HER MAJESTY THE QUEEN .....APPELLANT;

AND

KENNETH HARDER .....RESPONDENT.

1956

*Feb. 24
*Apr. 24

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Rape—Aiding and abetting—Crown's case, that accused assisted another—Indictment charging him with carnal knowledge—Whether indictment valid—Criminal Code, ss. 69, 852.

The respondent was convicted of rape on a charge that "he did have carnal knowledge of V.B., a woman who was not his wife, without her consent". The Crown's case was that while he did not in fact have sexual intercourse with the woman he had aided others to do so. The Crown sought a conviction under s. 69(1) of the *Code* as an "aider and abettor". By a majority judgment, the Court of Appeal quashed the conviction and ordered an acquittal on the ground that the indictment failed to allege the facts in support of the Crown's case.

Held (Cartwright J. dissenting): That the appeal should be allowed and the conviction restored.

Per Kerwin C.J., Taschereau and Fauteux JJ.: Since an aider and abettor may be indicted as principal simpliciter, it follows that an indictment so charging an aider, being valid in law, must therefore be construed not as exclusively charging the accused as having in fact actually committed the offence, but as having in the eyes of the law committed it. It also follows, since the reason for such construction being that all participants are by law principals, that the same construction obtains whether the indictment charges them jointly or each of them alone of the offence in the ordinary form, as if they had actually committed it, or whether the offence is stated "in popular language" or "in words of the enactment describing the offence" as authorized by s-s. 2 and 3 of s. 852 of the *Criminal Code*.

While it was open to the respondent, before or during the trial, to move for the different reliefs he might then have considered desirable for his defence, he, admittedly being at all times fully informed of the case against him, elected not to do so; he cannot now complain in appeal of matters which, subject to their merits, could have been corrected at trial.

Per Rand J.: The charge as laid included the offence in law attributable to the respondent through his act of aiding and abetting. The evidence of assistance only was, after verdict, sufficient to convict (*Rex* v. *Folkes and Ludds* 168 E.R. 1301 followed).

Per Kellock J.: The indictment complied with s. 852(3) of the *Code* and was a valid and appropriate indictment.

Per Locke J.: When a person has abetted another to commit the offence of rape, it is a literal compliance with the requirements of s. 852(3) of the *Code* to charge him of the offence as a principal.

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

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Per Cartwright J. (dissenting): The wording of the charge not only failed to inform the respondent of the case against him but was actually misleading. The charge should have contained at least a statement that someone had raped the complainant and that the respondent had done an act for the purpose of aiding him to do so. The rape with which he was charged was not one committed by someone else but by himself personally and there was no evidence of any such rape. Where the criminality of an act depends on the existence or non-existence of a particular relationship between the individual personally committing the act and another person, it is essential that the charge should specify whether the accused did the alleged act personally or merely aided another to commit it.

Furthermore, since there was evidence by the complainant of two separate rapes, the charge was bad either for uncertainty or for charging two separate crimes in one count.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), setting aside, Robertson and Bird JJ.A. dissenting, the respondent's conviction on a charge of rape.

Lee A. Kelley, Q.C. and *J. J. Urie* for the appellant.

T. P. O'Grady for the respondent.

The judgment of Kerwin C.J., Taschereau and Fauteux JJ. was delivered by:—

FAUTEUX J.:—The material facts giving rise to this case are related by the complainant; they may be summarized as follows: At 9 o'clock p.m., on the 23rd day of May, 1954, the respondent, Kie Singh, Pew Singh and Jumbo Singh invited the complainant to board the automobile in which they were and eventually abducted her to a secluded place where each of the three Singhs raped her; respondent himself had no carnal knowledge of the girl but, by use of force, assisted in subduing her; immediately after the occurrence, the latter was driven back to a short distance from her home and upon entering her residence, complained to her mother of the assault and the police were notified.

The accused was arrested and upon evidence of these facts related by the complainant at the preliminary inquiry, was committed for trial and tried upon an indictment charging him in the very words of the enactment describing the offence of rape (s. 298), to wit:—

That at or near Newton, in the Municipality of Surrey, in the County and Province aforesaid, on the 23rd day of May in the year of Our Lord 1954, he, the said Kenneth Harder, a man, did have carnal knowledge of

(1) 112 C.C.C. 277.

(Christian name and surname mentioned in the indictment are here omitted), a woman, who was not his wife, without her consent, against the form of the statute in such case made and provided and against the peace of Our Lady the Queen, her Crown and dignity.

The issue at trial was whether, during the whole of the transaction, rape had been committed by a person or persons other than the accused and whether the accused aided in its commission. The latter, assisted by counsel, did not testify and was found guilty by the jury.

This conviction was appealed and quashed by a majority judgment of the Court of Appeal for British Columbia.

The point upon which the appeal turned is centred upon the indictment and, as indicated by Davey, J.A., had never been raised at trial. The majority (O'Halloran, Smith and Davey, JJ.A.), relying primarily on the decision of this Court in *Brodie* v. *The King* (1), expressed the view that the indictment, containing no averment that Harder had assisted Jumbo Singh or any one else to have carnal knowledge of the girl, must on a proper construction, be held to charge respondent as having himself physically raped the complainant; and there being admittedly no evidence to support the indictment as thus construed, the Court maintained the appeal and directed an acquittal to be entered. Robertson and Bird JJ.A. dissenting, held:—

That the indictment charging the accused as principal was sufficient notwithstanding that it did not aver that the accused aided and abetted Kie Singh to assault the woman criminally.

With deference, I cannot agree with the views held by the majority. Admitting that the construction they placed upon the indictment is justified, on the restrictive basis upon which it was made i.e. the literal wording of the document, it cannot be supported, on the entirely different legal basis upon which indictments can be framed and must therefore be construed, according to law. And while it was open to the accused, before or at any stage during the trial, to move for the different reliefs he might then have considered desirable for his defence, he, admittedly being from the moment of his committal for trial to the end of the trial fully informed of the case against him, elected not to do so; he cannot now complain in appeal of matters which, subject to their merits, could have been corrected at trial, had he then chosen to so move.

(1) [1936] S.C.R. 188.

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Fauteux J.

The indictment. An indictment cannot properly be construed without regard to the substantive and procedural provisions of the criminal law related to its substance and its form. As stated by Willes J., with the concurrence of all the Judges who advised the House of Lords, and with the approval of the latter, in the case of *Mulcahey* v. *The Queen* (1):

> . . . an indictment only states *the legal character of the offence* and does not profess to furnish the details and particulars. These are supplied by the depositions, and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions, which it may be intended to produce at the trial. To make the indictment more particular would only encourage formal objections upon the ground of variance, which have of late been justly discouraged by the Legislature.

This statement was acted upon by Sir William Ritchie C.J. and Strong J. in *Downie* v. *The Queen* (2).

At common law, the actor or actual perpetrator of the fact and those who are, actually or constructively, present at the commission of the offence and aid and abet its commission, are distinguished as being respectively principal in the first degree and principals in the second degree; yet, in all felonies in which the punishment of the principal in the first degree and of the principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree. (Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 1499). In Hawkins's Pleas of the Crown, Vol. II, p. 316, s. 64, it is stated:—

> That where several are present and one only actually does it, an indictment may in the same manner as in appeal, either lay it generally as done by them all or specially as done only by the one and abetted by the rest.

The reason for the rule is evident. It is stated as follows in East's Pleas of the Crown, Vol. I, at page 350:—

> For in these cases all the parties are principals, and the blow of one is, in law, the blow of all. For which reason an indictment that A. gave the mortal blow and B., C. and D. were present and abetting, is sustained by evidence, that B. gave the blow and A., C. and D. were present and abetting. Upon the like indictment, evidence that E., though not named therein, gave the blow, and that A., B., C. and D. were present and abetting, would be sufficient; or even that a person unknown gave the blow.

(1) (1868) L.R. 3 H.L. 306 at 321. (2) (1889) 15 Can. S.C.R. 358 at 375.

In *The Queen* v. *James* (1), the indictment charged the accused with the larceny of a letter; the question raised in that case was whether he was a joint thief with the postman whom he had induced to intercept and hand him over the letter, or whether he was an accessory before the fact to the larceny committed by the servant of the Post Office. Lord Coleridge, C.J., with the concurrence of Pollock, B., Hawkins, Grantham and Charles, JJ., stated at page 440:—

> I can entertain no doubt in this case. Either the prisoner was a joint thief with the postman from whom he obtained the letter, or he was an accessory before the fact, in which case, by 24 & 25 Vict. c. 94, s. 1, he was liable to be convicted in all respects as if he were a principal felon. In either case, therefore, he was rightly convicted.

Section 1 of c. 94, therein referred to, reads:—

> 1. Whosoever shall become an Accessory before the Fact to any Felony, whether the same be a Felony at Common Law or by virtue of any Act passed or to be passed, may be *indicted, tried, convicted* and punished in all respects as if he were a principal Felon.

This Imperial statute, later adopted into Canadian law (R.S.C. 1886, c. 145) practically brought to an end the distinctions between accessories before the fact and principals in the second degree.

By the enactment of section 61, the predecessor to section 69, these distinctions in the substantive law entirely disappeared from our criminal laws when codified in 1892. With them, of course, also disappeared, because being made no longer necessary, the relevant adjective rules related to the framing of the indictment of such persons who, not actually committing the offence charged, were then made, by statute, principals and equally party to, guilty of and punishable for the offence as if actually committed by them. It is unthinkable that, getting rid of the difficulties arising out of these prior distinctions, Parliament would, in the same breath, have created new ones by refusing to the Crown the right to indict—which right it had before, under common and statutory law—as principal simpliciter, either a principal in the second degree or an accessory before the fact, and this, under the regime of this new law holding each and all *particeps criminis* as being nothing less than principals.

(1) (1890) L.R. 24 Q.B.D. 439.

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Sir Elzéar Taschereau, in his *Criminal Code,* deals with the matter and, indicating how an abettor may be indicted, says at page 29:—

> For instance: A. abetted in the commission of a theft by B. The indictment may charge A. and B. jointly or A. and B. alone as guilty of the offence in the ordinary form, as if they had actually stolen by one and the same act.

In *Rémillard* v. *The King* (1), is evidenced the practice more generally followed since this change of the law. The facts in that case were that, on the counsel of his father, a son killed another person. Father and son were separately indicted; the indictment against the father, as appears in the file of this case in this Court, was for murder simpliciter, there being no averment, either of the fact that he counselled the commission of the crime or of the fact that another person was involved therein. The son was found guilty of manslaughter but the father, guilty of murder. The conviction of the latter was upheld by this Court.

Relying on the decision of this Court in *Rémillard* v. *The King* (*supra*), Chief Justice Robertson, in *Rex* v. *Halmo* (2), dealing with the same matter though arising in a different way, expressed the following views, at p. 118:—

> Appellant was charged in express terms with an offence against s. 285(6), and if he did aid, abet, counsel or procure Mayville to drive his motor-car in the manner in which it was in fact driven, he was guilty of a breach of that subsection, and s. 69, beyond question, warrants his prosecution for an offence under s. 285(6); *Remillard* v. *The King* (1921), 59 D.L.R. 340, 35 Can. C.C. 227, 62 S.C.R. 21. It was unnecessary to allege in the charge that appellant "did aid, abet, counsel or procure Wilfred Mayville," for by force of s. 69 it would have been sufficient, and perhaps, better pleading, to charge him simply with the offence that Mayville in fact committed. The insertion of the unnecessary words did not, in my opinion, invalidate the charge, nor prevent its being a good and sufficient charge under s. 285(6). Appellant was assisted rather than injured by the more specific statement of his relation to the offence with which he was charged.

In this state of the law, an aider and abettor may be indicted as principal simpliciter. It follows that such an indictment, valid in law, must therefore be construed, not —as was done in the Court below—as exclusively charging an accused as having in fact actually committed the offence charged, but as having in the eyes of the law committed it.

(1) (1921) 62 Can. S.C.R. 21. (2) 76 C.C.C. 116.

And, the reason for the construction being that all *particeps criminis* are by law principals, it also follows that the same construction obtains whether, as stated in Taschereau's Criminal Code, the indictment charges them jointly or each of them alone of the offence in the ordinary form, as if they had actually committed it, or whether the offence is stated "in popular language" or "in the words of the enactment describing the offence" as Parliament authorized it to be done at the option of the prosecution, under sub-sections 2 and 3, respectively, of s. 852.

It is said that charging a man with rape or to have had carnal knowledge of a woman when he only aided another to do the act is repugnant and, therefore, misleading. This is so if the indictment is literally construed but not so if legally construed. Countenance must be given to the law as laid down and not to arguments prompted by logic without regard to what the law is. In *Simcovitch et al.* v. *The King* (1), the argument was that, neither of the appellants falling within the description of the classes of persons to whom indictable offences of which they were charged are imputed by statute, they could not physically for that reason commit, and therefore be convicted of, such offences. This argument was not accepted to defeat the law as interpreted by the Court.

The *Brodie* case (*supra*), relied on by the majority in the Court below, has, with respect, no application in the matter. The question in the case was whether the indictment did specify the offence. The point raised in the present appeal is an entirely different one and one which was not in issue in the *Brodie* case. While, in the latter, this Court dealt with sections 852, 853 and 855, it clearly did so exclusively in relation to the matters under consideration in that case, carefully adding, indeed, at the end of the judgment:—

> We do not want to part with this appeal, however, without saying that our decision is strictly limited to the points in issue.

And contrary to what is the situation here, the Court treated the indictment as being invalid on its face, quashed it as well as the conviction, and added that the Crown was at liberty to prefer a fresh indictment if so advised.

(1) [1935] S.C.R. 26.

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The course of conduct at trial. As already indicated, respondent was admittedly fully aware of the case for the prosecution and of the position taken by the latter on the indictment. This knowledge he gained respectively from the depositions at the preliminary inquiry and from the opening address of the Crown to the jury at the very end of which the prosecutor said:—

> Now, in that regard, I think I should at this point advise you that the Crown will not attempt to prove that this accused actually had sexual intercourse with the complainant (name being now omitted). The Crown, however, will bring evidence to show that he in concert with another man, held the accused, the girl, while others had sexual intercourse with her.
>
> THE COURT: You said the accused.
>
> MR. FRASER: Oh, I beg your pardon, held the complainant, while others had sexual intercourse with her.

Thus openly and at the very beginning of the trial the Crown, on the one hand, stated its intention to treat—as it was entitled to on the facts of the case and on the indictment as preferred (see *The King* v. *Michaud* (1); *Regina* v. *Giddins and two others* (2))—the whole conduct of the accused during the event as being, so far as the accused was concerned, one entire transaction, rather than to deal separately with his participation in each of the rapes committed in separate counts, a process much less favourable to the accused than the one adopted. With all this information and with this statement of the Crown, the accused, on the other hand, was content to undergo trial on the indictment as laid. No attempts were made by the defence either before, or at any stage of, the trial to have this substantially valid indictment quashed for matters of form, particularized, amended or divided. From this course of conduct in which both the Crown and the defence joined, the trial Judge was entitled to conclude that the accused had neither doubts as to what the case was nor embarrassment with respect to his defence to the charge as laid. In this situation, the defence was precluded, after the verdict, from complaining as to the indictment and the Crown was foreclosed from thereafter laying an indictment charging the accused with respect to any of the rapes actually committed during the events forming the basis of the charge.

(1) 17 C.C.C. 86.

(2) (1842) Car. & M. 634.

In brief, the indictment was valid, the evidence of the complainant was accepted by the jury; and no substantial wrong or miscarriage of justice occurred in the case.

The appeal should be maintained and the conviction restored.

RAND J.:—The question raised in this appeal is that of the language in which the offence of rape is to be stated against an accused. S. 69 of the former *Code* declared that accessories before the fact and principals in the second degree, as these were known at common law, were parties to and guilty of an offence as if principals in the first degree. By s. 852(1) a count was sufficient if it contained in substance a statement that the accused "has committed some indictable offence therein specified"; s-s. (2) permitted the statement to be made in popular language, and s-s. (3) that "it may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence". This latter general provision might, obviously, require to be accommodated to the special nature of the offence when accessories before the fact or principals in the second degree were charged. For example, a husband who aids the ravishment of his wife by a third person is guilty of the crime of rape upon her; but could the charge follow the description of the offence as given by s. 298 of the *Code* which requires a statement that the woman is not his wife? In such a case it is necessary to include an allegation of the actual ravishment by another and a further allegation of the participation by way of assistance of the husband. The same conflict exists in the case of a woman charged with rape: it would be an absurdity to state the charge in the language of the *Code,* yet she is declared to be a party to the offence and may be found guilty of it.

The permitted description in the language of the statute is not, then, absolute. In the case before us I would, in the absence of direct authority, have been disposed to agree with the Court of Appeal that, owing to the nature of the crime and the connotation of the language by which it is directly described, the charge states only the personal act of ravishment by the accused and excludes the offence in law attributable to him through his act of aiding and abetting.

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Rand J.

In *Regina* v. *Crisham* (1) the count set forth the actual facts of aiding and abetting a rape by another and it was argued that the accused should have been indicted as principal at common law, with the count stating that the accused "as well as M'Donough" had ravished the prosecutor, which so far supports the view I take of the matter.

But I am precluded from following it by *Rex* v. *Folkes and Ludds* (2). There the indictment in the first count charged Folkes with having feloniously ravished the named woman and in the second that Ludds was there and then present, aiding and abetting him. The third and fourth counts were similar except that Ludds was charged as principal and Folkes as aider. The fifth and sixth, and the seventh and eighth counts, in each couplet, charged a person unknown to have been principal with Folkes and Ludds aiders. Ludds was acquitted on an alibi and a general verdict of guilty found against Folkes. The statute, 9 Geo. IV, c. 31 made no provision against aiders and abettors in rape and the question was whether, upon the indictment, the verdict could be sustained against Folkes. As the statute dealt with accessories before and after the fact to felonies and for aiders in cases of misdemeanour, it seems to have been accepted or it was at least assumed that the fourth, sixth and eighth counts did not state an offence against Folkes. There was evidence both of the personal ravishment by him and his aiding and abetting the ravishment by others. At a meeting of all the judges except four, the conviction was upheld on the first count. What this means is that on that count there could be a conviction upon the finding by the jury based either on the evidence going to the ravishment or that going to his secondary role as abettor. From this it follows that if there had been no other than the first count the evidence of assistance only would, after verdict, have been sufficient. That is the case before us.

I would, therefore, allow the appeal and restore the conviction.

KELLOCK J.:—The indictment upon which the respondent was tried and convicted contained the following charge:

THAT at or near Newton, in the Municipality of Surrey, in the County and Province aforesaid, on the twenty-third day of May, in the

(1) 174 E.R. 466. (2) 168 E.R. 1301.

year of Our Lord one thousand nine hundred and fifty-four, he the said KENNETH HARDER, a man, did have carnal knowledge of Vera Borushko, a woman who was not his wife, without her consent, against the form of the Statute in such case made and provided, and against the peace of our Lady the Queen her Crown and Dignity.

This conviction was set aside by the Court of Appeal, Robertson and Bird JJ.A., dissenting. The appeal comes to this court under s. 1023 of the *Criminal Code* upon the following dissent:

That the indictment charging the accused as a principal was sufficient notwithstanding that it did not aver that the accused aided and abetted Kie Singh to assault the woman criminally.

It is provided by s. 852(1) of the *Criminal Code* that every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed "some indictable offence therein specified". By s-s. (2) it is provided that such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved, while s-s. (3) provides that

Such statement may be in the words of the enactment describing the offence . . .

The particular offence here in question is described by s. 298 as follows:

298. Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, . . .

By s. 299, it is provided that "every one" who commits rape is guilty of an indictable offence and liable to suffer death or to imprisonment for life, and to be whipped.

It is further provided by s. 69 that

69. Everyone is a party to and guilty of an offence who
(*a*) actually commits it;
(*b*) does or omits an act for the purpose of aiding any person to commit the offence;
(*c*) abets any person in commission of the offence; or
(*d*) counsels or procures any person to commit the offence.

The view which commended itself to the majority below is sufficiently expressed in the language of Davey J., who, after referring to s. 69(1), clauses (*b*) and (*c*), said:

The accessory is guilty of the offence committed by the principal, in this case carnal knowledge had unlawfully by Kie Singh. But that was not the crime charged against the appellant. It was his own unlawful carnal knowledge that was alleged.

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In my respectful view, the error into which the learned judges constituting the majority have fallen is in reading the charge as though it had been framed "in popular language" as permitted by s-s. (2) of s. 852, substituting for the words "did have carnal knowledge of Vera Borushko" in the indictment, the words "did have sexual intercourse" with the named woman without her consent. The indictment was not, however, so framed but employs "the words of the enactment describing the offence" in accordance with s-s. (3) of s. 852. Accordingly, the indictment complying, as it does, with the statute, the only question is as to whether in a case such as the present, where the respondent did not himself have sexual intercourse with the woman but aided and abetted Kie Singh to do so, the indictment is a valid indictment.

At the time of the enactment of the *Code* in 1892, it had already been provided by R.S.C., 1886, c. 145, s. 2, that an aider or abettor

> may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted.

and might be punished in the same manner as an accessory before the fact, who, by s. 1 of the statute, might be *indicted,* tried, convicted and punished *in all respects* as if he were *a principal.*

Sir Henri Elzéar Taschereau, in his work on the *Criminal Code,* at p. 28, says in relation to s. 61 (now s. 69) that the section was so framed by the Imperial Commissioners as to put an end to the nice distinctions between accessories before the fact and principals in the second degree "already practically superseded by chapter 145 Revised Statutes". The learned author goes on to state that all are now principals in any offence, and punishable as the actual perpetrator of the offence, as it always has been in treason and misdemeanour. He continues:

> The prosecutor may, *at his option,* prefer an indictment against the accessories before the fact, and aiders and abettors as principal offenders, whether the party who actually committed the offence is indicted with them or not; *R.* v. *Tracey,* 6 Mod. 30. For instance: A. abetted in the commission of a theft by B. The indictment may charge A. and B. jointly or A. or B. *alone* as guilty of the offence, *in the ordinary form,* as if they had actually stolen by one and the same act. . . .
>
> In every case where there may be a doubt whether a person be a principal or accessory before the fact, it may be advisable to prefer the

indictment against him as a principal, as such an indictment will be sufficient whether it turn out on the evidence that such person was a principal or accessory before the fact, as well as where it is clear that he was either the one or the other but it is uncertain which he was.

In Russell on Crime, Tenth Edition, p. 811, the learned author says:

The indictment against aiders and abettors may lay the fact to have been done by all, or may charge it as having been done by one and abetted by the rest. Thus where, upon an appeal against several persons for ravishing the appellant's wife, an objection was taken that only one should have been charged as ravishing and the others as accessories, or that there should have been several appeals as the ravishing of one would not be the ravishing of the others, it was answered that if two come to ravish and one by comport of the other does the act, both are principals, and the case proceeded; *R.* v. *Vide,* Fitz. Corone, pl. 86.

In *Archbold's Criminal Pleading,* 33rd Ed., p. 1089, the following appears:

1938. Indictment
Statement of Offence
Rape
Particulars of Offence

A B, on the day of , in the county of had carnal knowledge of J N, without her consent.

.....

.....

The offence is a felony at common law, but the punishment is statutory. An indictment is good which charges that A committed a rape, and that B was present aiding and abetting him in the commission of the felony; for the party aiding may be charged *either* as, as he was *in law,* a principal in the first degree or, as he was *in fact,* a principal in the second degree; *R.* v. *Crisham,* C. & Mar. 187.

In the case cited, the indictment stated that

one Peter M'Donough upon one Bridget Lamb did make an assault, and her the said Bridget Lamb violently, feloniously, and against her will did ravish, etc.; and went on to state that the prisoner was present, and feloniously aided and assisted the said Peter M'Donough in the commission of the said felony, contrary to the statute, etc.

After a verdict of guilty on a motion in arrest of judgment it was argued for the prisoner that there being no statutory provisions applicable to persons aiding and abetting in cases of this nature, the indictment was wrongly framed, that he should have been indicted as at common law and the indictment

should have charged him as a principal, and stated that he, as well as M'Donough, ravished the prosecutor.

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It was pointed out that the statute of 9 Geo. 4, c. 31, which declares that every person convicted of the crime of rape should suffer death, made no specific provision as to aiders and abettors, to which Maule J., said:

> Then your objection is, that the offence which has been committed is not stated in the indictment.
>
> Payne:
>
> My objection is, that the person is not charged, as he ought to have been, *as a principal.*
>
> Maule J.:
>
> There does not appear to me to be any ground for the objection. It has been already decided that, in a case of this description, the party may be charged according to the fact, *or* indicted as a principal in the *first* degree.

In my opinion, therefore, the English authorities are in accord with the construction which appears to me to be the proper construction of the *Code* itself.

For present purposes I see no difference in principle between the crime of rape and the crime of driving dangerously contrary to s. 285, s-s. (6) of the *Criminal Code,* where the accused did not personally drive, the actual driving having been done by another. This was the situation in *Rex.* v. *Halmo* (1).

In that case the accused was charged with aiding and abetting one Mayville to drive contrary to the statute and it was contended (conversely to the contention in the case at bar) that he

> should have been charged *directly* with reckless or dangerous driving, even if his part in it was only to aid, abet, counsel or procure another . . .

Robertson C.J.O., in refusing to give effect to the objection, said, at p. 101:

> It was unnecessary to allege in the charge that appellant "did aid, abet, counsel or procure Wilfrid Mayville", for by force of sec. 69 it would have been sufficient, and perhaps, better pleading, to charge him simply with the offence that Mayville in fact committed.

In my opinion this is a correct statement of the law. Whether an indictment framed as in the case at bar would be appropriate in a case where a husband has assisted another in ravishing the wife of the former need not, in my opinion, be considered. There is nothing inappropriate in the indictment in the case at bar. In my opinion also, as

(1) [1941] O.R. 99.

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the present charge was fully authorized by the *Code*, the decision of this court in *Brodie* v. *The King* (1), where it was considered that the indictment there in question was unauthorized, has no application.

No argument was advanced by the respondent based in any way upon evidence given as to the latter having assisted any other or others than Kie Singh in ravishing the woman named in the indictment. I decline, therefore, to consider whether the conviction was open to objection on such a ground, without any argument as to the applicability of such decisions as *Reg.* v. *Giddins* (2) and *The King* v. *Michaud* (3), as well as our jurisdiction under s. 1014 of the *Code*.

I would allow the appeal and restore the conviction.

LOCKE J.:—In my opinion, the law in England and in Canada, as of the time at which the *Criminal Code* came into force on July 1, 1893, is correctly stated in the 31st Edition of *Archbold's Criminal Pleading and Practice* at p. 1499, where it is said that in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree, provided the offence permits of a participation. The decision in *Mackalley's Case* (4), the reference in *Hawkins' Pleas of the Crown,* Vol. 2, p. 316, s. 64, and the decision of Blackburn L.J. in *Reg.* v. *Ram* (5), appear to me to support the author's statement.

The question to be determined in this appeal is whether this was changed by the provisions of s. 611 of the *Code* (55-56 Vict., c. 29) which appeared as s. 852 of the *Code* prior to its repeal and reenactment in 1955.

It is to be noted that in *Brodie's Case* (1), the concluding paragraph of the reasons of the Court delivered by Rinfret J. (as he then was) made it clear that the decision was "strictly limited to the points in issue" in that matter and that, on the face of it, the indictment considered was defective in that it charged that the accused were parties to "a seditious conspiracy in conspiring together", without

(1) [1936] S.C.R. 188.
(2) (1842) Car. & M. 634.
(3) 17 C.C.C. 86.
(4) 9 Co. Rep. 67b.
(5) (1893) 17 Cox C.C. 609.

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saying what they conspired to do. The head note correctly states the only point decided in these terms: "Although conspiracy to commit a crime, being in itself an indictable offence, may be charged alone in an indictment and independently of the crime conspired to be committed, it is nevertheless necessary that a count charging conspiracy alone, without the setting out of any overt act, should describe it in such a way as to contain in substance the fundamental ingredients of the particular agreement which is charged." Once it is appreciated that this was the point for decision, it appears to me to be clear that the reasons delivered do not touch the present matter.

With great respect, the judgments of the majority in the Court of Appeal appear to me to overlook the fact that s-ss. (2) and (3) of s. 852 are to be considered separately since they state alternative methods in which an indictment may be phrased. It appears to me to be error to graft on to the provisions of s-s. 3 the concluding words of s-s. 2. Once this is appreciated, I think that the proper conclusion in the present matter is made clear. The indictment against Harder was in the language of s. 298. The offence there described might, indeed, be committed in more than one manner, by virtue of the provisions of s. 69 of the *Code*. Ignorance of this, if he was indeed ignorant, would not assist the accused. The fact would be immediately made known to him, in any event, when, as in the present matter, he retained counsel. In my opinion, when a person has abetted another to commit the offence of rape, it is a literal compliance with the requirements of s-s. 3 to charge him of the offence as a principal, just as it was prior to the first enactment of the *Criminal Code*. If, as I think it must be conceded, the three Indians and Harder had been charged together in one indictment of the offence of rape, as was done in the case of Ram, the indictment could not have been impeached by Harder, I am unable, with respect for differing opinions, to appreciate why he may do so when he is charged alone.

The question is not whether, in fact, the form of the indictment misled the accused as to the offence with which he was charged, since there was a preliminary hearing and a statement made by Crown counsel at the commencement of the trial in the Assizes as to the nature of the case of the

Crown which precluded the possibility of his being misled. I merely mention the matter to say that it cannot be suggested that, in this respect, the accused did not have a fair trial. The question as to whether the indictment was misleading in this sense is quite aside from the point, which is limited to the question as to whether the indictment complied in strictness with the requirements of s. 852(3), read in conjunction with s. 855(*f*).

As to the point that the indictment should be held bad for uncertainty since it did not specify whether it was the rape committed by Kie Singh or that by Jumbo Singh with which he was charged, no such objection was raised at the trial nor presumably argued before the Court of Appeal since no mention is made of it in any of the judgments delivered. Nor was the matter mentioned in the factum of the respondent or in the argument in this Court. If the point had been argued in the Court of Appeal or in this Court, it would have been necessary to consider the application of s. 1014(2). In the circumstances, I express no opinion upon the point.

I would allow the appeal and restore the conviction.

CARTWRIGHT J. (dissenting):—The respondent was tried before Wilson J. and a jury and, on December 5, 1954, was convicted on the following charge:—

> THAT at or near Newton, in the Municipality of Surrey, in the County and Province aforesaid, on the twenty-third day of May, in the year of our Lord one thousand nine hundred and fifty-four, he the said KENNETH HARDER, a man, did have carnal knowledge of Vera Borushko, a woman who was not his wife, without her consent, against the form of the Statute in such case made and provided, and against the peace of our Lady the Queen her Crown and Dignity.

The Court of Appeal for British Columbia by the judgment of the majority (O'Halloran, Sidney Smith and Davey JJ.A.) allowed the respondent's appeal, quashed the conviction and directed a verdict of acquittal to be entered. The Attorney General now appeals to this Court on the question of law on which Robertson and Bird JJ.A. dissented which is stated in the following words in the formal judgment of the Court:—

> That the indictment charging the accused as a principal was sufficient notwithstanding that it did not aver that the accused aided and abetted Kie Singh to assault the woman criminally.

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We were informed by counsel that the appeal was argued in the Court of Appeal without a transcription of the evidence, the record before that Court consisting of the formal charge against the respondent, quoted above, and the charge of the learned trial judge to the jury. The complete record of the proceedings at the trial was however placed before us.

In opening the case to the jury counsel for the Crown said in part:—

> His Lordship will direct you insofar as the law is concerned, but I think his Lordship might forgive me at this time if I point out to you that it is necessary for the Crown to prove, firstly, that this offence took place within the Municipality of Surrey, or in any event within the jurisdiction of this court; secondly, that this man who stands before you in the prisoner's dock is not the husband of the complainant Vera Borushko; and, thirdly, that the circumstances under which this offence is alleged to have taken place constitute in law the offence of rape.
>
> Now, in that regard, I think I should at this point advise you that the Crown will not attempt to prove that this accused actually had sexual intercourse with the complainant Vera Borushko. The Crown, however, will bring evidence to show that he in concert with another man, held the complainant, the girl, while others had sexual intercourse with her . . . In that regard, his Lordship will instruct you on the law applicable to those particular circumstances.

It is not necessary to refer to the evidence in any detail. It is sufficient to say that the complainant deposed that the respondent did not himself have sexual intercourse with her or make any attempt to do so but that on the day stated in the charge he, Jumbo Singh and Puga Singh held her by force while Kie Singh had intercourse with her without her consent and that shortly thereafter the respondent, Kie Singh and Puga Singh held her by force while Jumbo Singh had intercourse with her without her consent.

It is obvious that if the facts were as testified by the complainant each of the four named men could on proper charges have been found guilty of the rape which was committed personally by Kie Singh and also of the rape committed personally by Jumbo Singh. The question before us is whether on this evidence the respondent could lawfully be convicted on the charge as laid.

I do not find it necessary to review the numerous authorities cited to us in which ss. 852 and 853 and the related sections of the *Criminal Code* have been discussed as it is my opinion that the majority of the Court of Appeal were

right in holding that the charge in the case at bar did not fulfil the minimum requirements of those sections as to what a count in an indictment must contain.

In speaking of s. 852 and of the manner in which an offence must be specified in a count, Rinfret J., as he then was, giving the unanimous judgment of the Court in *Brodie* v. *The King* (1), said:

> The statement must contain the allegations of matter "essential to be proved," and must be in "words sufficient to give the accused notice of the offence with which he is charged." Those are the very words of the section; and they were put there to embody the spirit of the legislation, one of its main objects being that the accused may have a fair trial and consequently that the indictment shall, in itself, identify with reasonable precision the act or acts with which he is charged, in order that he may be advised of the particular offence alleged against him and prepare his defence accordingly.

In *Rex* v. *Bainbridge* (2), the judgments stress the necessity that the indictment "shall in itself reasonably identify not only the nature of the crime charged, but the act or transaction forming the basis of the crime named" and assign as the two main reasons for this requirement, (i) that the accused may properly prepare for his trial and (ii) that he shall be able to plead *autrefois acquit* or *autrefois convict,* as the case may be, if he is again charged. The *Bainbridge* case was approved by this Court in *Brodie* v. *The King* (*supra*).

In my opinion the wording of the charge in the case at bar not only failed to inform the accused of the case which the Crown proposed to prove against him but was actually misleading. As it was put by Sidney Smith J.A., "no accused man on reading its language charging him with having carnal knowledge of a woman could possibly know that it did not mean that at all—that what it meant to charge against him was assisting another man so that such other man could have such carnal knowledge."

It may be mentioned in passing, as was pointed out by counsel for the respondent, that if the charge was intended to be directed to the fact that the accused had assisted another to rape the complainant the allegation that the accused was a man was irrelevant (see *R.* v. *Ram and Ram* (3)) as was also the allegation that the complainant was not his wife (see *Rex* v. *Audley* (4)).

(1) [1936] S.C.R. 188 at 194.
(2) (1918) 42 O.L.R. 203.
(3) (1893) 17 Cox C.C. 609.
(4) 3 St. Tr. 402.

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The bare minimum of information which the charge should have contained to enable the accused to know what he had to meet was a statement that Kie Singh (or Jumbo Singh) had raped the complainant and that the accused had done an act for the purpose of aiding him to do so. The language actually used to describe the offence imports personal commission by the appellant of the physical act of intercourse and it is impossible to read it as referring to a rape committed by some other individual with the assistance of the appellant. Adopting the words of Davey J.A., "because it charged an offence consisting of a single, specific and personal act of intercourse by the appellant on the woman, it excluded by such specification an act of intercourse had by another person which would also have constituted the crime of rape by the appellant if he had assisted in it within the meaning of Sec. 69."

The rapes of which the complainant's evidence, if believed, shewed the respondent to be guilty were (*a*) that committed by Kie Singh, and (*b*) that committed by Jumbo Singh. The rape with which he was charged was neither of these; it was one committed by himself personally and there was no evidence of any such rape.

It is suggested that the reasoning set out above fails to give effect to the provision in s. 852 (3) of the *Criminal Code* that "such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence"; but the answer to this suggestion is that the offence of which the evidence of the complainant indicated that the appellant was guilty is one created not by sections 298 and 299 simpliciter but by the combined effect of those sections and s. 69 (1) (*b*)— "Everyone is a party to and guilty of an offence who . . . does an act for the purpose of aiding any person to commit the offence." The words of s. 298 used alone, as they were in the charge in the case at bar, are inapt to describe the offence disclosed in the evidence.

However it may be in other cases, I am of opinion that where, as for example in incest or rape, the criminality of an act depends on the existence or non-existence of a particular relationship between the individual personally committing the act and another person it is essential that the charge should specify whether the accused did the alleged

act personally (in which case it is necessary to prove whether such relationship existed between the accused and the person with or upon whom the offence was committed) or merely aided another to commit it (in which case it is necessary to prove whether such relationship existed between the person aided and the person with or upon whom the offence was committed).

We were referred to no reported case and I have found none, in which the charge against an accused who had not personally ravished a woman but had assisted another to do so did not contain a statement that one other than the accused had done the act and the accused had assisted in it.

I am unable to regard the case of *R.* v. *Folkes and Ludds* (1), referred to by my brother Rand as requiring a decision contrary to that of the majority of the Court of Appeal in the case at bar. The report, which is very brief, shews that in the first count Folkes was charged with having personally ravished the complainant and that there was ample evidence that he had done so. The report does not contain any statement of the reasons given by the Judges but simply states their conclusion that the conviction was good on the first count. It may well be that the Judges treated the general verdict of guilty against Folkes as a verdict of guilty against him on each count. As was said by Lord Halsbury in *Quinn* v. *Leathem* (2):

> . . . a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

While what I have said above is, in my opinion, sufficient to dispose of the appeal I wish to deal with another point which, for the obvious reason that the evidence was not before them, was not referred to in the reasons of the Court of Appeal. In charging the jury the learned trial judge put the case to them as if the charge were that the accused had assisted Kie Singh to rape the complainant. In fact, as is set out above, the complainant had deposed to the commission of two separate crimes of both of which, on her evidence, the accused was guilty (i) the rape by Kie Singh and (ii) the rape by Jumbo Singh. If it was intended to charge him with one only of these crimes, then it is not

(1) 1 Mood. 354.

(2) [1901] A.C. 495 at 506.

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possible to say with which of the two he was charged and the charge is bad for uncertainty. If it was intended to charge him with both of these crimes then the charge is bad, for these two separate and distinct crimes could not both be charged in one count, although they might have been charged in separate counts in the same indictment. If it was intended to charge the accused not with both but only with one or the other of these two crimes the charge is bad, for it is an elementary principle that two separate and distinct offences must not be charged in the alternative in one count as the accused cannot then know with certainty with what he is charged or of what he is convicted or acquitted, as the case may be, and may be prevented on a future occasion from pleading *autrefois convict* or *autrefois acquit*.

It is impossible to regard the two rapes above referred to as other than separate and distinct offences. If the accused had been charged with the rape committed by Kie Singh in words making it clear that what was alleged against him was that he had assisted Kie Singh who personally committed the offence and been convicted on such charge, it could not be suggested that if he was thereafter charged in proper words with the rape committed by Jumbo Singh he could successfully plead *autrefois convict*.

For the above reasons I am of opinion that the disposition of the appeal made by the majority in the Court of Appeal was right and I would dismiss the appeal.

Appeal allowed; conviction restored.

Solicitor for the appellant: *G. W. Bruce Fraser.*

Solicitor for the respondent: *Terence P. O'Grady.*