1947

*Mar. 13, 14
*Apr. 18

HIS MAJESTY THE KING ..... APPELLANT;

AND

RAYMOND QUINTON ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Indictment for attempted rape—Verdict of assault causing bodily harm—Appellate court substituting conviction of common assault—Appeal to this Court by the Crown—Conviction to be changed to that of indecent assault—Conviction for "included" offences under section 951 Cr. C.—Sections 72, 292(c), 300, 1016 Cr. C.

A jury, upon an indictment for attempted rape, returned a verdict of assault upon a female, causing actual bodily harm. Upon an appeal by the accused, the Court of Appeal held that an indictment for attempted rape did not include the offence for which he was found guilty, and the Court then substituted a conviction for common assault. The Crown appealed to this Court, asking that the substituted conviction be changed to that of indecent assault.

Held that the appeal should be dismissed.

Per the Chief Justice and Kerwin, Kellock and Estey JJ.:—The offence of indecent assault may be included in a count of attempted rape under section 951 Cr. C.; but, in this case, it was not open to the appellate court, in view of the finding of the jury, to substitute a conviction of indecent assault.

Per The Chief Justice and Estey JJ.:—The jury, in finding the accused not guilty as charged on the count of attempted rape, negatived the existence of the element of indecency and in effect found the accused not guilty of indecent assault. Therefore, the appellate court, so far as substituting one conviction for another under section 1016 (2) Cr. C., had no other course open to it than to substitute that of common assault.

Per Kerwin and Kellock JJ.:—Section 1016 (2) Cr. C. requires it to appear to the Court of Appeal on the actual finding that the jury "must" have been satisfied of facts which proved the respondent guilty of indecent assault.

Judgment of the Court of Appeal ([1947] O.R. 1) affirmed.

APPEAL by the Crown, upon leave to appeal granted under section 1025 Cr. C., from a judgment of the Court of Appeal for Ontario (1), allowing in part an appeal by the respondent from a conviction of having committed an assault upon a female causing bodily harm and substituting a conviction of common assault.

W. B. Common K.C. for the appellant.

Vera L. Parsons K.C. for the respondent.

*Present:—Rinfret CJ. and Kerwin, Taschereau, Kellock and Estey JJ.

(1) [1947] O.R. 1.

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The judgment of the Chief Justice and of Estey J. was delivered by

ESTEY J.:—The accused was indicted for attempted rape under section 300 of the Criminal Code. The learned trial judge instructed the jury that included in the count of attempted rape were the other offences of indecent assault, assault on a female occasioning actual bodily harm (sec. 292(c)), and common assault.

The jury returned a verdict of assault on a female occasioning actual bodily harm.

Upon an appeal by the accused the appellate court in Ontario held that an indictment for attempted rape did not include the offence of assault on a female occasioning actual bodily harm within the meaning of section 951. The learned judges of that court then substituted under sec. 1016(2) a verdict of common assault and imposed sentence of one year in reformatory.

The accused does not appeal but the Crown appeals to this court and asks that the substituted verdict of common assault be changed to that of indecent assault.

Leave to appeal was granted to the Crown on the basis that *Rex* v. *Stewart* (1) in which the Appellate Division in Alberta held that the offence of indecent assault is by virtue of the provisions of section 951 included in a count of attempted rape and, therefore, is in conflict with the decision of the appellate court of Ontario in this case.

The commission of the offence of rape includes an act of indecency, as stated by my Lord the Chief Justice in *Wright* v. *The King* (2):

> No doubt in a crime such as the one (rape) under consideration, the initial step might be stated to be an indecent assault, followed by the subsequent step which might be described as an attempt to rape * * *

Section 72 of the Criminal Code defines an attempt:

> Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

This section requires that one to be guilty of an attempt must intend to commit the completed offence and to have done some act toward the accomplishment of that

(1) (1938) 71 C.C.C. 206; [1938] 3 W.W.R. 631.

(2) [1945] S.C.R. 319, at 322.

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objective. That act must be beyond preparation and go so far toward the commission of the completed offence that but for some intervention he is prevented or desists from the completion thereof.

> Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it but acts immediately connected with it are. Parke B. in *Reg.* v. *Eagleton* (1), quoted by Lord Reading C.J. in *Rex* v. *Robinson* (2).

It is the existence of both the intent and the act in such a relationship that the former may be regarded as the cause of the latter. The intent unaccompanied by the act does not constitute a criminal offence.

In the early case of *Rex* v. *Scofield* (3), Lord Mansfield stated at p. 403:

> So long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.

This case is commented upon in Broom's Legal Maxims, 6th Ed. p. 305:

> It is a rule, laid down by Lord Mansfield, and which has been said to comprise all the principles of previous decisions upon this subject, that so long as an act rests in bare intention, it is not punishable by our laws; but when an act is done, the law judges not only of the act itself, but of the intent with which it was done; and if the act be coupled with an unlawful and malicious intent, though in itself the act would otherwise have been innocent, yet, the intent being criminal, the act likewise becomes criminal and punishable.

It appears from the foregoing that the intent may determine the criminal quality of the act. There is present in the offence of rape the intent to commit an indecent act. The same intent is required in the offence of attempted rape. In the latter that intent may be found from the nature of the act or from the conduct of the accused immediately associated with the commission of that act or indeed both. If such an intent be not present the offence of attempted rape is not committed. The act cannot be dissociated from the intent as evidence which caused the accused to do such act.

(1) (1855) Dears, 515, at 538.
(2) [1915] 2 K.B. 342, at 348.
(3) (1786) Caldecott's Rep. 397.

In *Rex* v. *Louie Chong* (1), the magistrate found the accused guilty of indecent assault and stated a case for the opinion of the appellate division in Ontario as to whether he was justified in finding the accused guilty of indecent assault, where the accused in taking hold of the girl did so in a manner that did not import indecency. At the same time, however, he offered her money to go with him for an immoral purpose. The judgment of the court written by Middleton J. affirmed the magistrate's conviction. His Lordship in delivering the judgment stated:

> It appears to me that an act in itself ambiguous may be interpreted by the surrounding circumstances and by words spoken at the time the act is committed * * *. It is in each case a question of fact whether the thing which was done, in the circumstances in which it was done, was done indecently. If it was, an indecent assault has been committed.

His spoken words which were part of his conduct evidenced the intention of the accused and determined the criminal quality of his act.

It would, therefore, appear that a count charging an attempt to commit rape would include the offence of indecent assault under section 951.

Though the offence of indecent assault is included in a count of attempted rape under section 951 it was not in this case, because of the finding of the jury, open to the appellate court to substitute a verdict of indecent assault. Section 951 provides that the

> accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved * * *

The learned trial judge explained to the jury the ingredients essential to find the accused guilty upon one or other of the four counts. Those of attempted rape and indecent assault require a finding of indecency, while that of actual bodily harm to a female does not. The jury in finding the accused not guilty as charged on the count of attempted rape negatived the existence of the element of indecency and, therefore, in effect found the accused not guilty of indecent assault.

Where an indictment contained three counts: (1) that the accused did unlawfully kill, under section 268; (2) grievous bodily harm, sec. 284; and (3) wanton or furious

(1) (1914) 23 C.C.C. 250.

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driving, sec. 285, the jury found the accused guilty of wanton or furious driving. Chief Justice Anglin stated at p. 47:

> In a case such as that at bar, that the jury had found that neither the whole offence charged in count No. 1 nor the whole offence charged in count No. 2 had been proved, is an intendment which we must make in support of the verdict.

And at p. 48:

> It was within the province of the jury to find that the offence charged in the third count was satisfactorily proven, but that, for reasons which we can only surmise and as to the validity or the adequacy of which we are not at liberty to inquire some essential element of each of the offences charged in the first and second counts respectively was, in their view, not established beyond reasonable doubt. *Barton* v. *The King* (1).

The jury in finding the accused guilty of assault occasioning actual bodily harm to a female negatived the existence of the element of indecency essential to the finding of a verdict of indecent assault. Therefore, the appellate court could not conclude "that the jury * * * must have been satisfied of the facts which proved him guilty of" indecent assault as required by section 1016(2) before it can substitute a verdict of guilty of that other offence. *Rex* v. *Hayes and Pallante* (2); *Rex* v. *Collins* (3).

In a case where the accused was found guilty of murder this court so satisfied was in a position to and did reduce the verdict to one of manslaughter. At p. 350 Chief Justice Duff:

> The finding makes it clear that the jury must have been satisfied of the facts necessary to constitute manslaughter, and we are, consequently, of opinion that the Court of Appeal would have authority under s. 1016 to substitute a verdict of manslaughter for the verdict of the jury and to pronounce sentence upon the prisoner. *Rex* v. *Hopper* (4); *Manchuk* v. *The King* (5).

The learned judges in the appellate court, because of the verdict of the jury, so far as substituting one verdict for another under section 1016(2), had no other course open to them than to substitute that of common assault.

The appeal should be dismissed.

(1) [1929] S.C.R. 42.
(2) (1942) 77 C.C.C. 195; [1942] O.R. 52.
(3) (1922) 17 Cr. A.R. 42.
(4) [1915] 2 K.B. 431.
(5) [1938] S.C.R. 341.

The judgment of Kerwin and Kellock J.J. was delivered by

KELLOCK J.:—This is an appeal by the Attorney General of Ontario, pursuant to leave granted under section 1025 (1) of the Criminal Code, from the judgment of the Court of Appeal for Ontario, dated December 13, 1946.

The present respondent was charged with attempted rape and on his trial before Schroeder J. and a jury was convicted of "assault upon a female occasioning actual bodily harm". The learned trial judge had charged the jury that they might convict as charged, or of indecent assault, or assault upon a female occasioning actual bodily harm or common assault or not guilty.

The respondent appealed in writing to the Court of Appeal and on the hearing of the appeal the court raised the question whether it was competent for the jury to return the verdict they had returned. It was held that such a verdict was not open to the jury and the court substituted a conviction of common assault, being of opinion that the jury by their verdict, in view of the learned judge's charge, had negatived indecent assault. Roach J.A., who delivered the judgment of the court, expressed disagreement with the decision of the appellate division of Alberta in *Rex* v. *Stewart* (1), by which it was held that, on a charge of attempting to have carnal knowledge of a girl under the age of fourteen, the accused might be convicted of indecent assault, under section 951 (1).

The Attorney General now appeals on the ground that the Court of Appeal was in error in holding that indecent assault is not an included offence in a charge of attempted rape. He asks that a conviction for indecent assault be substituted. We are not called upon otherwise to consider the judgment in appeal. Counsel for the respondent agrees with the submission of the appellant that the Court of Appeal was in error in the view taken with respect to indecent assault being included in the charge of the indictment here in question.

If common assault be an included offence in a charge of attempted rape as held by the Court of Appeal, and there can be no question but that such an assault would

(1) (1938) 71 C.C.C. 206.

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be an act within section 72, then such an act, though in itself ambiguous, may, interpreted by the surrounding circumstances, including words spoken at the time, amount to indecent assault; *Rex* v. *Louie Chong* (1). It is not necessary that the act constituting the assault be in itself indecent in its nature. If the assault, coupled with the intention required by section 72, is of such a nature as to constitute an attempt within the rule as laid down in *Rex* v. *Robinson* (2), such assault must necessarily be indecent; *Rex* v. *Louie Chong* (1). In other words, the crime of attempted rape progresses from assault through indecent assault to the complete crime. If the facts of the suppositious case referred to by Roach J.A. amount to the offence of attempted rape, the assault itself necessarily becomes indecent. This would appear to have been the view of the majority in *Wright* v. *The King* (3).

However, I agree with the Court of Appeal in the view that it was not open to that court, in view of the learned trial judge's charge and the verdict of the jury, to substitute a conviction for indecent assault. Section 1016 (2) requires it to appear to the Court of Appeal on the actual finding that the jury "must" have been satisfied of facts which proved the respondent guilty of indecent asault. The highest that Mr. Common puts his argument, and properly so, is that:

> It is quite possible that the jury might be under the erroneous impression that a conviction for assault occasioning actual bodily harm on a female was more serious than that of indecent assault.

That is not sufficient. I do not think that the Court of Appeal were required, in the circumstances here present, to come to the conclusion the statute requires.

I would accordingly dismiss the appeal.

TASCHEREAU J.:—I am of opinion that this appeal should be dismissed.

Appeal dismissed.

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(1) (1914) 32 O.L.R. 66.
(2) [1915] 2 K.B. 342.
(3) [1945] S.C.R. 319, at 322