

R. v. Jones, [1991] 3 S.C.R. 110

Roger Jones and Howard Pamajewon

Appellants

v.

Her Majesty The Queen

Respondent

and

**The Attorney General of Canada,
the Attorney General of Quebec,
the Attorney General for Alberta,
the Attorney General for Saskatchewan and
the Attorney General of Newfoundland**

Interveners

Indexed as: R. v. Jones

File No.: 21879.

1991: June 20; 1991: September 26.

Present: La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Stevenson and Iacobucci JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Delegation -- Criminal law -- Lotteries -- Criminal Code prohibiting lotteries except those conducted in accordance with terms and conditions of licence issued by Lieutenant Governor in Council of province -- Whether lottery provisions in Code improperly delegating criminal law power -- Criminal Code, R.S.C., 1985, c. C-46, s. 207(1)(b), (2), (3).

Constitutional law -- Colourability -- Criminal law -- Lotteries -- Criminal Code prohibiting lotteries except those conducted in accordance with terms and conditions of licence issued by Lieutenant Governor in Council of province -- Whether lottery provisions in Code create invalid discretionary regulatory regime -- Criminal Code, R.S.C., 1985, c. C-46, s. 207(1)(b), (2), (3).

Constitutional law -- Charter of Rights -- Right not to be found guilty unless act or omission constituted offence in law -- Criminal Code prohibiting lotteries except those conducted in accordance with terms and conditions of licence issued by Lieutenant Governor in Council of province -- Terms and conditions of licence not published in official gazette -- Accused convicted of unlawfully conducting a bingo -- Whether non-publication of terms and conditions infringes s. 11(g) of the Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, s. 207.

Criminal law -- Defences -- Colour of right -- Accused convicted of unlawfully conducting a bingo -- Accused mistakenly believing that lottery provisions in Criminal Code inapplicable to lotteries conducted on Indian reserve

-- *Whether defence of colour of right available -- Criminal Code, R.S.C., 1985, c. C-46, ss. 19, 206(1)(d).*

The appellants were charged with unlawfully conducting a bingo contrary to s. 206(1)(d) of the *Criminal Code*. The charges arose out of gaming operations at the Shawanaga Reserve, which were initiated under three Band Council resolutions signed by the appellants as Chief and Councillor of the Shawanaga First Nation. Before conducting the lotteries, the appellants had been advised by representatives of the province, including the Ontario Provincial Police, that the *Criminal Code* prohibits lottery schemes, other than those conducted under the auspices of a provincial licence. The appellants were convicted at trial and their convictions affirmed by the Court of Appeal. In addition to the constitutional questions dealt with in *R. v. Furtney*, [1991] 3 S.C.R. 000, this appeal also raises the issue of whether the appellants were entitled to be acquitted by reason of a defence of colour of right. That right was the belief that s. 206 did not apply to their activities since they were carried out on a reserve which they thought was not subject to the laws of Canada relating to gaming.

Held: The appeal should be dismissed.

For the reasons given in *Furtney*, the challenged provisions of s. 207 of the *Criminal Code* are not *ultra vires*, nor do they offend s. 11(g) of the *Canadian Charter of Rights and Freedoms*.

The defence of colour of right does not apply to a charge under s. 206(1)(d) of the *Code*. First, no authority was cited for the proposition that colour of right is relevant to any crime which does not embrace the concept within its definition. Second, appellants' mistake was one of law, rather than of fact. They mistakenly believed that the law did not apply because it was inoperative on Indian reserves. A mistake about the law is no defence to a charge of breaching it.

Cases Cited

Followed: *R. v. Furtney*, [1991] 3 S.C.R. 000, aff'g (1989), 52 C.C.C. (3d) 467 (Ont. C.A.), aff'g (1988), 44 C.C.C. (3d) 261 (Ont. H.C.);
referred to: *R. v. Bulmer*, [1987] 1 S.C.R. 782; *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369; *R. v. Howson*, [1966] 3 C.C.C. 348; *R. v. Johnson* (1904), 7 O.L.R. 525.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, ss. 19, 206(1), 207 [am. c. 27 (1st. Supp.), s. 31; rep. & sub. c. 52 (1st Supp.), s. 3].

APPEAL from a judgment of the Ontario Court of Appeal, dismissing the appellants' appeal from their convictions on charges of unlawfully conducting a bingo contrary to s. 206(1)(d) of the *Criminal Code*. Appeal dismissed.

David C. Nahwegahbow and *David M. Bolger*, for the appellants.

Scott C. Hutchison, for the respondent.

I. G. Whitehall, Q.C., and *Kimberly Prost*, for the intervener the Attorney General of Canada.

Gilles Laporte and *Monique Rousseau*, for the intervener the Attorney General of Quebec.

Peter V. Teasdale, for the intervener the Attorney General for Alberta.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

B. Gale Welsh, for the intervener the Attorney General of Newfoundland.

The judgment of the Court was delivered by

//Stevenson J.//

STEVENSON J. -- These appellants appeal, by leave of this Court, a judgment of the Ontario Court of Appeal affirming their conviction for unlawfully conducting a bingo, contrary to s. 206(1)(d) of the *Criminal Code*, R.S.C., 1985, c. C-46.

They attack the constitutionality of s. 207 of the *Criminal Code* and also argue that they were entitled to be acquitted by reason of a defence of colour of right. That right was the belief that s. 206 did not apply to their activities which were carried out on a reserve which they thought was not subject to the laws of Canada relating to gaming.

The Facts

The charges arose out of gaming operations at the Shawanaga Reserve, which operation was initiated under three Band Council resolutions. The first resolution, dated May 12, 1987, formally purported to renounce the jurisdiction of federal and provincial governments in relation to gaming on reserves. The second resolution, passed on August 31, 1987, purportedly enacted the Shawanaga First Nation Lottery Law. A further resolution, passed on the same date, purportedly appointed a five-member Lottery Authority. Each resolution was signed by the appellant, Jones, as Chief and the appellant, Pamajewon, as Councillor.

On September 11, 1987, a meeting took place between the appellants and representatives of the province, including the Ontario Provincial Police, during the course of which meeting the appellants were advised that the *Criminal Code* prohibits lottery schemes, other than those conducted under the auspices of a provincial licence. On the following two days, police attended at the reserve and observed three large circus tents and four cash stations. Admission to the bingo

games was \$100 on the first day and \$50 on the second and, in addition, Nevada break-open and California Gold Rush tickets were being sold. On both days, the bingo was being called by the appellants. The lotteries purported to be conducted under the authority of permits issued pursuant to the Shawanaga First Nation Lottery Law.

Relevant Statutory Provisions

Criminal Code, R.S.C., 1985, c. C-46

19. Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

206. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who

(a) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property by lots, cards, tickets or any mode of chance whatever;

(b) sells, barter, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatever;

(c) knowingly sends, transmits, mails, ships, delivers or allows to be sent, transmitted, mailed, shipped or delivered, or knowingly accepts for carriage or transport or conveys any article that is used or intended for use in carrying out any device, proposal, scheme or plan for advancing, lending, giving, selling or otherwise disposing of any property by any mode of chance whatever;

(d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, lent, given, sold or disposed of;

207. (1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

. . .

(b) for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose;

. . .

(2) Subject to this Act, a licence issued by or under the authority of the Lieutenant Governor in Council of a province as described in paragraph (1)(b), (c), (d) or (f) may contain such terms and conditions relating to the conduct, management and operation of or participation in the lottery scheme to which the licence relates as the Lieutenant Governor in Council of that province, the person or authority in the province designated by the Lieutenant Governor in Council thereof or any law enacted by the legislature of that province may prescribe.

Judgments

The trial judge considered first the submission that the delegation by Parliament to the province of Ontario of the regulatory power in relation to the operation of bingo games constitutes an invalid delegation of such power. Matte Prov. Ct. J. noted, in this respect, that he was bound by the decision of the Ontario High Court of Justice in *R. v. Furtney* (1988), 44 C.C.C. (3d) 261, a case also under appeal to this Court in which we are concurrently giving judgment.

Dealing with the defence of mistake of fact, the trial judge observed that the appellants had been made aware of the legal requirements before the bingo games were staged. Furthermore, the evidence before him did not establish that they were of the mistaken belief that the resolutions passed by the Band Council were legally valid. Matte Prov. Ct. J. added that, even if the facts did so disclose, the mistake was one of law, rather than of fact, and therefore would not afford a defence.

Court of Appeal (Brooke J.A. for the Court)

The Court of Appeal found that the trial judge was right in characterizing the appellants' defence as a mistake of law. Accordingly, he was correct in holding that the defence failed. The court was of the view that this was not a case in which the defence of colour of right could be made out.

The court stated, as well, that the *Furtney* judgment (1989), 52 C.C.C. (3d) 467 (Ont. C.A.) was dispositive of the issue of delegation of licensing authority by s. 207 of the *Criminal Code*.

Issues

The following constitutional questions were stated by Cory J. on September 17, 1990 for the *Furtney* case and restated word for word on January 10, 1991 for this case:

1. Do sections 207(1)(b), 207(2) and 207(3) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, create a discretionary administrative regulatory regime to govern lotteries, and if so, is it thereby *ultra vires* Parliament?
2. Are sections 207(1)(b), 207(2) or 207(3) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, or any combination thereof, *ultra vires* Parliament as improper delegation to a provincial body of a matter within the exclusive competence of the Federal Government?
3. Does the non-publication of the terms and conditions imposed under ss. 207(1)(b) and 207(2) of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, infringe or deny the rights guaranteed under ss. 7 or 11(g) of the *Canadian Charter of Rights and Freedoms*? If so, is such non-publication a reasonable limit prescribed by law demonstrably justified in a free and democratic society and thereby saved by s. 1 of the *Canadian Charter of Rights and Freedoms*?

In addition, the appellants raised the following point:

4. Did the learned trial judge err in convicting the Appellants by finding that they did not have a valid defence based on colour of right?

Disposition

The constitutional questions are answered in the companion judgment in *R. v. Furtney*, [1991] 3 S.C.R. 000. The appellants fail on these issues. I note that we did not need to address the question of whether the invalidity of s. 207 could have any impact on the charges against these appellants, which were based on s. 206. Indeed, the validity of s. 206 was not put in issue under the constitutional questions so the obvious question of severability was not addressed by the appellants and is not addressed here.

Accordingly, I address only the question of colour of right.

The appellants must be taken, for the purpose of this appeal, to acknowledge that they were mistaken in their belief that the *Criminal Code* did not apply to their activities on the reserve. They have not taken any proceedings to challenge the authority of Canada to enact laws applicable to those activities and have not made any such challenge here. In their factum, the appellants not only disclaim asking for such a determination, they ask the Court not to make statements that may adversely affect legal issues concerning Indian self-government. That request will be respected.

There are, in my view, two clear barriers to this alleged defence. Firstly, it is not a defence to this crime, secondly, any mistake is a mistake of law.

The appellants cited no authority for the proposition that colour of right is relevant to any crime which does not embrace the concept within its definition. They cited *R. v. Bulmer*, [1987] 1 S.C.R. 782; *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.); *R. v. Howson*, [1966] 3 C.C.C. 348 (Ont. C.A.), and *R. v. Johnson* (1904), 7 O.L.R. 525 (Ont. Div. Ct.). *Bulmer* is a case of mistake of fact as an issue in sexual assault. In the other cases the offences, such as theft, required the absence of a colour of right.

They argued that mistake of fact is a constitutionally mandated defence to criminal charges. Even assuming that proposition is correct, it can only apply

to the facts which constitute the offence. There is no suggestion of any mistake relating to those facts here, the mistake is in believing that the law does not apply because it is inoperative on reserves.

Section 19 of the *Code* expresses the long recognized principle that a mistake about the law is no defence to a charge of breaching it. No attack was made on the validity of that section. The argument here is that this legal mistake should be characterized as a mistake of fact and I find it impossible to characterize the mistaken belief put forward here as embracing any mistake of fact.

Conclusion

The constitutional questions are answered as they are in *Furtney*, the sections are neither *ultra vires*, nor do they offend the *Canadian Charter of Rights and Freedoms*. The appellants mistaken belief that the *Code* does not apply to them is no answer to the charges. I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Nahwegahbow, Jones, Ottawa.

*Solicitor for the respondent: The Ministry of the Attorney General,
Toronto.*

Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Ste-Foy.

Solicitor for the intervener the Attorney General for Alberta: The Department of the Attorney General, Edmonton.

Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

Solicitor for the intervener the Attorney General of Newfoundland: Paul D. Dicks, St. John's.