1968

*Feb. 15, 16
Apr. 29

MALCOLM IRWIN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Sale of drug to procure abortion—Whether intention to use drug for that purpose an essential ingredient of the offence—Criminal Code, 1953-54 (Can.), c. 51, s. 238.

The appellant was convicted of attempting to commit the offence of unlawfully supplying a drug knowing that it was intended to be used to procure the miscarriage of a female person, contrary to s. 238 of the *Criminal Code*. The female in question was a policewoman and had no intention of using the drug. It was argued by the appellant that he could not have supplied the drug in question "knowing" that it was intended to be used to procure a miscarriage because in fact it was not intended that it be so used or employed. The appellant's conviction was affirmed by the Court of Appeal and he was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

Section 238 of the Code is directed against the supplying or procuring of poison or noxious things for the purpose of procuring abortion with the intention that they shall be so employed, and knowing that it is intended that they shall be so employed. The intention of any other person besides the accused himself that the poison or noxious thing should be used to procure a miscarriage is not necessary to constitute

* PRESENT: Judson, Ritchie, Hall, Spence and Pigeon JJ.

the offence. In the present case, the appellant intended that the substance procured by him should be used to procure a miscarriage. This case was therefore within the words of the statute.

Droit criminel—Vente d'une drogue pour obtenir l'avortement—Est-ce que l'intention d'employer la drogue pour cette fin est un élément essentiel de l'infraction—Code criminel, 1953-54 (Can.), c. 51, art. 238.

L'appelant a été déclaré coupable de la tentative de commettre l'infraction d'illégalement fournir une drogue sachant qu'elle est destinée à être employée pour obtenir l'avortement d'une personne du sexe féminin, contrairement à l'art. 238 du *Code criminel*. La personne en question était de la police et elle n'avait pas l'intention d'utiliser la drogue. L'appelant a soutenu qu'il ne peut pas avoir fourni la drogue en question «sachant» qu'elle était destinée à être employée pour obtenir l'avortement parce qu'en fait elle n'était pas destinée à être employée à cette fin. La déclaration de culpabilité a été confirmée par la Cour d'appel, et l'appelant a obtenu la permission d'appeler à cette Cour.

Arrêt: L'appel doit être rejeté.

L'article 238 du Code vise le cas d'une personne qui fournit ou procure un poison ou des substances délétères dont le but est d'obtenir l'avortement avec l'intention que ces substances soient employées à cette fin, et sachant qu'elles sont destinées à être employées à cette fin. L'intention de toute personne, autre que l'accusé lui-même, que le poison ou la substance délétère sera employé pour obtenir l'avortement n'est pas nécessaire pour constituer l'infraction. Dans le cas présent, l'appelant avait l'intention que la substance fournie par lui soit employée pour obtenir un avortement. Le cas tombe, par conséquent, sous les termes mêmes du statut.

APPEL d'un jugement de la Cour d'appel de l'Alberta[1], confirmant une déclaration de culpabilité. Appel rejeté.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming the appellant's conviction. Appeal dismissed.

S. J. Helman, Q.C., and R. Kambeitz, for the appellant.

E. L. Collins, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a judgment of the Appellate Division of

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[1] (1967), 61 W.W.R. 103, [1968] 2 C.C.C. 50.

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the Supreme Court of Alberta[1] affirming the appellant's conviction for attempting to commit the offence of unlawfully supplying a drug knowing that it was intended to be used to procure the miscarriage of a female person contrary to s. 238 of the *Criminal Code* which reads as follows:

> Every one who unlawfully supplies or procures a drug or other noxious thing or an instrument or thing, knowing that it is intended to be used or employed to procure the miscarriage of a female person, whether or not she is pregnant, is guilty of an indictable offence and is liable to imprisonment for two years.

Leave to appeal was granted to this Court under the provisions of s. 591(1)(*b*) of the *Criminal Code* on the following question of law, namely:

> Whether in the circumstances of the charge the Appellate Division erred in the interpretation of the words "knowing that it is intended to be used or employed to procure the miscarriage of a female person", as those words are used in Section 238 of the *Criminal Code*.

In the reasons for judgment delivered by Mr. Justice McDermid on behalf of the Appellate Division, it was held that:

> ...if the person who supplied the drug believes that the person to whom he is supplying it intends to use it to procure a miscarriage that is sufficient for a conviction under the section. It does not matter that the person to whom the drug was supplied did not in fact intend to use it.

The appellant was charged as the result of a policeman and policewoman, dressed in civilian clothes, going to his drug store in Calgary where the policeman told the appellant that his girlfriend was pregnant and said: "We were wondering if we could get something to do something about it". The appellant then supplied them with a "bean bag" saying that that was what they needed and that it would cost $10.00. The "bean bag" consisted of 4 boxes of pills and a 2-ounce bottle of castor oil. Neither the policewoman nor any girlfriend of the policeman was pregnant and neither of them intended the pills to be used to procure a miscarriage.

At his trial before Chief Justice McLaurin, it was contended on behalf of the appellant that he could not have supplied the drug in question *"knowing"* that it was intended to be used to procure a miscarriage because it was not intended that it should be so used or employed. In

[1] (1967), 61 W.W.R. 103, [1968] 2 C.C.C. 50.

support of this contention, reliance was placed on the decision of the Supreme Court of Victoria in the case of *Reg. v. Hyland*[2], where it was decided on an equal division of the Court that "the words 'intended to be used' must apply to the person supplied and not to the supplier" and Madden C.J. said:

> Whatever difficulty there may be ... arriving at a knowledge of what another really "intends", it at least is possible; while the absurdity of asking a tribunal to be satisfied that a prisoner "knew", as a thing intended to be done, what admittedly no one ever did intend, has only to be stated to be manifest.

The *Hyland* case runs contrary to a line of authority starting with the case of *Reg. v. Hillman*[3], where Erle C.J., speaking of s. 59 of the *Offences Against the Person Act*, 1861, which was virtually the same as s. 238 of the *Criminal Code*, said:

> The question is, whether or not the intention of any other person besides the defendant himself, that the poison or noxious thing should be used to procure a miscarriage, is necessary to constitute the offence charged under the 24 and 25 Vict. c. 100, s. 59. We are all of opinion that that question must be answered in the negative. The statute is directed against the supplying or procuring of poison or noxious things for the purpose of procuring abortion with the intention that they shall be so employed, and knowing that it is intended that they shall be so employed. The defendant knew what his own intention was, and that was, that the substance procured by him should be employed with intent to procure miscarriage. The case is therefore within the words of the Act.

The *Hillman* case was followed seventeen years later in *R. v. Titley*[4], where Stephen J. rendered a decision which has been quoted at length and adopted by Mr. Justice McDermid in the reasons for judgment which he rendered on behalf of the Appellate Division of the Supreme Court of Alberta in the present case.

No Canadian case directly in point was cited to us and I have been unable to find one, but the authority of the *Hillman* and *Titley* cases is recognized by leading Canadian text writers (see Tremeear's Criminal Code, 6th ed., page 385, and Crankshaw's Criminal Code of Canada, 7th ed., pages 361 and 362). These cases also appear to have been widely followed in other parts of the Commonwealth as indicated by the case of *R. v. Neil*[5], which is a decision

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[2] (1898), 24 Vict. L.R. 101.
[3] (1863), 9 Cox C.C. 386, 169 E.R. 1424.
[4] (1880), 14 Cox C.C. 502.
[5] [1909] S.R.Q. 225.

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of the Supreme Court of Queensland, and *Rex v. Noseworthy*[6], a decision of the Court of Appeal of New Zealand. The same reasoning appears to have been followed by the courts in South Africa; see *R. v. Freestone*[7].

In my view the reasoning of Erle C.J. in the *Hillman* case, *supra*, applies to the construction to be placed on s. 238 of the *Criminal Code* and I agree with the interpretation of that section adopted by the Appellate Division.

For these reasons, as well as for those expressed in the reasons for judgment delivered by Mr. Justice McDermid, I would dismiss this appeal.

Appeal dismissed.

Solicitors for the appellant: Helman, Fleming & Neve, Calgary.

Solicitor for the respondent: The Attorney General of Alberta.

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[6] (1907), 26 N.Z.L.R. 536.

[7] (1913), T.P.D. 758.