U.S. Supreme Court

106 U.S. 583

PACE
v.
STATE OF ALABAMA.

January 29, 1883

Section 4184 of the Code of Alabama provides that 'if any man and woman live together in adultery or fornication, each of them must, on the first conviction of the offense, be fined not less than $100, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months. On the second conviction for the offense, with the same person, the offender must be fined not less than $300, and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than 12 months; and for a third or any subsequent conviction with the same person, must be imprisoned in the penitentiary or sentenced to hard labor for the county for two years."

Section 4189 of the same Code declares that 'if any white person and any negro, or the descendant of any negro to the third generation, inclusive, though one ancestor of each generation was a white person, intermarry or live in adultery or fornication with each other, each of them must, on conviction, be imprisoned in the penitentiary or sentenced to hard labor for the county for not less than two nor more than seven years.'

In November, 1881, the plaintiff in error, Tony Pace, a negro man, and Mary J. Cox, a white woman, were indicted under section 4189, in a circuit court of Alabama, for living together in a state of adultery or fornication, and were tried, convicted, and sentenced, each to two years' imprisonment in the state penitentiary. On appeal to the supreme court of the state the judgment was affirmed, and he brought the case here on writ of error, insisting that the act under which he was indicted and convicted is in conflict with the concluding clause of the first section of the fourteenth amendment of the constitution, which declares that no state shall 'deny to any person the equal protection of the laws.' [106 U.S. 583, 584] J. R. Tompkins, for plaintiff in error.

H. C. Tompkins, for defendant in error.

FIELD, J.

The counsel of the plaintiff in error compares sections 4184 and 4189 of the Code of Alabama, and assuming that the latter relates to the same offense as the former, and prescribes a greater punishment for it, because one of the parties is a negro, or of negro descent, claims that a discrimination is made against the colored person in the punishment designated, which conflicts with the clause of the fourteenth amendment prohibiting a state from denying to any person within its jurisdiction the equal protection of the laws.

The counsel is undoubtedly correct in his view of the purpose of the clause of the amendment in question, that it was to prevent hostile and discriminating state legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment. Such was the view of congress in the re-enactment of the civil-rights act, after the adoption of the amendment. That act, after providing that all persons within [106 U.S. 583, 585] the jurisdiction of the United States shall have the same right, in every state and territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, declares that they shall be subject 'to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.' 16 St. c. 114, 16.

The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offense for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person. The two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.

Judgment affirmed.

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Editor's Note: This is the case overthrown by Loving v. Virginia, (1967)