REGINA v. DERRIKSAN

(1975), 60 D.L.R. (3d) 140 (also reported: [1975] 4 W.W.R. 761, 24 C.C.C. (2d) 101

British Columbia Court of Appeal, Farris C.J.B.C., Branca, Robertson, Seaton and McIntyre JJ.A., 28 February 1975

(On appeal from judgment of British Columbia Supreme Court, supra p.496)

(Appealed to Supreme Court of Canada, infra p.512)

Motion for leave to appeal to the Supreme Court of Canada (Martland, Ritchie and Dickson, JJ.) granted June 16, 1975.

Indians -- Aboriginal rights -- Accused Indian fishing for food in tribe's traditional fishing ground contrary to Regulations made under federal statute -- Whether Regulations apply to Indians -- Whether Regulations override treaty right to fish -- Fisheries Act (Can.) -- British Columhia Fishery Regulations (Can.), ss. 32, 76(1), 80(1)(e), 81 (1) (d).

The language of the *British Columbia Fishery Regulations*, P.C. 1954- 1910, SOR Con. 1955, vol. 2, p. 1627, made pursuant to the *Fisheries Act*, R.S.C. 1970, c. F-14, which provides that "No person shall fish" contrary to those provisions is of general application admitting of no exceptions, "no person" obviously including "no Indian", and to the extent that the Regulations are inconsistent with treaty or other rights acquired by Indians they override those rights, so that an accused Indian who violates the Regulations may be convicted notwithstanding that he was fishing for food in his tribe's traditional fishing ground. Section 32 [am. SOR/67-374, s. 12(1)] of the Regulations which makes special vision for licensing fishing by Indians reinforces the concept that Indians are not otherwise excepted from the Regulations.

[*R. v. Francis*, [1970] 3 C.C.C. 165, 10 D.L.R. (3d) 189, 9 C.R.N.S. 249, 2 N.B.R. (2d) 14, folld; *R. v. Sikyea*, [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, 43 C.R. 83, 46 W.W.R. 65; affd [1965] 2 C.C.C. 129,

50 D.L.R. (2d) 80, [1964] S.C.R. 642, 44 C.R. 266, 49 W.W.R. 306, apld; *Calder et al. v. A.-G. B.C.* (1969), 8 D.L.R. (3d) 59, 71 W.W.R. 81; affd (1970), 13 D.L.R. (3d) 64, 74 W.W.R. 481; affd (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1974] 4 W.W.R. 1; *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267, 47 C.R. 382, refd to]

APPEAL by the accused from the judgment of Aikins, J., 20 C.C.C. (2d) 157, 52 D.L.R. (3d) 744, [1975] 1 W.W.R. 56, dismissing his appeal by way of stated case from a conviction for unlawful fishing contrary to s. 34 of the *Fisheries Act* (Can.).

B. F. Fraser, for accused, appellant.

F. H. Herbert, Q.C., for the Crown, respondent.

The judgment of the Court was delivered by

ROBERTSON, J.A.:--The appellant was charged with of- fences against the *British Columbia Fishery Regulations*, P.C. 1954-1910, SOR Con. 1955, vol. 2, p. 1627 [am. SOR/68- 273, s. 6] made under the *Fisheries Act*, R.S.C. 1970, c. F-14. Provincial Court Judge Collver convicted him and then, on the application of the appellant, stated a case. Aikins, J., heard the appeal by way of stated case and dismissed it. Against that dismissal the appellant has appealed to this Court.

The appellant is an Indian within the meaning of the *Indian Act*, R.S.C. 1970, c. I-6. In October, 1970, he caught fish in Peachland Creek, a tributary of Okanagan Lake, where fishing was prohibited by s. 81(1) (*d*), and he did so by methods prohibited by ss. 80(1) (*e*) and 76(1).

Some of the findings stated in the case are:

2. That at all material times herein, the accused caught kokanee as alleged, for food and not for sale.

7. That the accused did not, at any material time herein, have a permit issued to him under Section 32 of the Regulations made under the Fisheries Act, being Chapter 119 of the Revised Statutes of Canada, 1952, and amendments thereto.

10. That generations of Okanagan Indians have fished for kokanee salmon in Peachland Creek during the spawning season and that Peachland Creek, or Deep Creek as it is known to the Okanagan Indians, must still be considered as traditional fishing grounds for Indians of the Okanagan Valley.

The questions propounded by the Provincial Court Judge were these:

1. Was I correct in holding that Noll Derriksan as an Okanagan Indian has no aboriginal right to fish for food for his own use on ancient tribal territory, namely, at or near Peachland Creek, known to him as Deep Creek?

2. Was I correct in holding that the Royal Proclamation of 1763 does not apply to the Okanagan Valley of the Province of British Columbia ?

3. Was I correct in holding that it would only be if the Royal Proclamation of 1763 were applicable to Okanagan Indians, that pursuant to the provisions of Section 88 of the Indian Act, the accused, Noll Derriksan could have lawfully done the acts com- plained of"

To both Qq. 1 and 2, Aikins, J., answered "Yes". In so doing he relied on *Calder et al. v. A.-G. B.C.*, in which the reasons of Gould, J., are reported at (1969), 8 D.L.R. (3d) 59, 71 W.W.R. 81, the reasons of this Court are reported at (1970), 13 D.L.R. (3d) 64, 74 W.W.R. 481, and the reasons of the Su- preme Court of Canada are reported at (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1974] 4 W.W.R. 1. Aikins, J., found it unnecessary to answer Q. 3. In the result, as I have already stated, he dismissed the appeal and affirmed the convictions [20 C.C.C. (2d) 157, 52 D.L.R. (3d) 744, [1975] 1 W.W.R. 157].

Each of the Regulations under which the charges were laid provides that "No person shall" do the acts in question and so, upon its face, applies to all persons. There is no provision exempting Indians from the operation of those Regulations.

In *R. v. Sikyea*, [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, 46 W.W.R. 65, the Court of Appeal of the Northwest Terri- tories had to consider the application of the *Migratory Birds Convention Act, 1917*, and the Regulations made there- under to an Indian. From the decision of that Court an appeal was taken to the Supreme Court of Canada, whose judgment is reported at [1965] 2 C.C.C. 129; 50 D.L.R. (2d) 80, [1964] S.C.R. 642. Hall, J, delivered the judgment of the Court. After discussing whether a bird that the appellant had shot was a "wild bird" within the meaning of the Act, Hall, J., said at p. 132 C.C.C., p. 84 D.L.R., p. 646 S.CR:

On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson, J.A., in the Court of Appeal [1964] 2 C.C.C. 325, 43 C.R. 83, 46 W.W.R. 65. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written.

Johnson, J.A., referred to the rights of Indians that had their origin in the Royal Proclamation that followed the Treaty of Paris in 1763 and to certain other treaties. Then, after quoting from the Act and the Regulations, he said at p. 335 C.C.C., p. 158 D.L.R., p. 74 W.W.R.:

I have quoted s. 5 (1) of the Regulations which says that "no person shall . . . kill . . . a migratory bird at any time except during

an open season . . .". It is difficult to see how this language admits of any exceptions. When, however, we find that reference in both the Convention and in the Regulations to what kind of birds an Indian and Eskimo may "take" at any time for food, it is im- possible for me to say that the hunting rights of the Indians as to these migratory birds have not been abrogated, abridged or in- fringed upon.

It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations.

Again at p. 336 C.C.C., p. 159 D.L.R., p. 75 W.W.R., he said:

I can come to no other conclusion than that the Indians, not- withstanding the rights given to them by their treaties, are pro- hibited by this Act and its Regulations from shooting migratory birds out of season.

In the first passage that I have quoted from Johnson, J.A.'s judgment, he says that it is difficult to see that the language that "No person shall kill any migratory bird at any time . . ." admits of any exceptions. Equally I cannot see that the language of the Regulations under the *Fisheries Act* in ques- tion here admits of any exceptions. This would in itself be sufficient to dispose of the matter, but, as in the case of *R. v. Sikyea*, there is an additional reason for thinking that the Regulations under the *Fisheries Act* apply to Indians, notwithstanding their rights (if any) under the Proclamation. I refer to s. 32 [am. SOR/67-374, s. 12(1)], which reads in part:

32(1) Notwithstanding subsection (1) of section 68, an Indian may at any time under a permit issued by the Regional Director or a fishery officer catch fish for food for himself and his family, but for no other purpose.

(1*a*) The Regional Director or a fishery officer may, in issuing a permit referred to in subsection (1)

(*a*) limit or fix the area of the waters in which any fish may be caught;

(*b*) limit or fix the means by which or the manner in which any fish may be caught; and

(*c*) limit or fix the time during which the permit shall be operative.

(2) An Indian shall not fish for or catch fish pursuant to the said permit except in the waters, by the means or in the manner and within the time expressed in the said permit, and no person shall sell, attempt to sell or otherwise dispose of any fish caught pursuant to such permit; any violation of the provisions of the permit shall be deemed to be a violation of these regulations.

The Regulations were obviously intended to apply generally to Indians.

Section 88 of the *Indian Act* was referred to in Q. 3 but I

shall not discuss it, because it has no application to Dominion legislation, for the reasons stated in *R. v. George*, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386, [1966] S.C.R. 267.

The opinion I have reached coincides with that of the Appeal Division of the New Brunswick Supreme Court in *R. v. Francis*, [1970] 3 C.C.C. 165 at p. 171, 10 D.L.R. (3d) 189 at p. 195, 9 C.R.N.S. 249. There Hughes, J.A., for the Court, said:

There can be no doubt that since the decisions of the Supreme Court of Canada in *Sikyea v. The Queen*, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642, and *R. v. George, supra*, legislation of the Parliament of Canada and Regulations made thereunder, properly within s. 91 of the *B.N.A. Act, 1867*, are not qualified or in any way made unenforceable because of the existence of rights acquired by Indians pursuant to treaty. It follows that even if the appellant had established that a right to fish salmon in the Richi- bucto River had been conferred by an Indian treaty, the benefit of which he was entitled to claim, such right could afford no defence to the charge on which he was convicted.

My view of the way in which this appeal falls to be de- cided makes it unnecessary for me to consider *R. v. Calder et al. v. A.-G. B.C., supra*, or to answer Qq. 2 and 3. Since I am of the opinion that the affirmative answer to Q. 1 was correct, in that the Regulations in question apply to the appel- lant, I would dismiss the appeal.

Appeal dismissed.