Darryl Ward Smith *Appellant*;

and

Her Majesty The Queen *Respondent.*

1978: November 28; 1978: December 5.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law — Charge of rape — Acquittal — Trial judge's refusal to charge jury on included offences — Penetration and consent in issue — Appellate Division correct in ordering new trial on attempted rape and indecent assault.

Wright v. The King, [1945] S.C.R. 319; *Regina v. Wright*, [1971] 3 O.R. 424; *Regina v. Touhey* (1960), 45 Cr. App. R. 23, distinguished.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], whereby the Crown's appeal from a verdict of acquittal of the appellant on a charge of rape was allowed and a new trial ordered as to the offences of attempted rape and indecent assault. Appeal dismissed.

Alain Hepner, for the appellant.

Paul S. Chrumka, Q.C., for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The accused was tried and acquitted of rape. The trial judge's charge to the jury in respect of this offence was unexceptionable. Although so requested by Crown counsel, he refused, however, to charge the jury on the included offences of attempted rape and indecent assault. After the jury had been out for about one hour and a half, they returned to ask the following question:

> The Crown prosecutor made the suggestion of either guilty or innocent of rape, attempted rape or indecent assault. What options if any do we have?

[1] (1977), 8 A.R. 5.

The trial judge repeated to them what he had said earlier to counsel, after the jury had retired, that it was a case of rape or nothing.

The Crown appealed on the ground of error in law in the trial judge's refusal to charge on included offences and also sought an order setting aside the acquittal and directing a new trial. The Appellate Division of the Supreme Court of Alberta concluded that there should be a new trial limited to the offences of attempted rape and indecent assault. Leave was later sought by the Crown from this Court to appeal the acquittal of rape but it was refused. The case is here, therefore, only on the question whether the Appellate Division was correct in ordering a new trial on attempted rape and indecent assault.

There were, admittedly, two issues before the jury on the charge of rape. One was whether intercourse had taken place, that is whether there was penetration, and the second whether there was consent. The trial judge placed considerable emphasis on the issue of consent as if that made the case one of rape or nothing. However, it is clear that the jury may have decided that there was no rape only because there was no proof beyond a reasonable doubt that sexual intercourse had occurred. Want of proof of sexual intercourse would not, of course, rule out attempted rape or indecent assault, but they would be ruled out if there was consent to the accused's advances.

I do not think that a trial judge has an untrammelled discretion to choose or refuse to charge the jury on included offences. He must be governed by the issues that are thrown up by the evidence. There may be cases where evidence of an issue referable to an included offence is so tenuous as to justify him in refusing to charge on it, and yet he would not necessarily be in error if he did so charge. This case is not of that kind. Here, having

Le juge du procès leur a répété ce qu'il avait déjà dit aux avocats, après le départ des jurés, c'est-à-dire qu'il s'agissait d'un cas de viol et rien d'autre.

Le ministère public a interjeté appel au motif que le juge du procès a commis une erreur de droit en refusant de donner au jury des instructions sur les infractions incluses et demandé l'annulation de l'acquittement et la tenue d'un nouveau procès. La Division d'appel de la Cour suprême de l'Alberta a conclu qu'il devait y avoir un nouveau procès limité aux infractions de tentative de viol et d'attentat à la pudeur. Le ministère public s'est adressé à cette Cour pour obtenir l'autorisation d'interjeter appel de l'acquittement sur l'accusation de viol, ce qui lui fut refusé. Le présent pourvoi porte donc uniquement sur la question de savoir si la Division d'appel a ordonné à bon droit la tenue d'un nouveau procès relativement aux accusations de tentative de viol et d'attentat à la pudeur.

Il est admis que deux questions étaient soumises au jury relativement à l'accusation de viol. La première était de savoir s'il y avait eu des rapports sexuels, c'est-à-dire s'il y avait eu pénétration, et la deuxième, s'il y avait eu consentement. Le juge du procès a beaucoup insisté sur la question du consentement comme si cet élément déterminait qu'il s'agissait d'un cas de viol et rien d'autre. Il est clair cependant que le jury pouvait décider qu'il n'y avait pas eu de viol pour la seule raison que la preuve n'établissait pas au-delà de tout doute raisonnable qu'il y avait eu des rapports sexuels. L'absence de preuve de rapports sexuels n'exclut naturellement pas les accusations de tentative de viol et d'attentat à la pudeur, mais ces dernières seront écartées si la plaignante a consenti aux avances de l'accusé.

Je ne crois pas que le juge du procès ait entière discrétion pour accepter ou refuser de donner aux jurés des instructions sur les infractions incluses. Les questions litigieuses soulevées par la preuve doivent le guider. Il peut arriver que la preuve d'un point relatif à une infraction incluse soit si ténue qu'il soit justifié de refuser de donner des instructions à ce sujet et pourtant il ne ferait pas nécessairement erreur s'il en donnait. Ce n'est pas le cas en

regard to the complainant's evidence of what the accused did and to the evidence of his physical disability in having intercourse unless there was complete co-operation of the complainant and to his denial of intercourse, both penetration and consent were in issue. The jury by its verdict might have found that there was neither penetration nor consent, and this would not exclude either attempted rape or indecent assault. In the circumstances there was a duty on the trial judge to charge on these included offences.

In *Wright v. The King*[2], which was also a case where the trial judge told the jury that it was "rape or nothing", it appears that the only issue was consent. That was also the situation in *Regina v. Wright*[3], and there the Ontario Court of Appeal held that it was wrong to leave indecent assault to the jury when intercourse was not in issue, citing and following the judgment of the English Court of Criminal Appeal in *Regina v. Touhey*[4]. Aylesworth J.A. pointed out that if there was sufficient separation in time, place and other circumstances surrounding an alleged indecent assault from time, place and circumstances leading to an alleged rape, then indecent assault should be the subject of a separate count in the indictment, but, apart from this, it could not be an included offence where penetration is admitted.

Those cases are distinguishable from the present one, which called for the instruction requested by the Crown. I would, accordingly, dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Harradence, Moore, Calgary.

Solicitor for the respondent: P. S. Chrumka, Calgary.

[2] [1945] S.C.R. 319.
[3] [1971] 3 O.R. 424.
[4] (1960), 45 Cr. App. R. 23.