

WILLIAM LLOYD BOLDUC and }
DAVID BIRD }

APPELLANTS;

1967
*June 6
June 26

AND

HER MAJESTY THE QUEEN RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Criminal law—Indecent assault—Doctor examining female patient in presence of friend, a layman—Friend falsely described as an intern—Whether consent given to examination—Whether consent obtained by fraud—Nature and quality of act—Criminal Code, 1953-54 (Can.), c. 51, ss. 21, 141, 230.

The two appellants, one a medical doctor and the other a layman friend of the doctor, were convicted of indecent assault, contrary to s. 141 of the *Criminal Code*. The doctor represented to a female patient that his friend was a medical intern in need of further experience and in this way obtained the patient's consent to the friend's presence in the examining room during the course of an examination of the patient's intimate parts. During the examination, the friend stood by and observed but at no time did he touch the patient. Their convictions were affirmed by the Court of Appeal. The appellants were granted leave to appeal to this Court.

Held (Spence J. *dissenting*): The appeal should be allowed and a verdict of acquittal entered for both appellants.

Per Cartwright, Fauteux, Ritchie and Hall JJ.: The appellants were not guilty of an indecent assault within the meaning of s. 141 of the *Criminal Code*. The conduct of the doctor was unethical and reprehensible in the extreme. However, the consent of the patient was not obtained by false and fraudulent representations as to the nature and quality of the act to be performed by the doctor. The fraud was as to

*PRESENT: Cartwright, Fauteux, Ritchie, Hall and Spence JJ.

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the friend being a medical intern. His presence as distinct from some overt act by him was not an assault. The friend was acting as a "peeping tom", and such conduct is not an offence.

Per Spence J., *dissenting*: Under s. 230 of the *Criminal Code*, the application of force, however slight, is an assault when it is "without the consent of another person or with consent when it is obtained by fraud". In this case, the patient consented to be touched by the doctor in the presence of a doctor and not a mere layman. The indecent assault upon her was not the act to which she consented and therefore the two appellants were guilty under the provisions of s. 141(1) of the Code when considered with ss. 21 and 230 of the Code without recourse to the provisions of s. 141(2).

Droit criminel—Attentat à la pudeur—Docteur examinant une patiente en la présence d'un ami non du métier—Ami décrit comme étant un interne—Le consentement a-t-il été donné pour l'examen—Le consentement a-t-il été obtenu par fraude—Nature et caractère de l'acte—Code criminel, 1953-54 (Can.), c. 51, arts. 21, 141, 230.

Les deux appelants, l'un un médecin et l'autre un ami non du métier, ont été trouvés coupables d'attentat à la pudeur, le tout contrairement à l'art. 141 du *Code criminel*. Le docteur a représenté à une patiente que son ami était un interne ayant besoin de plus d'expérience et de la sorte a obtenu le consentement de la patiente à ce que l'ami soit présent à la salle d'examen lors d'un examen des parties intimes de la patiente. Durant l'examen, l'ami se contenta de se tenir là et d'observer, mais à aucun moment a-t-il touché la patiente. Les verdicts de culpabilité ont été confirmés par la Cour d'Appel. Les appelants ont obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu et un verdict de non culpabilité doit être rendu en faveur des deux appelants, le Juge Spence étant dissident.

Les Juges Cartwright, Fauteux, Ritchie et Hall: Les appelants n'étaient pas coupables d'attentat à la pudeur dans le sens de l'art. 141 du *Code criminel*. La conduite du docteur était moralement répréhensible à l'extrême. Cependant, le consentement de la patiente n'a pas été obtenu par de fausses et frauduleuses représentations sur la nature et le caractère de l'acte devant être posé par le docteur. La fraude avait rapport à la description de l'ami comme étant un interne. Sa présence en tant qu'elle est distincte d'un acte positif n'était pas un assault. L'ami a agi comme un «peeping tom», et une telle conduite n'est pas une offense.

Le Juge Spence, *dissident*: En vertu de l'art. 230 du *Code criminel*, l'application de la force, si minime soit-elle, est une attaque lorsqu'elle est appliquée «sans le consentement d'autrui ou avec son consentement s'il est obtenu par fraude». Dans le cas présent, la patiente a consenti à ce que le docteur la touche en présence d'un docteur et non pas d'une personne qui n'était pas du métier. L'acte auquel elle a donné son consentement n'était pas l'attentat à la pudeur et par conséquent, sans avoir recours aux dispositions de l'art. 141(2) du Code, les deux appelants étaient coupables sous l'art. 141(1) lorsqu'on le considère avec les arts. 21 et 230 du Code.

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique¹, confirmant un verdict de culpabilité pour attentat à la pudeur. Appel maintenu, le Juge Spence étant dissident.

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APPEAL from a judgment of the Court of Appeal of British Columbia¹, affirming the appellants' conviction for indecent assault. Appeal allowed, Spence J. dissenting.

Neil M. Fleishman, for the appellant Bird.

Thomas R. Braidwood, for the appellant Bolduc.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of Cartwright, Fauteux, Ritchie and Hall JJ. was delivered by

HALL J.:—The facts and circumstances relative to this appeal are fully set out in the judgment of my brother Spence. The question for decision is whether on those facts and in the circumstances so described the appellants Bolduc and Bird were guilty of an indecent assault upon the person of the complainant contrary to s. 141 of the *Criminal Code* which reads:

141. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years and to be whipped.

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

With respect, I do not agree that an indecent assault was committed within the meaning of this section. What Bolduc did was unethical and reprehensible in the extreme and was something no reputable medical practitioner would have countenanced. However, Bolduc's unethical conduct and the fraud practised upon the complainant do not of themselves necessarily imply an infraction of s. 141, *supra*. It is common ground that the examination and treatment, including the insertion of the speculum were consented to by the complainant. The question is: 'Was her consent obtained by false and fraudulent representations as to the nature and quality of the act?' Bolduc did exactly what

¹ [1967] 2 C.C.C. 272, 59 W.W.R. 103, 61 D.L.R. (2d) 494.

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the complainant understood he would do and intended that he should do, namely, to examine the vaginal tract and to cauterize the affected parts. Inserting the speculum was necessary for these purposes. There was no fraud on his part as to what he was supposed to do and in what he actually did. The complainant knew that Bird was present and consented to his presence. The fraud that was practised on her was not as to the nature and quality of what was to be done but was as to Bird's identity as a medical intern. His presence as distinct from some overt act by him was not an assault. However, any overt act either alone or in common with Bolduc would have transposed the situation into an unlawful assault, but Bird did not touch the complainant; he merely looked on and listened to Bolduc's comments on what was being done because of the condition then apparent in the vaginal tract. Bird was in a sense a "peeping tom". Conduct popularly described as that of a "peeping tom" was not an offence under the *Criminal Code* nor was it an offence at common law: *Frey v. Fedoruk et al.*¹. Since the decision in *Frey v. Fedoruk, supra*, the *Code* was amended by the inclusion of s. 162 which first appeared in the 1955 *Code*. That section reads:

162. Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction.

The act of 'peeping' is not of itself made an offence, but it is the loitering or prowling at night near a dwelling house without lawful excuse that is made unlawful.

This case differs from *Rex v. Harms*² where the accused was charged with rape following carnal knowledge of an Indian girl, her consent to the intercourse having been obtained by false and fraudulent misrepresentations as to the nature and quality of the act. In that case Harms falsely represented himself to be a medical doctor, and although the complainant in that case knew that he was proposing sexual intercourse, she consented thereto because of his representations that the intercourse was in the nature of a medical treatment necessitated by a condition which he said he had diagnosed. Harms was not a medical man at all. He had no medical qualifications. The

¹ [1950] S.C.R. 517, 97 C.C.C. 1, 10 C.R. 26, 3 D.L.R. 513.

² [1944] 1 W.W.R. 12, 81 C.C.C. 4, 2 D.L.R. 61.

Court of Appeal affirmed the conviction by the jury that the Indian girl's consent had been obtained by false and fraudulent representations as to the nature and quality of the act.

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The question of fraud vitiating a woman's consent in the case of rape or indecent assault was fully canvassed by Stephen J. in *The Queen v. Clarence*¹ and by the High Court of Australia in *Papadimitropoulos v. The Queen*² where the Court, in concluding a full review of the relevant law and cases decided up to that time, including the *Harms* case, *supra*, said:

To return to the central point; rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality . . .

The complainant here knew what Bolduc was proposing to do to her, for this was one in a series of such treatments. Her consent to the examination and treatment was real and comprehending and it cannot, therefore, be said that her consent was obtained by false or fraudulent representations as to the nature and quality of the act to be done, for that was not the fraud practised on her. The fraud was as to Bird being a medical intern and it was not represented that he would do anything but observe. It was intended that the examination and treatment would be done by Bolduc and this he did without assistance or participation by Bird.

I would, accordingly, allow the appeal, quash the conviction and direct that a verdict of acquittal be entered for both appellants.

SPENCE J. (*dissenting*):—These are appeals by each accused from the judgment of the Court of Appeal of British Columbia³ pronounced on February 6, 1967 whereby that Court dismissed the appeals of the accused from their convictions by His Honour Judge Ladner on November 24, 1966, of charges of indecent assault contrary to the provisions of s. 141 of the *Criminal Code*. The appeals were argued together.

¹ (1889) 22. Q.B.D. 23.

² (1957), 98 C.L.R. 249.

³ [1967] 2 C.C.C. 272, 59 W.W.R. 103, 61 D.L.R. (2d) 494.

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The circumstances are as follows. Bolduc was a physician and surgeon licensed to practice in the Province of British Columbia. In the course of such practice he was treating the complainant Diana Elizabeth Osborne for an erosion of the cervic uteri. During the course of treatment, after necessary examinations, he had on several occasions cauterized the affected parts. On a Saturday morning in the month of October or November 1965, Mrs. Osborne attended Dr. Bolduc's office for another examination and treatment, if the latter were required.

The accused Bird was a professional musician in a night club. He had been for some time a personal friend of the accused Bolduc. He had obtained an honours degree in chemistry from the university and he swore that "I was very seriously considering returning to university to go to medical school".

On Mrs. Osborne's attendance at the office, the receptionist prepared her for the examination and/or treatment and then attended the accused Bolduc in his office to inform him that his patient was ready. Present in the office with Bolduc was the accused Bird and upon noticing that Bolduc was not alone the receptionist simply informed Bolduc that his patient had been prepared and requested him to notify her when he was ready to proceed. In a few moments the receptionist was recalled into the office and Bolduc instructed her to get a white lab coat, such as commonly worn by doctors, so that Bird might use the same stating to her that Bird was an intelligent young man and that he intended to pass Bird off as a doctor or medical intern, adding "this was a good way to learn the facts of life". The receptionist protested at what she considered such unethical conduct and declined to bring the lab coat. Bolduc himself obtained the coat for Bird and requested that the receptionist give her stethoscope to Bird. The receptionist simply dropped the instrument in the office and returned to the examining room.

Bolduc and Bird then entered the room together. Bird was wearing the white lab coat and had in his possession a stethoscope. Bolduc introduced Bird to Mrs. Osborne as "Dr. Bird", told Mrs. Osborne that Bird was a medical intern who had not obtained practical experience of this type of thing during his internship and asked if she would mind if Dr. Bird were present during the examina-

tion. Mrs. Osborne replied in the negative because he was an intern, that she didn't mind—"this is fine".

I have above summarized the evidence of the receptionist which was accepted by the learned trial judge.

The examination proceeded with Bolduc, the physician, sitting on a stool at the end of the examining table. He then proceeded to examine carefully and to touch Mrs. Osborne's private parts, and during the course of the treatment he inserted a speculum in the vaginal canal. Throughout this, the accused Bird stood to one side of Bolduc about a foot or eighteen inches away from him and Bolduc made comments as to the patient's treatment, progress, her condition, and also on the prevalence of such condition amongst female patients. Bird simply answered by nods and did not touch the patient at all. It is, of course, the question for decision whether or not the conduct of Bolduc in the circumstances constituted the offence of indecent assault.

Before the Court of Appeal and in this Court, it was immediately admitted, and it could not be otherwise, that if Bolduc's conduct did amount to indecent assault Bird was also guilty under the provisions of s. 21 of the *Criminal Code* despite the fact that he did not touch the patient at any time. Section 141(1) of the *Criminal Code* provides:

141. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years and to be whipped.

Section 230 of the *Criminal Code* provides:

230. A person commits an assault when, without the consent of another person or with consent, where it is obtained by fraud,

(a) he applies force intentionally to the person of the other, directly or indirectly, or

It is, of course, trite law that the force applied may be of very slight degree, in fact, may be mere touching.

The courts below were concerned with the provisions of s. 141(2) of the *Criminal Code* which provides:

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

Much argument was directed in this Court to whether the admittedly fraudulent and false representation made to Mrs. Osborne was as to "the nature and character of the

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act" so that the consent would be vitiated by the provisions of the said subsection.

I am of the opinion that this Court need not be concerned directly with the provisions of s. 141(2). Under s. 230 the application of force, however slight, is an assault when it is "without the consent of another person or with consent when it is obtained by fraud". Let us examine for a moment what was the consent obtained from Mrs. Osborne. Surely upon the evidence to which I have referred above, it was a consent to the examination by Bolduc of her private parts and the touching of them in the course of treatment in the presence of a doctor, and not a mere medical student or a mere layman who was in some vague fashion considering becoming a medical student.

There was no evidence whatsoever that Mrs. Osborne knew the accused Bird at all. The name Bird meant nothing to her. She only gave this consent to such a serious invasion of her privacy on the basis that Bird was a doctor intending to commence practice and who desired practical experience in such matters as Bolduc was proposing to engage in. That was the consent which Mrs. Osborne granted. The indecent assault upon her was not the act to which she consented and therefore I am of the opinion that the two accused were guilty under the provisions of s. 141(1) when considered with s. 230 and s. 21 of the *Criminal Code* without recourse to the provisions of s. 141(2). This makes it unnecessary, in my view, to consider the many authorities cited in the most able argument of counsel for the accused and which dealt with the problem of the nature and character of the act under the provisions of the latter subsection.

I would dismiss both appeals.

Appeal allowed and verdict of acquittal ordered,
SPENCE J. dissenting.

Solicitor for the appellant Bird: N. M. Fleishman,
Vancouver.

Solicitor for the appellant Bolduc: T. R. Braidwood,
Vancouver.

Solicitor for the respondent: The Attorney General for
British Columbia.