crown in that case indicated that the articles in question had disappeared over a period of time. The issue is raised by counsel in the case was whether there was more than one offence of theft in the light of the evidence which was given or whether on the other hand there was single transaction involving theft committed in a number of separate occurrences. The Court in that case held that the thefts alleged, in the circumstances of the case, constituted one transaction and were properly treated as one continuous theft.

8 The Court went on to point out that if the accused were later charged with the theft of any articles from Kelvinator of Canada between the dates mentioned in the indictment, the plea of *autrefois* convict would be open to him on the charge as laid.

9 Between that decision and the year 1969 this Court decided the case of *R. v. Wakefield*, [1965] 2 O.R. 669, [1966] 1 C.C.C. 324. That case in turn followed the case of *R. v. Hawkins and Sullivan*, [1952] O.W.N. 184, 102 C.C.C. 183, 14 C.R. 163. However, the *Flynn* decision was not referred to in the *Wakefield* case. In *R. v. Hulan*, [1969] 2 O.R. 283, [1970] 1 C.C.C. 36, 6 C.R.N.S. 296, the same problem again came before this Court, which declined to follow the decision in the *Wakefield* case, particularly on the ground that the *Flynn* case had not been cited to the Court nor referred to by it.

10 In considering the effect of the *Hulan* case it is important, as it always is, to read the observations of the Court against the background of the facts which formed the basis of the Crown's case. The accused was charged with acts of sexual intercourse with his step-daughter, who was 11 years of age. The Crown proved several acts of intercourse within the period of some six months mentioned in the count in the indictment. All of them had taken place in a similar way and there was a common pattern which had followed by the accused after he had successfully used it on the first occasion. The Court came to the conclusion that the "numerous incidents of intercourse during the specified period, referred to a single transaction" (p. 293 O.R., p. 46 C.C.C.).

11 Mr. Justice Kelly, in writing the judgment of the Court, referred to the use of the language "shall in general" found in s. 492(1), the predecessor of s. 510 of the Criminal Code, and stated that the use of those words indicated that there should be left some latitude "for exceptional cases". He then proceeded to indicate why, in the circumstances of the case before him, the circumstances were so exceptional that a "not-too-rigid application of the procedural requirements" should be resorted to in that case. He also went on to point out that the accused would be able to enter a special plea of *autrefois* convict should he ever again be charged with having had sexual intercourse with the complainant at any time in the six-month period mentioned in the charge.

12 He continued [at p. 293 O.R., p. 47 C.C.C.]:

Had a number of several offences been charged his protection from future prosecution would not have been as wide because a subsequent charge with respect to an offence on any date other than those specified could not be met by special plea of *autrefois* convict.

13 I conclude my references to the *Hulan* case by pointing out that at p. 294 O.R., pp. 47-8 C.C.C., Mr. Justice Kelly dealt with the point that the objection had not been taken at trial and said that the Crown was quite entitled to meet a technical objection with a technical answer. He went on to observe, however, that if the ends of justice so required, the Court would not have failed to give effect to any substantial objection even if raised late.

14 Finally, the same question on different facts came before this Court in *R. v. Canavan and Busby*, [1070] 3 O.R. 353, [1970] 5 C.C.C. 15, 12 C.R.N.S. 385. That was a case in which the accused were charged that during the month of July, 1969, they did unlawfully agree to place a bet on behalf of another person for a consideration paid, contrary to what was then s. 177A [now s. 187] of the Criminal Code.

15 The Crown's evidence at trial related to dealings between a police officer and two employees of the appellants on three separate days. It was held that the conviction was not void for uncertainty but again on the ground that the Court was able to say in the circumstances of the particular case that the occurrences were part of a single transaction. Mr. Justice Schroeder, giving the judgment of the Court, indicated that word "transaction" was a word of quite comprehensive import which had not been the subject of any exact legal definition and that a transaction might, and frequently did include a series of occurrences extending over a length of time. However, in discussing the facts he went on to indicate that each act proven to have taken place had followed a similar pattern and he concluded that the repetition of the offences were comparable to the continual wrongful taking of money by an embezzler (an example which had been used in earlier cases) or a day to day theft of goods from a merchant's stock-in-trade by one of his employees. He too went on to express the opinion that the words "in general" would appear to indicate a permissible relaxation of its terms "extending to exceptional cases in which a number of acts each in itself constituting an offence is capable of being treated as one transaction". He therefore followed the Hulan decision and refused to give effect to the objection to the count in the indictment.

16 The judgment of the Supreme Court of New Brunswick in the case of *R. v. Michaud* (1909), 17 C.C.C. 86, 39 N.B.R. 418, is another example of the principle recognized in the Hulan Canavan and Busby cases.

17 In our view a good deal of significance must be attached to the particulars which were given. That Section provides that where a particular is delivered "the trial shall proceed in all respects as if the indictment had been amended to conform with the particular". The result therefore was that this became an indictment in which 24 persons were alleged to have been defrauded, on dates varying widely in time, by offences taking place at different localities and involving different amounts, but more importantly, involving also quite different representations to the individuals who were called as witnesses.

18 After careful consideration, we are not able to conclude that the events which the Crown proved in this case can be regarded as occurrences which together form a single transaction. It is, of course, obvious that a separate charge could have been laid with respect to each of the persons alleged to have been defrauded, but this is not the conclusive test of the matter. The real test is whether either the count itself or the evidence adduced by the Crown in support of it, can fairly be said to simply be occurrences within a single transaction.

19 Since we are of the opinion that the events here proven cannot be so regarded it follows that in our opinion the indictment did not conform with s. 510(1) of the Criminal Code and was bad.

20 We have not, of course, overlooked the provisions of s. 529(1) of the Criminal Code, which provides that an objection to an indictment for a defect apparent on the face thereof shall be taken by motion to quash the indictment or count before the accused has pleaded and thereafter only by leave of the Court of Judge before whom the trial takes place.

21 Without dealing in depth with the cases which have been decided under this and its predecessor sections, which are discussed in considerable detail in the 6th ed. of Tremee's Annotated Criminal Code, it is sufficient to say that the Courts have not permitted s. 529(1) to stand as an answer to an allegation which turns out to be correct that an indictment is wholly void for failure to comply with s. 510. It has been held that duplicity is not a "defect apparent on the face" of the indictment: *R. v. Toth*, [1959] O.R. 137, 123 C.C.C. 292, 29 C.R. 371.

22 This disposition of the matter makes it unnecessary to deal with several of the points which were addressed to us with forcefulness and ability by Mr. Sopinka. I should, nevertheless, mention one point because of its importance. Even if we had come to the conclusion that the indictment in this case could be supported, we are all of the opinion that it would have been necessary nevertheless to direct a new trial in this case.

23 The accused gave evidence, and was asked in cross-examination whether he had filed income tax returns over a period of years. He answered that question by stating that he had done so except for two or three years when his books were under seizure by Crown authorities. The Crown then called evidence in reply to prove that in fact the accused had not filed any income tax returns, so far as the records of the Department disclosed, for a period of some ten years. Without discussing in any way the objection to this evidence as being hearsay (being based upon the testimony in the witness-box of an official of the Department who had made only part of the search which lay behind the answer), we are all

of the opinion that the accused had been cross-examined upon a collateral matter relating only to his credibility and that the Crown was bound by the answer received and was not entitled to call evidence to contradict it.

24 Under some circumstances an error of this kind might not necessarily have resulted in a new trial but in this case it is quite obvious from the reasons for judgment of the trial Judge that the question of assessing the relative and respective credibilities of the Crown and defence witnesses and of the accused himself, was to him one of great difficulty and that he attached great significance to the fact that in his opinion the accused had told the this untruth in the witness-box about a matter concerning which he could not be expected to be mistaken. Therefore, there was a miscarriage of justice in this case quite unrelated to the defect in the indictment itself.

25 In the result, therefore, the appeal will be allowed, the conviction set aside and the indictment will be quashed. We were invited to go one step further and direct an acquittal but we are all of the opinion that we should not do so.

Appeal allowed.