BARTLETT J. BROOKS.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1927

*Oct. 31.
*Nov. 2.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Criminal Law—Conviction on charge of using means to procure abortion (Cr. Code, s. 303)—Judge's charge to jury—Misdirection in a material matter—Appeal—Onus of Crown—Miscarriage of justice (Cr. Code, s. 1014 (1) (c)).

The judgment of the Appellate Division of the Supreme Court of Ontario, 61 Ont. L.R. 147, affirming appellant's conviction on a charge of using means to procure abortion, contrary to s. 303 of the *Cr. Code*, was reversed, and the conviction was set aside and a new trial ordered, on the ground that there was non-direction, tantamount in the circumstances to misdirection, in a material matter, in the trial judge's charge to the jury, in that he cast doubt, unwarranted on the evidence, upon the fact of the girl's menstruation shortly before the time of the acts charged, and failed to direct their attention to its possible significance (as bearing on the appellant's defence that he was never aware of the girl's pregnancy) and also to the motives, consistent with innocence which might have actuated the girl in consulting one W., a physician and surgeon, rather than the family physician, and in presenting herself to him under an assumed married name.

Misdirection in a material matter having been shown, the onus was upon the Crown to satisfy the court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty (*Gouin* v. *The King*, [1926] S.C.R. 539, at p. 543; *Allen* v. *The King*, 44 Can. S.C.R. 331, at p. 339; *Makin* v. *Att. Gen. for New South Wales*, [1894] A.C. 57, at p. 70). That onus was not discharged.

APPEAL by the accused from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, by a majority, dismissed his appeal from his conviction, upon trial by Logie J. and a jury, on the charge of using means to procure abortion, contrary to s. 303 of the *Criminal Code*.

By the judgment now reported, the appeal was allowed, the conviction set aside and a new trial ordered, on the ground of misdirection in the trial judge's charge to the jury in certain respects indicated in the judgment.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

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I. F. Hellmuth K.C. and *R. H. Greer K.C.* for the appellant.

E. Bayly K.C. for the respondent.

THE COURT.—A majority of the Court is of the opinion that, in view of the unfortunate failure of the learned trial judge to present to the jury the principal ground of defence put forward by the appellant, his conviction cannot be sustained. As there is to be a new trial, it is inadvisable to discuss the evidence in detail or to do more than indicate what is regarded as the fatal defect in the charge.

The appellant is shewn by the evidence to have been more or less connected with two occasions on which the girl, Ruth Dembner, was "treated" by Dr. Withrow. He accompanied her to the doctor's residence on the evening of Tuesday the 8th of February, 1927, when the doctor states that he made a physical examination, using a "dilator." The appellant also brought the girl to the Strathcona Hospital on the night of Friday, the 11th of February, and she was admittedly operated on by Dr. Withrow on the following (Saturday) morning.

That Ruth Dembner was in fact pregnant from some time in January is clearly established; and that she was in fact operated on by Dr. Withrow with intent to bring about an abortion is not open to question here.

The defence of the appellant is that he was never aware of Ruth Dembner's pregnancy. There is no direct testimony that he ever learned that fact, circumstantial evidence being relied upon by the Crown to justify an inference of such knowledge. The appellant, on the other hand, points to his knowledge that the girl had menstruated on the 28th of January (deposed to by his father) as importing ignorance by him of the vital fact that she had conceived. The fact of her menstruation is established by the uncontradicted testimony of her mother and sister, called as crown witnesses, and whose credibility is unimpeached. The medical testimony is that menstruation during pregnancy is not uncommon.

The fair inference from these facts, it is argued for the appellant, is that both he and the girl did not believe that she was pregnant when she first visited Dr. Withrow on the evening of the 8th of February. At all events, the fact of the menstruation and the significance attached to it by the

appellant should have been placed before the jury by the learned trial judge in his charge at least as fairly and as clearly as were the circumstances relied on by the Crown as implying guilty knowledge and intent. Yet, while some emphasis was laid in the charge on the facts that Ruth Dembner had passed over her family physician and had gone to Dr. Withrow, an utter stranger, to be treated, as the defence claims, for dysmenorrhoea, and that she had given her name to Dr. Withrow as "Mrs. Brooks," nothing was said of the suggested explanation offered for the appellant that she probably wished to conceal the loss of her virginity from the family physician and that, as that fact would be apparent to Dr. Withrow, she might have thought it would be more convenient for her to give the name of a married woman.

The learned judge, instead of telling the jury, as the evidence clearly warranted, that they should accept as undisputed the girl's menstruation in the end of January, cast doubt upon that fact, saying: "The evidence, if any, was of menstruation," and then, suggesting the possibility of the issue of blood on the 28th of January having been due to some earlier unlawful operation (of which there is not a scintilla of evidence), he added:

> The weight of that evidence (as to menstruation); the credibility of it is for you; you are the judges of that.

After the jury had retired, counsel for the appellant objected to the charge in these terms:

> In charging the jury as to the evidence of menstruation I was struck by the fact that you brushed it aside; you covered it in such a way that you in effect used this expression in regard to that; you must consider the weight of the evidence. You did not perhaps have present in your mind at that time that the evidence consisted of the mother's testimony and the sister's testimony.

Instead of recalling the jury and specifically directing their attention to this matter as requested, the learned judge said:

> But that was impressed upon the jury again and again by you and Mr. Roebuck. Of course there was evidence that blood had been seen on a pad, but all the girl said to her mother was—"It is the usual."
>
> Mr. GREER: I have it down that the mother actually saw it.
>
> HIS LORDSHIP: It may be so but I do not think any miscarriage will occur from that, because counsel reiterated that only this morning to the jury.
>
> Mr. GREER: Well you charged very carefully, and it struck me that perhaps a proper sense of proportion . . . .
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> HIS LORDSHIP: Any objection, Mr. Roebuck?
>
> Mr. ROEBUCK: I intend to make none.

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And yet the learned judge had, early in his charge to the jury, said:

> It is my duty, gentlemen, to lay the defence fairly and completely before the jury, and I will do that a little later * * *

To avoid any possible misapprehension, it should be stated that, in the opinion of the Court, but for the defects in the charge the appellant could not have successfully attacked his conviction. There was quite enough evidence to warrant the jury upon an adequate charge, had they seen fit to do so, drawing the inference of guilty knowledge and intention on his part. But it is impossible to gauge the effect on the jury's mind of casting doubt upon the fact of the girl's menstruation and of failing to direct their attention to its possible significance and also to the motives, consistent with innocence, which might have actuated the girl in consulting Dr. Withrow rather than the family physician and in presenting herself to him as "Mrs. Brooks." If the jury, properly instructed as to these points, regarded the first visit to Dr. Withrow on the 8th of February as made for an innocent purpose and in ignorance by the girl and the appellant of her pregnancy, as the Deputy Attorney General admitted they might, they would be obliged to infer from what subsequently occurred that the appellant's state of mind and his intention changed and that when he brought the girl to the hospital on the Friday evening (February 11) he did so with the object of furthering a design on her part to undergo an operation to procure an abortion. That it may seem probable to an appellate court perusing the record that the jury would have reached that conclusion, does not warrant affirming the conviction. That would, in effect, be to substitute the verdict of the court for that of a jury properly instructed, to which the appellant was entitled. Misdirection in a material matter having been shewn, the onus was upon the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty. *Gouin* v. *The King* (1); *Allen* v. *The King* (2); *Makin* v. *Att. Gen. for New South Wales* (3). That burden the Crown, in the view of the majority of the Court, has not discharged. There was non-direction by the learned trial judge in a vital matter, tantamount in

(1) [1926] S.C.R., 539, at p. 543. (2) (1911) 44 Can. S.C.R. 331, at p. 339.

(3) [1894] A.C. 57, at p. 70.

the circumstances of this case to misdirection, and constituting a miscarriage of justice within subs. 1 (*c*) of s. 1014 of the *Criminal Code*. Upon the whole case, and taking into consideration the entire charge, the majority of the Court, with respect, finds itself unable to accept the view expressed by the learned judge who delivered the majority judgment in the Appellate Division that "no substantial wrong or miscarriage of justice can have occurred" at the trial. (*Criminal Code*, s. 1014 (2)).

Appeal allowed, conviction set aside and new trial ordered.

Solicitors for the appellant: *Smith, Rae & Greer.*

Solicitor for the respondent: *Edward Bayly, Deputy Attorney-General for the Province of Ontario.*