1949

*Mar. 23, 24
*May 9

WILLIAM CLARENCE CULLEN .....APPELLANT;

AND

HIS MAJESTY THE KING .....DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO

Criminal law—Appeals by Attorney General—Whether Crown Counsel's failure to object to misdirection in charge to jury bars Crown's right of appeal—The Criminal Code, R.S.C. 1927, c. 36, s. 1013(4), as enacted by 1930, c. 11, s. 28.

Section 1013(4) of the *Criminal Code* provides that: "Notwithstanding anything in this Act contained, the Attorney General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone."

The appellant was acquitted by a jury of a charge laid under s. 276(*a*), and of a second charge laid under s. 292 (*a*), of the *Criminal Code*. The Attorney General of Ontario as provided by s. 1013 (4) of the *Code* (*supra*) appealed, and the Court of Appeal for Ontario allowed the appeal, set aside the verdict, and ordered a new trial. On appeal to this Court—

Held: (Rand J. dissenting), that the proper rule to be followed by an appellate court upon an appeal by an attorney general under s. 1013 (4) from a verdict of acquittal is that the onus is on the Crown to satisfy the Court that the verdict would not necessarily have been the same if there had been no error in law in the trial judge's charge, and that here such onus had been discharged.

Held: also, that there is no rule of law nor of practice that failure of counsel, whether for an accused or for the Crown, to object to a charge to a jury on the grounds of misdirection is of necessity a bar to the right of appeal. No such rule applicable in all circumstances exists, and in the circumstances of the present case, such failure by Crown counsel did not affect the right of appeal.

Per: Rand J., (dissenting), "Any ground of appeal", referred to in s. 1013 (4) of the *Code,* must be limited to matters in which the course of the Crown is thwarted or impeded unwarrantably by the Court. It does not arise from misdirection or non-direction where no objection was taken by Crown Counsel at the trial and there are no circumstances implicating the accused in that action.

APPEAL by the accused from the judgment of the Court of Appeal for Ontario, (1), allowing an appeal by

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

(1) [1949] O.R. 10.

the Attorney General for Ontario against the accused's acquittal by a jury on charges under ss. 276 (*a*) and 292 (*a*) of the *Criminal Code*, R.S.C., 1927, c. 36.

Wilfred Judson K.C. and *John W. Graham* for the appellant.

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

The judgment of the Chief Justice, Taschereau and Locke, JJ. was delivered by:

LOCKE, J.:—The charges against the appellant were laid under secs. 276 (*a*) and 292 (*a*) of the *Criminal Code* and the evidence adduced by the Crown, if believed, proved the commission of both offences. The girl, Doreen McMunn, aged seventeen, gave evidence that she had been induced by the appellant to go with him to a room in a hotel in Perth and that there he had beaten her severely, choked her into a state of unconsciousness, attempted to rape her and indecently assaulted her. Doctor Hagyard, a physician practising in Perth, had examined the girl on the day following the assault and found a lot of bruising on the right side of her face, her right lip cut, her neck badly swollen and her chest so badly bruised and swollen that he expected that some of the ribs or the breast bone might have been fractured. In addition to these injuries, the upper part of her arms was swollen and bruised and there was a great deal of bruising on the right side of her neck and, in the opinion of the Doctor, the force applied to her neck must have been so severe as to cause unconsciousness. Further evidence as to her injuries was given by the witness Nagle who came to the hotel room in response to the girl's cry for help and found her with a cut on her lip and on one of her eyes and the room in a state of disorder. The Chief of Police who came to the room shortly thereafter and saw the girl observed the cut on her lip and red welts on both sides of her neck. In addition to this evidence, a statement made by the appellant to the Chief of Police was put in evidence: this was to the effect that he had come to Perth that day, that he had been drinking and that while he remembered that Doreen McMunn had been in his room he did not remember what had happened or seeing the Police or leaving the hotel. He made no statement regarding the alleged offences.

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In the charge to the jury the learned trial judge instructed them in part as follows:—

> Now as I understand the defence to both these charges, it is that the girl consented and secondly, the accused's condition from drinking, that he was drunk and so drunk that he did not know what he was doing.

and again:—

> Now, counsel for the defence has referred to several things substantiating, as he presents the defence that there was consent—oh yes, there is also this, that he mentioned there is no corroboration of the essentials to this offence and it is my duty, I think, to charge you that it is unsafe—I don't know there is any statute that says you must have corroboration in connection with either of these two charges, but speaking as a matter of common sense and common experience and observation and practice in the courts, it is the duty of the judge to tell you that it is dangerous, it is unsafe, to convict on the evidence of the girl alone, unless it is corroborated by other evidence implicating the accused as to the offence charged. That doesn't mean that everything, that all the essentials must be corroborated but there must be corroboration to the extent that you feel, you find there is indication of implication of his guilt of the offence charged. Now, as to both these charges, I think as to both of them, if the girl consented that is a defence with the exception I think, and my attention will be drawn to what I am saying later if it is thought I am wrong, as to the first charge, that is the one with intent to commit rape choking so as to render unconscious or incapable of resistance, that if the consent there is brought about by threats and fear so that you find, you feel you should find, it is not a real consent, then it isn't consent. Now, in this matter of consent, the mere fact the girl puts up some resistance it seems to me doesn't necessarily indicate that she has not consented. She might make a mild sort of physical protest not wanting to indicate too readily a surrender of her virtue and still be willing enough that the action occur. The point for you to decide is whether or not in fact on the evidence you believe there was or was not consent, on the conduct and evidence otherwise pertinent to that.

While the learned trial judge thus informed the jury that one of the defences was that the accused was so drunk he did not know what he was doing, the only evidence on the point was that of the Chief of Police who said that it was evident that the man had been drinking but that he was quite steady on his feet, his speech was quite normal and, in the officer's opinion, he was not intoxicated. As to those portions of the charge dealing with the necessity for corroboration, the learned trial judge was clearly in error. There was in law no necessity for corroboration but, had there been, there was ample corroboration in the evidence of the doctor and of Nagle and the Chief of Police of material parts of the girl's story implicating the

accused. This the trial judge failed to point out to the jury. As to the instructions on the question of consent, I agree with Mr. Justice Hogg that consent would not be a defence to either charge. There were other material defects in the charge mentioned in the Notice of Appeal given by the Attorney-General but it appears to me to be unnecessary to consider them.

At the conclusion of the judge's charge, counsel for the Crown made no objection to it and the case went to the jury who acquitted the appellant on both charges. The important question to be determined upon this appeal is as to whether the failure to object to the charge bars the right of appeal given to the Attorney-General under sec. 1013 (4) of the *Code*.

The right of appeal to the Court of Appeal against any judgment or verdict of acquittal in a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone was first given by s. 28, c. 11, Statutes of Canada 1930. As to the manner of the exercise of the right thus given to the Attorney-General, subsection 5, enacted at the same time, provided that the procedure upon such an appeal and the powers of the Court of Appeal, including the power to grant a new trial, should *mutatis mutandis,* in so far as the same are applicable to appeals upon a question of law alone, be similar to the procedure prescribed and the powers given by ss. 1012 to 1021 of the *Code* and to the rules of court passed pursuant thereto and to s. 576. The powers of the court on an appeal by the Attorney-General are thus clearly defined as co-extensive with its powers in dealing with a question of law on an appeal from conviction. In the case of an appeal by a convicted person, a failure on the part of his counsel to object to the admissibility of material evidence was held not to prejudice his right of appeal from a conviction in *Rex* v. *William Stirland* (1). The rule in civil matters was stated by Duff J. as he then was, in delivering the judgment of the full Court of British Columbia in *Scott* v. *Fernie* (2). In that action which was to recover damages for negligence, questions apparently approved by counsel for both parties were submitted to a jury and a verdict found for the

(1) (1943) 30 Cr. App. R. 40. (2) (1904) 11 B.C.R. 91.

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plaintiff. The defendant appealed, asserting as one of the grounds that a further issue of fact should have been submitted. Duff J. there said:

> It is, perhaps, needless to say that in these circumstances, but for the legislation hereinafter referred to (i.e. s. 66 of the *Supreme Court Act* of British Columbia, 1904), the rule long established, which holds a litigant to a position deliberately assumed by his counsel at the trial, would preclude in this Court any discussion of the sufficiency of the findings to support the judgment. The rule is no mere technicality of practice; but the particular application of a sound and all-important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.

In *Spencer* v. *Field* (1), the judgment of Davis J. with which Duff C.J.C. and Hudson J. concurred, expressly approved what had been said in *Scott* v. *Fernie* and referred to "the long established rule which holds a litigant to a position deliberately assumed by his counsel at the trial." In *Wexler* v. *The King* (2), the application of sec. 1013(4) of the *Code* was considered by this Court. The appellant had been tried on a charge of murder and the case presented by the Crown against him was that he had intentionally shot a woman with the intention of killing her. The contention of the defence was that the shooting was the result of an accident and the trial judge instructed the jury that if they believed the account given by the accused he was entitled to be acquitted, and this instruction was accepted by both counsel as correctly stating the single issue of fact which was to be put before the jury. The jury returned a verdict of not guilty but on an appeal the verdict was set aside and a new trial directed on the ground that the trial judge had erred in omitting to instruct the jury first, that from certain facts disclosed by the evidence of the appellant the jury might have convicted the accused of murder under s. 259(*c*) and (*d*) of the *Code*, and secondly, that the accused having in his charge a loaded firearm and being bound to take reasonable precautions to avoid danger to human life, the jury might have convicted the accused of manslaughter under ss. 247 and 252(2). Counsel for the Crown in this Court stated that the only issue which counsel for the Crown intended to put before the jury was that in fact put before them. Sir Lyman Duff C.J. in delivering judgment allowing the

(1) [1939] S.C.R. 36. (2) [1939] S.C.R. 350.

appeal said that the point was not merely that the Crown did not take exception to the learned judge's charge, but that the conduct of the trial with respect to the single issue of fact which was raised by the case put forward by the Crown was admittedly unimpeachable and that the jury had been told by the Crown that the determination of that issue in favour of the accused would entitle him to an acquittal. Kerwin J. who delivered the judgment of the majority of the Court, and with whose reasons the Chief Justice also agreed, said that the real point to be determined was whether the Crown was entitled to an order for a new trial in order to present an entirely new case against the accused and pointed out that during the course of the trial nothing of the nature then sought for the first time to be advanced had been submitted for the consideration of the jury.

In *Rex* v. *Munroe* (1), the Attorney-General appealed from the acquittal of Munroe, who had been charged with arson, on the ground of misdirection, although no objection was taken by the Crown to the charge at the trial. Sloan J.A., now Chief Justice of British Columbia, was of the opinion that, while the failure of counsel for an accused to object to a charge was not necessarily fatal to the right of the convicted appellant to raise the issue on appeal, this did not apply in favour of the Crown on an appeal from an acquittal, saying in part:

> Whether the prisoner is defended or undefended when Crown counsel elects to go to the jury without objection to the charge, then he is, in my opinion, bound by the resultant verdict.

and referred to the decision of this Court in *Wexler's case* (2). Martin C.J.B.C. agreed with Sloan J.A. and said that the practical and grave consequences of allowing such an appeal for misdirection where no objection had been made would be that the Crown "will get a new trial because of its own oversight at the expense of the accused" and said further that, in his opinion, the Court should decline to entertain the appeal because to do so would be to violate a long and well established principle of fundamental justice. MacDonald J.A. said that he preferred not to join in the view expressed by the Chief Justice that failure to object was fatal to the Crown's case and McQuarrie J.A. and O'Halloran J.A. agreed with him.

(1) (1939) 54 B.C.R. 481. (2) [1939] S.C.R. 350.

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However, in *Rex* v. *Fleming* (1), the Court of Appeal for British Columbia held that the failure of Crown counsel to object to the judge's charge was a fatal objection to an appeal from an acquittal on the ground of misdirection and expressly approved the judgments of Martin C.J.B.C. and Sloan J.A. in *Munroe's case*. In *Rex* v. *Rasmussen* (2), Barry C.J.K.B. expressed the opinion that the failure to object to a charge on the ground of non-direction did not affect the right of appeal, though no objection was made at the time.

There is no rule of law nor, in my opinion, of practice that failure of counsel, either for an accused or for the Crown or in civil matters for a litigant, to object to a charge to the jury on the ground of misdirection, is of necessity a bar to the right of appeal. No such general rule applicable in all circumstances exists. In civil matters the true principle has been stated in *Scott* v. *Fernie* and *Spencer* v. *Field*. I do not think it can be said that in all criminal proceedings the principle applied in civil matters must be followed. The right of appeal given to the Attorney-General by the amendment of 1930 introduced a new principle into the administration of criminal justice, that is, that a man might under certain circumstances be tried again upon a criminal charge after having been acquitted. It would be, in my opinion, inadvisable to attempt to lay down a general rule in a matter of this nature. In the present case, the accused did not give evidence and called no witnesses and, from the terms of the charge, it is clear that it was the address of counsel for the accused that led the learned trial judge into giving the erroneous instructions on the questions of consent and corroboration. There is nothing to indicate what the nature of the supposed consent was. It can scarcely have been contended that this young girl had given her consent to being beaten, choked and indecently assaulted with violence, even if her consent would have been an answer to the charge. The Crown has discharged the onus cast upon it of satisfying the Court of Appeal that had the jury been properly instructed the verdict would not necessarily have been the same, a conclusion with which I entirely agree. The principle followed in the cases of

(1) (1945) 61 B.C.R. 464. (2) (1934) 62 Can. C.C. 217.

Wexler, supra and of *Savard* and *Lizotte* (1) has here no application. Under these circumstances, I think the failure to object to the judge's charge does not affect the right of appeal.

This appeal should be dismissed.

KERWIN J.:—I would dismiss the appeal. I adhere to the view expressed by me in *White* v. *The King* (2), that the proper rule to be followed by an Appellate Court upon an appeal by an attorney general from an acquittal, even when such acquittal is by a jury, is that the onus is on the Crown to satisfy the Court that the verdict would not necessarily have been the same if there had been no error in law in the trial judge's charge.

As to the point that the Crown is deprived of an appeal where counsel for the Crown at the trial does not object to the judge's charge (as was the case here), I am of opinion that this result cannot follow in all cases. There may be circumstances where the result of such a failure on the part of Crown counsel would be fatal but not here.

RAND J. (dissenting):—The appellant was charged under section 276(*a*) of the *Criminal Code* with having attempted to render a young woman of 17½ years unconscious or incapable of resistance by choking her with intent to enable him to commit rape upon her. On the evidence presented by the prosecution he was acquitted. The Attorney-General thereupon appealed and a new trial was ordered.

The point of law on which the case comes to this Court is very simple. The acquittal was set aside because of what was considered serious misdirection and non-direction to the jury, as to which, however, there was no objection or request on the part of counsel representing the Crown; and the question is whether the Attorney-General in such a case can bring himself within the intendment of section 1013(4).

The right of appeal given to the Crown by that section is an innovation in the procedure of criminal law, and I have been unable to discover that it exists, certainly in the form in which the *Code* provides, in any other common law jurisdiction. It is such a striking departure from

(1) [1946] S.C.R. 20. (2) [1947] S.C.R. 268.

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fundamental principles of security for the individual that I find it necessary to examine the language of the statute in the background in which it ought I think to be interpreted.

The subsection reads:—

> Notwithstanding anything in this Act contained, the Attorney-General shall have the right to appeal to the Court of Appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone.

What then is "any ground of appeal"? What are the considerations necessary to a "ground of appeal" generally in the administration of law? That it is not equivalent to error in law *simpliciter* occurring in the course of proceedings, is, I should say, undoubted, but to come to any clear or definite answer to the question we must, I think, recall to mind the basic character of proceedings in judicature.

In the common pleas presented to courts, contests between individuals over conflicting claims, the theory of the common law is that the court resolves the dispute according to the law of the land, but in the role of an impartial arbiter: it is not of itself concerned in the merits of the conflict though it may be said to be so in the settlement of it. Either party may deal with or dispose of his private right by any of the modes recognized, including abandonment, as he pleases; he is likewise in command of his case before the tribunal, and he is bound by the presentation which he makes. He is presumed to know his legal rights, and if he stands by when he can and should object or protest against what is a disregard of prescribed rules, he is not, in general, permitted thereafter to complain of what he could then and there have had corrected or have protested. In other words, a ground of complaint must be based upon the denial of what in law he is entitled to and endeavours to assert: but being able to deal with his rights as he sees fit he will not be permitted to play fast and loose with the serious conduct of a tribunal exercising a vital function of government: Lord Halsbury in *Nevill* v. *Fine Art Co.* (1), at p. 76; *Scott* v. *Fernie* (2).

(1) [1897] A.C. 76.

(2) (1904) 11 B.C.R. 91.

In the administration of the criminal law, the pleas of the crown, however, the underlying conception is in some respects different. The King symbolizes the "fountain of justice", but at the same time there is committed to him in his executive capacity the functions of enforcing the public law against offenders. All prosecutions are in his name, i.e. they are "at the suit" of the King; and in a solemn proceeding it is determined by the "country" in the form of twelve fellow citizens, almost invariably representing the community in which the act has been committed and generally to which the accused belongs, whether or not the latter is guilty as charged. In that formal process the notion of an issue of "rights" in a civil sense is out of place.

The characterizing feature is the scope of executive discretion. Arising from the same source as the abrogated historical power of dispensation is the right of *nolle prosequi* preserved in effect by section 962 of the *Code,* by which the Attorney-General may, at any point up to judgment, stay proceedings; and notwithstanding the right of the subject to initiate prosecutions, this power obviously puts the Crown in command of all indictments: *Rex* v. *Edwards* (1). Then either before or after judgment the prerogative of pardon can be exercised. Finally there is the unchallengeable discretion to determine what evidence shall be presented and what not, what the form of the case put to the jury shall be and what not, what course of action shall be taken at any stage of the prosecution and what not, and just as clearly, what objections to the charge to the jury, either for what has been improperly stated or not stated at all, shall be taken or omitted. It is the matter and the form of fact which the Crown exhibits to the jury, either by way of evidence or address or of any other participation in the proceedings, including objection to or acquiescence in any act of the court, from which in the aspect of the prosecution the guilt or innocence of the accused is to be determined; and the Crown will not be held to have a ground of appeal where the matter complained of was that the trial judge had not put to the jury a case on the facts not asked for by the Crown and

(1) (1919) 2 W.W.R. 600.

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different from that to which the Crown limited itself: *Wexler* v. *The King* (1), followed in *Savard and Lizotte* v. *The King* (2), in which the conviction on the case put by the Crown and found by the jury could not be supported.

At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter and the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical power of the community to a test which may mean the loss of his liberty or his life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy. The position of the accused is in sharp contrast to that of the prosecution. He is charged with a violation of public law; but he is entitled to remain passive, and to have the charge proved if it can be proved only in accordance with those observances which the law for his protection has prescribed. The setting aside of a conviction or the granting of a new trial to a person who has been found guilty in circumstances in which there has been a failure in those essential requirements seems to me to be a necessary corollary of that right unless no substantial wrong has been done or unless by affirmative conduct on his part he can be said to have implicated himself in the impropriety later objected to.

But the abstention of the Crown in similar circumstances is quite another matter. Section 1013(4) does indeed give a right of appeal, but "any ground of appeal" must I think be limited to matters in which the course of the Crown is thwarted or impeded unwarrantably by the court. A failure on the part of crown counsel to object to improper or insufficient directions must arise either from a lack of appreciation of their objectionable character, or a deliberate decision for various reasons to allow matters to stand as they are. Are we then to say that that lack of appreciation is a "ground of appeal" sufficient to supersede such a fundamental rule as that against second jeopardy? And if the omission is deliberate, have we not immediately, in an appeal, what has been termed "playing fast and loose" with the court?

(1) [1939] S.C.R. 350. (2) [1946] S.C.R. 20.

If the ground of allowance of an appeal goes to the degree of failure on the part of the court, to the point say of apparent miscarriage, there is of course a corresponding delinquency on the part of crown counsel; and can that justify such an intolerable burden on the accused as necessarily follows? An innocent person may thus be subjected to a most crippling expense, to say nothing of the pain or humiliation. Criminal proceedings have not yet become a species of semi-respectable contests in which effects are in dollars and cents only. A prosecution is still too serious a matter to be assimilated with party litigation. The ruling which confirms the order of the court below in this case places the appeal of the Attorney-General on the same footing as that of the accused, and virtually identifies criminal with civil appeal. I quite agree that should the accused be involved with improper action by crown counsel wholly different considerations arise; but it is following a will-o-the-wisp justice, in cases in which, from a written record, the action of a jury seems inexplicable, to depart from principles long verified in experience. There is to be avoided, also, the danger of treating a case of this sort as being an adjudication between the victim and the accused. It is not that. What is being asserted is the paramount interest of the state in maintaining order and personal security. The safeguarding of that interest has been committed to public officers, and we must leave with them the manner in which it is to be vindicated. If they fail, they may call upon themselves public condemnation; but on the soundest considerations of policy, the course of judicial action should not be grounded on the court's reaction to the individual case. Surely an accused, as a condition of a definitive acquittal, is not to be forced to see that the charge is in order as against himself. He is entitled to say that he can be convicted only in accordance with the requirements of law; is he to be told that he can be acquitted only if the Attorney-General or his representative has done his duty as a court of appeal may conceive it?

In *Rex* v. *Munroe* (1), Sloan J.A., the present Chief Justice of British Columbia, came to the conclusion to

(1) (1939) 54 B.C.R. 481.

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which I am driven and with him Martin C.J. agreed. Their view was later followed unanimously by the Court of Appeal of that province in *Rex* v. *Fleming* (1).

For the foregoing reasons, I am of the opinion that the right of appeal given to the Attorney-General does not arise for misdirection or non-direction where no objection was taken by crown counsel at the trial and there are no circumstances implicating the accused in that action. I would, therefore, allow the appeal and restore the verdict of acquittal.

Appeal dismissed.

Solicitors for the appellant: *Daly, Thistle, Judson & McTaggart.*

Solicitor for the respondent: *W. B. Common.*

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(1) (1925) 61 B.C.R. 464; [1945] 4 D.L.R. 800.