SENTENCING SC CR 76 001

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN,

Respondent

- and -

IOLAT E7-413,

14-Jan-1976

Appellant

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE W. G. MORROW

The Appellant was convicted before His Worship Magistrate R. B. Wong sitting as a Justice of the Peace at Frobisher Bay, in the Northwest Territories on May 7th, 1975. The conviction was for unlawful possession of liquor contrary to Section 60 of the *Liquor Ordinance*, R.O.N.W.T. 1974, c. L-7. The learned Magistrate suspended sentence for six months. In the probation order the appellant was ordered to report to and be under the supervision of the Probation Services and to do 25 hours of community services within the next three months as they may be directed by the probation officer Mr. Don Hunter. The present appeal is as to sentence only.

Counsel for the appellant does not dispute that the *Liquor Ordinance* may be enforced by way of summary conviction proceedings under the *Criminal Code*. In fact this has already been before this Court, viz: *R. v. Bernhardt*, (1971) 4 C.C.C. (2d) 50.

The issue is rather as to whether a Justice of the Peace in enforcing the provisions of the *Liquor Ordinance*, or some other Ordinance, for that matter, also has jurisdiction to apply sentencing provisions of the *Criminal Code*, such as probation, as they may be applicable to summary conviction proceedings or whether such Justice of the Peace is limited to apply only the specific penalties as set forth in the particular legislation.

The governing penalty section of the *Liquor Ordinance* in issue in the present case is 89(1). It states:

> "89(1) Every person, other than an incorporated company, who contravenes any provision of this Ordinance or the regulations for which no other penalty is provided in this Ordinance is guilty of an offence and liable, on summary conviction, to a fine not exceeding one hundred dollars or to imprisonment for a term not exceeding thirty days or to both."

Turning to the *Interpretation Ordinance*, R.O.N.W.T. 1974, c. I-3 there are three Sections which require consideration:

> "28(1) Unless otherwise therein specially provided proceedings for the imposition of punishment by fine, penalty or imprisonment for enforcing an enactment or municipal by-law may be brought summarily before a justice of the peace under the provisions of the Criminal Code relating to summary convictions; and the words "on summary conviction" wherever they appear in an enactment or by-law shall refer to and mean under and by virtue of those provisions of the Criminal Code."

> "30. Where a pecuniary penalty or a forfeiture is imposed for the contravention of an enactment, then, if the provisions

> "of the *Criminal Code* relating to summary convictions are not applicable to the case and if no other mode is prescribed for the recovery of such penalty or forfeiture or if the mode prescribed is not applicable to the case, the penalty or forfeiture shall be recoverable with costs by civil action or proceeding at the suit of the Attorney General of Canada or of a private party suing as well for the Crown as himself; and, if no other provision is made for the appropriation of the penalty or forfeiture, one-half thereof shall belong to the Crown for the public uses of Canada and the other half shall belong to the private plaintiff if any there be, and if there be none the whole shall belong to the Crown."

> "31. Where under any enactment now in force or under any future enactment a court or person is impowered or required to award imprisonment, the court or such person may in its discretion, unless such future enactment otherwise provides, award imprisonment with or without hard labour."

By section 2(a) of the latter Ordinance "enactment" means ordinance.

Counsel for the appellant takes the position that the penalty provisions as set forth in the *Liquor Ordinance* are intended to match the gravity of the particular offence in the view of the legislators and that for a court to suspend sentence or provide for release on conditions is to meddle with the legislative intent. It is further argued that probation orders come within the purview of Section 663 of the *Criminal Code* under Part XX whereas summary convictions are dealt with under Part XXIV. And finally it is submitted that as a penal statute the *Liquor Ordinance* should be strictly construed, and that in such cases the statute should be construed so as

to impose the lesser penalty, that to permit probation could result in the appellant if he breaches the terms of same being subject to a much greater penalty for breach of probation as provided for in Section 666(1) of the *Code* than the maximum provided for in the prime offence.

It now becomes necessary to examine the state of the law in respect to these submissions.

In *R. v. Smith,* (1923) 38 C.C.C. 327, the Appeal Bench of the Nova Scotia Supreme Court was called on to examine, among other things, whether Section 1029 (as it then was) set forth in Part XX was applicable to Summary Convictions. While the result did not require an affirmative decision on the point, the discussions in each judgment appear to be favourable to the proposition that the part of the Code referring specifically to Summary Convictions is not a complete code. As Chisholm, J. states at page 330 of the report: "many sections outside of Part XV are obviously applicable to cases of summary conviction, although not in express terms made so applicable ... ."

On a *certiorari* application Bence, C.J.Q.B., in *R.v. Sunstrum et al,* 1963 3 C.C.C. 43, gave as his opinion (obiter only) that a Magistrate had no authority to impose a suspended sentence for an offence under the *Vehicles Act* of Saskatchewan. In this judgment there is a reference to the many decisions reported to that date. I have read them carefully.

There remain two decisions in this Court that are of some relevance. In *R. v. Bernhardt*, (1971) 4 C.C.C. (2d) 50 somewhat the same language as is found in the present appeal was considered. In this case in dealing with summary conviction proceedings under the *Child Welfare Ordinance* this Court decided that the provisions respecting sentencing were enforceable under the *Criminal Code* provisions. Again in *R. v. Smith* (1972) 7 C.C.C. (2d) 468 this Court considered the *Liquor Ordinance*, the same legislation as is under examination in the present appeal. The main question before the Court in that case was whether a Magistrate could give a probation order if he had already fixed a fine and a term of imprisonment. It was then decided that the probation order could not be given because of the use of "or" in Section 663(1) of the *Code*. While neither case is directly authoritative in the present appeal they must be considered persuasive, particularly as the practice has so far developed in this jurisdiction.

Helpful as all of the previous decisions are, as is so often the case, the present appeal must be decided on the particular legislation. Section 28(1) of the *Interpretation Ordinance* appears to me to be a clear declaration that in the absence of special provisions, the provisions of the *Criminal Code* with respect to summary convictions apply. These provisions cannot but incorporate and include those sections of the *Code* which refer to probation orders: *R. v. Smith*, (1923) 38 C.C.C. 327 and *Richard v. The Queen* (1971) 13 D.L.R. (3d) 591. The language of Section 89(1) of the

Liquor Ordinance is not within the purview of the exception contained in Section 28(1) but rather is a mere limitation. In this respect, therefore, I conclude that the learned Magistrate had jurisdiction when he purported to suspend sentence for six months.

As to the suggestion that to permit probation could result in a much bigger penalty for the breach of same than the maximum provided for under the section I cannot accept this as a valid reason for saying there cannot be probation. In passing Section 89(1) the Territorial Council can be assumed to have had in mind the provisions of the *Interpretation Ordinance*. To me the question of penalty for breach of probation is merely an incidence which can only arise out of a subsequent offence being commited, by a breach of a condition only. If, as could be the case, the penalty for this breach might be higher than the maximum provided for the original offence, that is a matter to be considered at the time of sentencing for the breach.

There has been no appeal from the terms of the probation order as such. Accordingly the appeal is dismissed and the sentence affirmed without costs. I would observe in passing that in communities in the Territories, such as Frobisher Bay, by far the greatest number of cases that come before the Courts are related to liquor and are more of a social than criminal nature. So long as the terms of probation are not unreasonable, the type of conditions set forth to be carried out by the learned Magistrate in the present case, are likely to have a more salutory effect on the

accused appellant and others who might be inclined to breach the *Liquor Ordinance* as he did, that the imposition of such penalties as a fine, which latter more likely than not would probably come from a welfare cheque or from a parent's pocketbook. I should add, as well, that the probation officer, Mr. D. Hunter, has lived at Frobisher Bay for many years and is a most reliable member of his profession. He can be relied on to give reasonable direction here.

W. G. Morrow.

Yellowknife, N.W.T.
14 January 1976.

Counsel:

Dennis Patterson, Esq.,
for Appellant

W. H. Corbett, Esq. and T. Boyd, Esq.,
for the Crown