

Young v. Uchiyama

[1933] B.C.J. No. 53

47 B.C.R. 155

British Columbia Supreme Court
Vancouver, British Columbia

Fisher J.

Heard: March 8, 1933.

Judgment: March 15, 1933.

Counsel:

Craig, K.C., for the plaintiff.

Sloan, and Murdock, for the defendant. [47 BCR Page156]

1 15th March, 1933. **FISHER J.**-- In this action plaintiff claims that he is entitled to recover from the defendant under section 1045 of the Criminal Code either under an order of the Chief Justice of the Supreme Court, dated May 20, 1932, or, without regard to that order, the sum of \$2,417.95 as costs incurred by one Kanetaro Takagishi by reason of an indictment or information preferred against him by the defendant for the publication of a defamatory libel, the said Kanetaro Takagishi having assigned the said sum to the plaintiff by instrument in writing (Exhibit 3). Said section 1045 reads as follows:

In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information, either by warrant of distress issued out of the said Court, or by action or suit as for an ordinary debt.

2 It is first submitted on behalf of the defendant in the action that there was no "judgment for the defendant" in the case intituled Rex v. Kanetaro Takagishi on the ground that there was no acquittal of the accused but only a discharge upon a nolle prosequi. Following Rex v. Blackley (1904), 8 C.C.C. 405, however, I would hold that such a discharge pronounced by the Court upon a nolle prosequi constituted the "judgment for the defendant" mentioned in section 1045 and rendered the private prosecutor liable for defendant's costs.

3 It is further contended, however, on behalf of the defendant herein that in any event the plaintiff (assignee) cannot in this action recover under said section 1045 either under the said order of the Chief Justice or without regard to that order. I propose to deal first with the position of the matter so

far as the plaintiff seeks to rely upon said order. Counsel on behalf of the, defendant contends that the plaintiff cannot rely on the order and his contention is based upon the submission that such order was made "without jurisdiction and contrary to law" even on the assumption that there was "judgment for defendant" in the criminal case as I have already found. The order referred to reads as follows:

UPON application of the above named Kanetaro Takagishi and it appearing that a nolle prosequi has been entered by the Attorney General:

THIS COURT DOTH ORDER that the informer, George Kenroku Uchiyama [47 BCR Page157] do pay to the said Kanetaro Takagishi his costs incurred by him by reason of the indictment herein, including the costs of the trial at which the jury disagreed and the costs incurred before the police magistrate:

AND THIS COURT DOTH FURTHER ORDER that such costs be taxed by the registrar at Vancouver, B.C.

4 Counsel for the defendant herein contends that the costs that may be ordered to be paid by the Court are limited to the proper and lawful costs incurred by the defendant in the criminal case and that the test to be applied to determine such is that suggested by DRAKE, J. in *Rex v. Nichol* (1901), 8 B.C.R. 276 at pp. 279-80; 6 C.C.C. 8, where he says as follows:

Under these authorities I am of opinion that if the costs are to be taxed according to the laws governing the taxation of costs in civil cases that the evidence taken on commission, and not used at the trial on which a verdict was obtained, could not be taxed against the unsuccessful party, neither could the costs of the abortive trials. Each trial would be considered as a *venire de novo*, and the question is, does the language used in section 833, "The costs incurred by him by reason of such indictment," taken in conjunction with section 835, authorize the taxation of any other or different costs than such as would be allowed in a civil case. Section 833 is similar to the language in the English statute, 6 & 7 Vict., Cap. 96, Sec. 8, but that Act does not contain our section 835.

I think that section 835 indicates sufficiently that the costs to be allowed are all such costs as would be allowed in a civil case as far as applicable; and if the costs occasioned by an abortive trial, or by a commission not used, would be disallowed in a civil case, they ought equally to be disallowed in a libel case, and I so order accordingly.

5 If I understand correctly the submission of counsel on behalf of the defendant herein on this phase of the matter it would seem to be submitted that the debt created by said section 1045 is only for legal and proper costs incurred, that an action brought for such a debt can therefore be only for such legal and proper costs according to the test laid down by DRAKE, J. in *Rex v. Nichol*, *supra*, and that the action herein, so far as it is based upon the said order, dated May 20th, 1932, and upon the subsequent taxation ascertaining the amount, is wrongly based and cannot succeed because the

order, according to the contention of counsel, allowed other than legal and proper costs to be taxed and was therefore made without jurisdiction. It seems to me this submission on behalf of the defendant herein means that if in the opinion of the Court, before which the civil action is tried, the costs allowed upon the taxation in, or pursuant to, the order of the criminal Court should not have been allowed [47 BCR Page158] following the decision of DRAKE, J. in *Rex v. Nichol*, supra, then the Court should hold that there was no jurisdiction to award such costs and the amount taxed in the criminal Court should not control as the civil Court has no power to award other than legal and proper costs. With respect to the argument that the Court in the criminal case had no jurisdiction to order the informer George Kenroku Uchiyama to pay Kanetaro Takagishi the costs of the trial at which the jury disagreed because they were not legal and proper costs, I would say in the first place with all respect to the opinion expressed by DRAKE, J. in *Rex v. Nichol*, supra, that in my opinion they were legal and proper costs to be allowed. I would further say however that in my opinion, whether they should have been allowed or not, the Chief Justice, as presiding judge on the discharge of the accused, had jurisdiction to deal with the costs. The question of the jurisdiction does not depend upon whether the presiding judge in the criminal Court, having entered upon the hearing of an application with respect to the costs to be allowed, decides in accordance with the test laid down by another judge, but depends upon the nature of the application and is determinable on the commencement, not at the conclusion, of the application. It is quite apparent that in *Rex v. Nichol*, supra, DRAKE, J. upon an application by the defendant in that case to him, as the judge who had tried the indictment, assumed to exercise the jurisdiction and to deal with the question of all the costs of the abortive trials as well as of the costs of the commission as aforesaid although counsel for such defendant said his motion asked for the costs of the commission only and he objected to anything else being dealt with. In the present case it is admitted that Kanetaro Takagishi, the defendant in the criminal case, upon his discharge, applied to the Chief Justice for and obtained an order as to the costs, and, as I have already indicated, my view is that the Court had jurisdiction to hear the application and dispose of it as it did.

6 Even on the assumption that there was jurisdiction to make the said order there is still a further question however to be considered. As already pointed out, I am not now dealing with whether or not the present or any similar action lies without regard to such an order either before any application for such [47 BCR Page159] has been made or after such an order and taxation have been obtained. Still dealing solely with the question, as to whether or not the action lies, so far as such order is relied upon, I have to consider the further question whether the obtaining of such an order and the subsequent taxation of the costs in accordance therewith, even if this does not limit the mode of recovery of the costs simply to distress, in any event can only be relied upon as a basis for recovery by distress and not for recovery by an action such as the present one as for an ordinary debt. It is apparently argued on behalf of the defendant in the action before me that the costs cannot be taxed by or pursuant to an order of the criminal Court and then made the subject of a civil action to realize the amount so ascertained by such taxation and duly assigned to the plaintiff. The argument would seem to me to be that if, after such a taxation, a separate civil action can be and is brought, the taxation, though not appealed from, must be treated as a nullity and the action must be brought not for the amount so ascertained but for the costs incurred, the amount to be determined de novo by the Court sitting for the trial of civil cases. I do not think that such an argument is well founded and in this connection reference might be made to what is said in Tremeear's *Criminal Code*, 4th Ed., p. 1423, and cases there referred to:

If the costs are taxed at the criminal trial, they may be included in the judgment of the criminal Court and realized as such: *Rex v. Fournier* (1910), 25 Que. K.B. 556, 25 C.C.C. 430; or may be taxed either at the criminal trial or afterwards and made the subject of a separate civil action to realize the amount. *Mackay v. Hughes* [(1901)], 19 Que. S.C. 367; *Nichol v. Pooley* [(1902)], 9 D.C. 363, 6 C.C.C. 289, affirming 9 B.C.R. 21; 6 C.C.C. 12; *Rex v. Nichol* [(1901)], 8 D.C. 276; 6 C.C.C. 8.

The amount taxed in the criminal Court will control. *Mackay v. Hughes*, supra; and the civil action may be stayed to enable the plaintiff to have the costs taxed in the criminal Court if he prefers to have them taxed there: *Mackay v. Hughes*, supra.

7 It may be suggested that the result would be that the defendant in the criminal case, though not perhaps obliged to obtain such an order or taxation through the criminal Court as a condition precedent to the right of action (see *Nichol v. Pooley*, supra) would have the right to adopt such a mode of procedure as would deprive the private prosecutor of an appeal as to the amount of the costs to be allowed and also of the right to question [47 BCR Page160] in the subsequent civil action the order or the taxation in accordance therewith. I think however that a sufficient answer to this is that the private prosecutor is responsible for having put the said defendant in the criminal Court and cannot complain of the result in that forum. See *Tremear's Criminal Code*, supra, at p. 1423:

The procedure was instigated at his instance and he must be held responsible for its incidents and its result.

8 In my opinion the said defendant Takagishi had the right to have the costs taxed in or pursuant to an order of the criminal Court and in my opinion also if he had made no assignment he could have maintained such an action as the present action pursuant to said section 1045 of the Criminal Code, relying, if he wished to do so, upon the said order and taxation in pursuance thereof as definitely settling the amount. I also hold that the plaintiff, as his assignee as aforesaid, can maintain the action in the same way.

9 At the trial it was stated that the parties had agreed that, if I should find that the plaintiff is not entitled to recover under the said order but is entitled to recover without regard to the order, the bill of costs would be referred to the registrar for taxation. The question might still be raised that upon the form of assignment before me and the pleadings as they stand the plaintiff is not entitled to recover without regard to the order but in view of the conclusion I have already indicated that the plaintiff is entitled to recover under the order I do not find it necessary to deal with this further question.

10 There will be judgment therefore in favour of the plaintiff against the defendant for the sum of \$2,417.95 with costs.

Judgment for plaintiff.

