Rex v. Nyshimura

[1920] S.J. No. 40

[1920] 2 W.W.R. 994

SASKATCHEWAN COURT OF APPEAL

Haultain, C.J.S., Newlands, Lamont, Elwood, JJ.A.

Judgment: June 28, 1920

Counsel:

D. D. McCurdy, for accused.

H. E. Sampson, K.C., for the Crown.

The judgment of the Court was delivered by

1 ELWOOD, J.A.--The accused was charged for that he for the period between April 20 and 29, 1920, at the city of Moose Jaw, did, being a male person, live wholly or in part on the earnings of prostitution contrary to sec. 216 (*l*) of *The Criminal Code* of Canada.

2 The accused was tried before the District Court Judge of the judicial district of Moose Jaw who reserved the following question for the opinion of this Court, namely:

> Was the accused living wholly or in part on the earnings, of prostitution during the period between the 20th and 29th days of April, A.D. 1920?

3 The facts as found by the District Court Judge are the following:

(a) That one Beatrice Wilcox was a prostitute and lived at room 204 in the said * * Hotel from Saturday until Thursday, between the 20th and 29th days of April, A.D. 1920.

(b) That the said Beatrice Wilcox paid to the defendant tips from time to time on an average of about 50c per day for taking up meals and ice water to her room.

(c) That the said Beatrice Wilcox paid to the defendant on two occasions between the said Saturday and Thursday the sum of $1.00 each for bringing up a man to her room for purposes of prostitution.

(d) That the accused was employed during the said period between the 20th and 29th days of April, A.D. 1920, as an elevator boy and bell boy in the * * Hotel in the City of Moose Jaw aforesaid and received for such services a salary of $30.00 per month, free board and a suit of clothes from the said Hotel free of charge to the Defendant, and that the Defendant received from guests in the said hotel during the said period between April 20th and April 29th A.D. 1920, tips from proper sources and for proper purposes a sum of at least at the rate of $30.00 per month.

4 The sole question for consideration is, under the circumstances of this case, did the fact that the accused on two occasions receive $1 for bringing up a man to her room for the purposes of prostitution justify the conclusion that he was living in part on the earnings of the prostitution? Counsel for the Crown contended that the case of *Rex v. Hill, Rex v. Churchman*, [1914] 2 K.B. 386, 83 L.J.K.B. 820, is authority for the proposition that the accused was living in part on the earnings of the prostitution. At p. 389 of the report of the above case, Bankes, J. is reported as follows:

> A further objection was taken in the case of Hill. He was indicted for having lived on the earnings of prostitution upon one specified day only, and it was contended that the indictment was therefore bad. It was also contended that evidence was not admissible upon, the indictment, as laid, of anything done on any day except the day specified. We do not agree with either contention. The indictment charging the offence in that way is perfectly good, and there is no ground for saying that evidence is not admissible to show what the appellant's relations with the woman in question had been either before or after the day specified in the indictment, as such evidence is clearly relevant to the question whether he was or was not, on the day specified, living on the earnings of her prostitution.

5 It seems to me that what is stated above distinguishes the case of *Rex v. Hill, supra*, from the case at bar. The accused in that case was indicted for having lived on the earnings of prostitution upon one specified day only, but apparently evidence was admitted showing the appellant's relations with the woman in question before or after the day specified in the indictment. The course of conduct would be indicated by such evidence, and from such course of conduct the conclusion would be reached that the accused on the specified day was living on the earnings of prostitution. It may very well be that the specified day was merely one of a number of days upon Which he was so living. In the case at bar, however, there is no evidence that, in my opinion, would justify the conclusion that the accused pursued an "habitual" or "continuous" course of conduct in receiving money from the earnings of prostitution, and I am of the opinion that, in order to render the accused guilty, the evidence must show him to have been guilty of "habitually" or "continuously" receiving money, the earnings of prostitution. I am of the opinion that the two isolated occasions upon which he received money do not render his conduct in that respect either "habitual" or "continuous."

6 I think that the case of *Apothecaries Co. v. Jones* [1893] 1 Q.B. 89, 17 Cox C.C. 588, is very much in favour of the conclusion which I have, arrived at. By sec. 20 of *The Apothecaries' Act* if any person shall act or practise as an apothecary without having obtained a certificate, every person so offending shall for every such offence forfeit [pounds]20. Three separate actions were brought against the defendant to recover three separate penalties for having treated and prescribed for three distinct patients on three separate occasions on the same day without having a certificate contrary to

the above section. It was held that the three acts of practising constituted only one offence of acting or practising, and at p. 590 of the above report, (17 Gox C.C.) Pollock, B. is reported as follows:

> It appears to me, therefore, to be clear that, however the subject-matter and character of the offences created by the two statutes may differ, they are both directed against an habitual or continuous course of conduct, and not against an individual act, and therefore they ought both to receive the same construction.

7 In my opinion, therefore, the question submitted for the opinion of the Court should be answered "No."