VICTOR WRIGHT..... APPELLANT; 1945

AND *Feb. 19 *Mar. 12

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Criminal law—Trial on charge of rape—Question whether trial judge should have charged jury as to possible alternative findings of lesser offence—Question whether failure of accused to testify was made subject of comment, contrary to Canada Evidence Act, R.S.C. 1927, c. 59, s. 4 (5).

The appeal was from the judgment of the Supreme Court of Nova Scotia *en banc* dismissing appeal from appellant's conviction on a charge of rape. The appeal to this Court was on two questions of law on which there was dissent in said Court *en banc*, in connection with the trial Judge's charge to the jury, it being contended: (1) He erred in failing to instruct them as to possible alternative findings of a lesser offence, there being evidence to warrant such a finding. (The trial Judge withdrew from the jury a count of indecent assault contained in the indictment and stated, according to an affidavit offered to the Court *en banc*, that they "must find a verdict of rape or nothing"; and he directed his charge only to the count of rape). (2) The failure of the accused to testify was made the subject of comment, contrary to s. 4 (5) of the *Canada Evidence Act*, R.S.C. 1927, c. 59. (The trial Judge stated: "* * * You heard the story of this woman * * * and her evidence is not denied * * * I can see nothing in the conduct of this woman that day, according to her evidence—and that is the only evidence we have as to her conduct excepting the other witnesses that came in here to tell the story of what she told them * * * It was his doing, according to the evidence and the only evidence we have * * *").

Held: The appeal should be dismissed (Taschereau J. dissented).

Per the Chief Justice, Kerwin and Hudson, JJ.: As to the first contention: On the evidence (discussed), the only evidence of the actual commission of the crime, on which the jury could reasonably have returned a verdict of guilty, pointed only to rape, if the jury believed the victim's story, or not guilty, if they did not believe her; and the trial Judge's charge in this respect was justified. As to the second contention: The trial Judge's remarks complained of could not be taken to have had any effect on the jury as being a comment obnoxious to s. 4 (5) of the *Canada Evidence Act*. (It was remarked that said words "her evidence is not denied" were no doubt referring to statements made by the victim, after the occurrence, to other persons, who gave evidence) (*Rex* v. *Gallagher*, 37 Can. Cr. C. 83, and *Bigaouette* v. *The King*, [1927] S.C.R. 112, discussed and distinguished. Opinion expressed that the latter case went as far on the subject in question as this Court would care to go).

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

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Per Taschereau J., dissenting: As to the first contention (the second one is not dealt with): It was open to the jury upon the evidence to find, if they saw fit, that the accused was guilty only of an attempt to commit rape (a lesser offence included in the major charge of rape), and the failure of the trial Judge to instruct them that such a verdict was open to them and that it was within their power to find the accused guilty of a reduced offence was fatal to the legality of the verdict, and therefore the conviction should be quashed and a new trial directed. (The facts were not sufficiently clear to allow an appellate court to substitute, for the verdict found by the jury, a verdict of guilty of a lesser offence, as may be done in certain cases under s. 1016 of the *Criminal Code*).

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* dismissing appeal from the conviction of appellant, at trial before Carroll J. and a jury, on a charge of rape. There was dissent in the Supreme Court of Nova Scotia *en banc* on certain questions of law in connection with the trial Judge's charge to the jury, which questions are set out and discussed in the reasons for judgment in this Court now reported. The appeal to this Court was dismissed, Taschereau J. dissenting.

R. A. Ritchie for the appellant.

R. M. Fielding K.C. for the respondent.

The judgment of the Chief Justice and Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—The appellant was, by a jury, found guilty of rape and, on appeal, the Supreme Court of Nova Scotia, sitting *en banc*, affirmed his conviction.

In the order dismissing the appeal, Smiley J. is stated to have dissented on questions of law, to wit:—

(1) That the learned trial Judge erred in failing to instruct the jury as to possible alternative verdicts.

(2) That the failure of the person charged to testify was made the subject of comment by the learned trial Judge contrary to Section 4, sub-section 5, of the *Canada Evidence Act*.

On the first point. Although Doull J., who sat in the Court of Appeal, is not stated in the formal judgment to have actually dissented, if we look at the learned Judge's reasons we find that, as he expressed it:—

> Giving the accused the benefit of every argument, I proceed to give effect to the doubtful opinion which I have that the verdict of an attempt

was open to the jury. No reasonable jury could in my opinion have found a verdict of anything less than attempted rape and it seems to me that a new trial is a most undesirable outcome of this prosecution.

On the actual findings, it appears that the jury must have been satisfied of facts which proved the accused at least guilty of an attempt. The court should therefore substitute a verdict of guilty of attempted rape and pass a sentence of four years' imprisonment in Dorchester Penitentiary.

We take that to be a dissenting opinion by Doull J.; more particularly since the sentence against the appellant on the charge as brought was for five years. The point would be in respect of the failure of the learned trial Judge to charge the jury as to lesser offences. In the opinion of Smiley J., "there was evidence in this case from which the jury might reasonably have inferred that the accused was guilty of a lesser offence, not necessarily that contained in the second count". The learned Judge referred to Sections 949 and 951 of the *Criminal Code,* which read as follows:—

949. When the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly.

951. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

We omit paragraphs (2) and (3) of section 951, as they deal with counts charging murder, or manslaughter, and have no application here.

The indictment in the present case contained two counts, the first being that of rape, and the second that of indecent assault. The learned trial Judge withdrew from the consideration of the jury the second count in the indictment and directed his charge to the first count only, on which the jury returned a verdict of guilty.

It is said that the trial Judge, when he announced that he was withdrawing the count of indecent assault from the jury, added that he "was going to instruct them that they must find a verdict of rape or nothing", and that counsel should confine himself to the question of rape. This is based on an affidavit offered to the Court of Appeal by Mr. Norman D. Murray, Barrister at Law, who acted

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as counsel for the appellant upon his trial. Nothing to that effect is to be found in the charge itself; but, as two of the learned Judges of Appeal based their dissenting opinions on that point, we think we ought to consider it in the present judgment.

The contention is that, by force of Sections 949 and 951, reproduced above, a jury properly instructed might have found the accused guilty only of an attempt to commit the offence, or of the lesser offence of indecent assault, notwithstanding that the latter charge was already contained in the second count of the indictment and the learned trial Judge had withdrawn that count from the jury.

The only evidence at the trial pointing to the guilt of the accused was as to his being guilty of the crime of rape. That was the story of the victim, Mrs. Myrna D. Bosma.

No doubt in a crime such as the one 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; but, when once the rape is stated to have taken place, there no longer remains any question of indecent assault, or attempted rape, if the story of the victim is believed.

In her testimony, Mrs. Bosma definitely states that she was raped by the appellant. In the words of Sir Joseph Chisholm, C.J.:—

> She said the appellant had tried to rape her—a quite correct statement—and she followed that answer with the direct statement that he did commit the offence of rape. I do not think that any jury could reasonably, from the fragment on which the contention is based, conclude that the offence was merely an attempt, nor do I think that the first answer should be weighed in isolation from the second. It was as if she exclaimed in her excitement: "He tried to rape me and he succeeded".

It is true that when she was on her way back to Halifax she told Mr. Murdock Bell, who testified to that effect:— "She said she had been attacked". But, of course, it was not to be expected that she would, in her conversation with Mr. Bell, go into the details of what had taken place and the word "attacked" is quite apt to include the fact of the rape itself.

Then when the victim spoke to her housekeeper, Mrs. Marion Marriott, she first mentioned that the appellant had "mistreated her". Mrs. Marriott was then asked whether the victim described the mistreatment in any way,

and she said that she did and that the description which she gave of the mistreatment was "that he had tried to rape her". The next question was:—"Did she say that he did?", and the answer is "Yes, after she was upstairs, she said that he did." Again the question is put to Mrs. Marriott:—"And she said that he had raped her?", and the answer is "Yes".

Even if the testimony of Mr. Bell and of Mrs. Marriott was to be taken as evidence of the commission of the offence itself, it will be seen that in both instances the statements made by Mrs. Bosma to them could not convey the idea that the accused had stopped at mere indecent assault, or at attempted rape, but, on the contrary, they would tend to show that actual rape was consummated. But it is not to be forgotten that Mrs. Bosma's statements, either to Mr. Bell or to her landlady, were not admissible for the purpose of proving the crime; they were merely evidence of the complaints subsequently made by Mrs. Bosma in order to show that her acts and statements after the commission of the offence were consistent with her evidence as to the actual facts that had taken place at the appellant's house on the occasion where rape is alleged to have been committed by the appellant upon Mrs. Bosma.

So that the only evidence there is in the record of the actual commission of the crime, on which the jury could reasonably have returned a verdict of guilty, pointed only to rape, if they believed the story of Mrs. Bosma, or not guilty, if they did not believe her.

We, therefore, think that the learned trial Judge, even if he did not actually say so in his charge, was justified in withdrawing from the jury the count relating to indecent assault, and also in telling the jury that, in the circumstances shown in the evidence properly admissible, the only verdict could be either guilty of rape or not guilty. This was the view of the majority of the Supreme Court of Nova Scotia *en banc,* and we cannot agree with the learned dissenting Judges that, in doing what he did, the learned trial Judge erred in such a way as to justify the contention that the jury might have found the accused guilty of a lesser offence and that, on account of this failure, a new trial should be ordered.

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Dealing now with the second point. The portions of the charge, to which objection is made, are as follows:—

> Now, he is charged with rape and I tried to define what rape is to you. You heard the story of this woman, who came on the witness stand here, and her evidence is not denied.

And later the trial Judge said:—

> Now Gentlemen, I am not going into the sordid things that took place there, but I can see nothing in the conduct of this woman that day, according to her evidence—and that is the only evidence we have as to her conduct excepting the other witnesses that came in here to tell the story of what she told them—I see nothing in her conduct that day that should make the jury detract from the truth of anything that she said.

And then again:—

> It was his doing, according to the evidence and the only evidence we have * * *

On that point, as already stated, the majority of the Court of Appeal was of the opinion that the remarks complained of do not in effect amount to such comment that they may be regarded as obnoxious to the statutory direction.

Doull J., in that regard, in the course of his reasons, said:—

> I certainly dissent from any pronouncement that a statement of a judge that certain evidence is "not denied" or is "uncontradicted" without more is a sufficient ground for setting aside a verdict. The words "subject of comment" mean something more than a reference to evidence as "uncontradicted". There must be something which pointedly draws the attention of the jury to the fact that there is evidence which the accused could give and which he has failed to give.

For his dissenting opinion on that point, Smiley J. relied on the judgment of the Appellate Division of the Supreme Court of Alberta in *Rex* v. *Gallagher* (1), and on the judgment of this Court in *Bigaouette* v. *The King* (2). He also said that in the *Bigaouette* case a certain part of the statement of Stuart J.A. in the *Gallagher* case was quoted with approval in this Court.

In the *Gallagher* case (1), the trial Judge in his charge to the jury suggested that evidence ought to have been given which only the accused could have given. The actual words by him were (p. 85):—

> Now then, though we have the evidence which we have that the defendant was the last person seen in the company of the murdered man, the circumstantial evidence that he was killed at a certain time after-

(1) (1922) 37 Can. Cr. C. 83. (2) [1927] S.C.R. 112.

wards and the circumstantial evidence as to the possession of these bullets and the possession of the firearm or firearms and that is not denied by the defendant, it would still seem to leave room for a reasonable doubt as to whether or not he was the person who committed this crime. . . . .

There is no suggestion of anything else, he either went down that path towards his own home or he went on with the car and there is no suggestion from the defence or any other person that he could have gone any other way.

It will be seen that there the trial Judge in his charge to the jury offended, unwittingly no doubt, against the provision contained in subsection (5) of Section 4 of the *Canada Evidence Act* that:—

The failure of the person charged * * * to testify, shall not be made the subject of comment by the judge * * *

There the defendant, in the first part of the portion of the charge objected to, was specifically mentioned, and in the second part of it was referred to in such a way that it could not apply to anybody else but the defendant.

In the *Bigaouette* case (1), the learned trial Judge said:—

Le docteur Marois a fait l'autopsie à trois heures et quart, et si vous croyez son témoignage (c'est un homme dont le témoignage a du poids), il a déclaré que la mort avait dû arriver à sept heures, ou à six heures et même avant, du matin.

Voilà les circonstances qui enveloppent la mort de la défunte.

Si la mort, mes amis, remonte à six heures ou à sept heures du matin, où était l'accusé à ce moment-là, vers sept heures ou six heures du matin, même plus à bonne heure? A la maison. A la maison, car, d'après sa propre déclaration, il n'est sorti qu'à huit heures du matin.

Il était donc seul avec sa mère à la maison quand la mort est arrivée et si l'accusé était seul avec sa mère quand elle a été tuée et égorgée, la défense aurait dû être capable d'expliquer par qui ce meurtre a été commis. Car une pareille boucherie n'a pas dû se faire, sans que l'accusé en eut connaissance.

As was said by Duff J., as he then was, delivering the judgment of the Court:—

It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment implied in this passage upon the failure of *la défense* to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial. It is conceivable, of course, that such language might be understood as relating to a failure to give an explanation to police officers or others; but the language of the charge is so easily and naturally capable of being understood in the other way, that it seems plainly obnoxious to the enactment referred to, subs. 5 of s. 4, R.S.C., c. 145.

(1) [1927] S.C.R. 112.

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Smiley J., as already adverted to, said that the latter part of the statement of Stuart J.A., in *Rex* v. *Gallagher* (1) had been approved by this Court in the *Bigaouette* case (2), but the words which were approved as correctly stating the law are quoted in the judgment of this Court and they only expressed a general view of the law without in any way applying them to the particular facts of the *Gallagher* case (1). They are merely to the effect that, even if the language used is just as capable of one meaning as the other, the position would be that the jury would be just as likely to take the words in the sense in which it was forbidden to use them, as in the innocuous sense, and in such circumstance the error was thought fatal.

We have nothing of the kind here. The accused appellant was no where mentioned in those portions of the charge which are objected to. In the last two paragraphs above mentioned the only statement in the charge is that the evidence of the victim is "the only evidence we have"; and, as to the first statement: "her evidence is not denied", the learned Judge no doubt was referring there to the fact that, in the course of Mrs. Bosma's evidence, she said that on her way back to Halifax she had told Mr. Bell that she had been attacked and Mr. Bell confirmed that; also that when she reached her house she had told Mrs. Marriott that she had been mistreated and had described such mistreatment by saying that the appellant "had tried to rape her" and "she said that he did". Not only was that not denied, but it was confirmed by Mrs. Marriott.

We think the *Bigaouette* case (2) certainly goes as far on that subject as this Court would care to go and, like the majority of the Court of Appeal, we are unable to find that the remarks here complained of could have any effect on the jury as being a comment "obnoxious to the statutory direction".

We think, therefore, that the appeal should be dismissed.

TASCHEREAU J. (dissenting)—The appellant was indicted for rape and indecent assault. In the course of the address of defendant's counsel, the presiding Judge withdrew the count of indecent assault, and left the jury with the only

(1) (1922) 37 Can. Cr. C. 83. (2) [1927] S.C.R. 112.

alternative of finding the accused "guilty" or "not guilty" of rape. A verdict of "guilty" was returned, and the appellant was sentenced to five years in the penitentiary.

His appeal to the Supreme Court of Nova Scotia was dismissed, Justices Doull and Smiley dissenting. The former thought that a verdict of attempted rape was open to the jury, and was of opinion that such a verdict should be substituted to the one given by the jury. The latter reached the conclusion that there was evidence from which the jury might reasonably have inferred that the accused was guilty of a lesser offence, nor necessarily that contained in the second count, and he was also of opinion that certain comments made by the trial Judge might have been considered by the jury as relating to the failure of the accused to testify. He would have granted a new trial.

Before this Court, it is submitted on behalf of the appellant that the learned trial Judge erred in failing to instruct the jury as to possible alternative verdicts, and that the failure of the appellant to testify was made the subject of comment in the charge to the jury.

It is undisputed and undisputable that the offence of rape for which the appellant was charged, is one of those offences which may be reduced, and that the accused, if the evidence does not warrant a conviction for the major offence, may be found guilty of a lesser one. Under the *Criminal Code,* (949-951), every count is deemed divisible, and when the offence charged includes all the elements of a lesser offence, the person accused may be convicted of the offence as charged, or may be convicted of an attempt to commit the offence charged, or he may be convicted of the lesser offence or of an attempt to commit it. In the case of rape, the possible verdicts which in law may be found, are, therefore, attempted rape, indecent assault, common assault, or attempt to commit one of these lesser offences. In the case at bar, the charge of indecent assault in a separate count was quite unnecessary, as it was included in the major charge of rape.

Of course, it cannot be contended that all these intermediate verdicts are open to the jury in all cases. They will receive the sanction of the courts only if there exists a foundation of facts which would justify a reasonable jury, properly instructed, to reach such a conclusion. In

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other instances a trial Judge will, therefore, be well advised to instruct the jury that the only possible verdict is "guilty" or "not guilty" of the major offence which is charged, and that there is no room for any other finding. The facts of each particular case must be considered, but whenever there is evidence, the jury must be free to weigh it, to consider it in the light of all the circumstances of the case, and all the possible verdicts must be left open to them, even if it is unlikely that they will reach some of them.

And if any authority is needed to substantiate these propositions, I may refer to the cases of *The King* v. *Hughes* (1); *The King* v. *Hopper* (2); *Rex* v. *Roberts* (3).

It follows that it is the imperative duty of the trial Judge to instruct the jury as to all the verdicts which they have the right to find, and that he may not impose his personal views upon them, by withdrawing from their consideration certain verdicts which they could reach if they accepted a certain view of the facts as revealed by the evidence that would reasonably justify them to find the accused guilty of a lesser offence.

In the present case, I do not find it necessary to deal with the question of there being any evidence on which the jury might find indecent or common assault. A graver offence may have been committed, but I strongly disagree with the view that it was necessarily rape, and that the jury, if left free, had not before them the necessary foundation of facts to reach the conclusion, if they found fit, that the appellant was guilty of attempted rape. I do not say that such would have been their verdict, but I am of opinion that it was for them to decide.

It fell within their province after weighing the surrounding circumstances of the evidence, to say if all the necessary steps towards the full execution of the criminal purpose had been completed, or if they were interrupted before the act, which the appellant had in mind, had been totally accomplished within the meaning of the *Criminal Code*. If this last hypothesis had been accepted by the jury, a verdict of attempt to commit rape could not have been qualified as perverse and would have undoubtedly been left undisturbed by the courts, if challenged by the Crown.

(1) [1942] S.C.R. 517, at 525.
(2) [1915] 2 K.B. 431.
(3) [1942] 1 All E.R. 187.

But the jury were not instructed that such a verdict was open to them, and that it was within their power to find the appellant guilty of a reduced offence. The failure to give such a direction was, I think, fatal to the legality of the verdict, and it should therefore be quashed. In view of this conclusion, it is useless to discuss the second point raised by the appellant.

Section 1016, *Cr. Code,* is drafted in terms broad enough to allow a court of appeal in certain cases, to substitute for the verdict found a verdict of guilty of a lesser offence. But I do not think that in the present case such a course should be followed. I am not satisfied that the facts are sufficiently clear to allow me to make such a substitution, without assuming the rôle which belongs exclusively to the jury. This course may be adopted when it appears to a court of appeal that the jury must have been satisfied of facts which proved the accused guilty of the lesser offence, but such a situation does not arise in the present case.

I would allow the appeal, quash the conviction and direct a new trial.

RAND J.—I concur in dismissing the appeal.

Appeal dismissed.

Solicitor for the appellant: *N. D. Murray.*

Solicitor for the respondent: *R. M. Fielding.*