1948

*Feb. 17, 18
*April 27.

WILLIAM FRASER ROBERT HENDERSON ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal Law—Accused charged of murder entitled to have all his defences adequately put to jury by trial judge—Appellant conspired with two others to hold up and rob bank, when block away turned back, were intercepted by police and appellant disarmed—Companion attempting to escape killed policeman—Whether appellant party to offence of murder within meaning of S. 69 (2) Criminal Code, or had abandoned common intention to prosecute unlawful purpose—Whether such common intention was (a) attempt to rob bank; (b) to resist arrest by violence and assist each other in doing so; or (c) conspiracy to rob bank—Whether trial judge erred in charging jury appellant guilty of an attempt to rob bank within meaning of S. 72 (2) of Criminal Code.

The appellant together with one M and C, each having provided himself with a revolver and ammunition, proceeded in a motor car to hold up and rob a bank. The police having learned of the plot had parked a police car near the bank. When the trio were a short distance from it they turned the car about, abandoned it about a mile away, and walked to some railway tracks. They were there intercepted by two policemen in plain clothes who escorted them back to a detective also in plain clothes. The latter after asking the appellant his name and receiving no reply, noticed the appellant's revolver and took it from him without resistance, objection or protest. At this moment the suspects, who were standing in line, sprang in different directions, the police giving chase. M in his flight turned and shot his pursuer. The police returned the fire. As a result of the shooting, C and the two policemen were killed, M and the

*PRESENT: Kerwin, Taschereau, Kellock, Estey and Locke JJ.

detective, wounded. The appellant took no part in the shooting but in his flight joined M and was subsequently arrested while hiding with him. M and the appellant were charged jointly with the murder of the policeman shot by M, but were tried separately, and both found guilty. M was executed and the present appeal is from the conviction of the appellant.

Held: The appellant was entitled to have each of his defences adequately put to the jury by the trial judge, and since this was not done with regard to his principal defence, that of abandonment (Kerwin J. dubitante), there should be a new trial.

Per Kerwin, Estey and Locke JJ.: There was evidence upon which the jury might properly find that there had been an attempt to commit an offence within the meaning of S. 72 of the *Criminal Code.*

Per Kerwin J.: Such offence constituted an attempt to rob the bank and in leaving the question to the jury, the trial judge did not prejudice the accused.

Per Taschereau and Kellock JJ.: The question was, whether on the evidence the trio had sufficient reason for thinking they had rendered themselves liable to arrest and had determined to resist to the extent of using violence if necessary. It was open to the jury on the evidence to conclude that the appellant at the time of the shooting was a party to the prosecution of an unlawful purpose; it was also open to them to come to a contrary conclusion, if they were of opinion that even had there been an earlier unlawful intention, it had, so far as the appellant was concerned, been abandoned. Before the appellant could be convicted it was essential that these alternatives should have been put to the jury by the trial judge from the standpoint of the Defence as well as the Crown, which was not done.

Per Taschereau J.: The conspiracy to rob the bank was complete and this in itself was a crime, but the subsequent facts revealed by the evidence did not show the essential ingredients of an attempt to rob the bank within the meaning of S. 72 of the *Criminal Code.* An intent, an act of preparation, and an attempt, must not be confused. A mere intent is not punishable in criminal law, even if coupled with an act of preparation. *Reg.* v. *Eagleton,* Dears C.C. 515; It cannot be held that the mere fact of going to a place where the contemplated crime is to be committed, constitutes an attempt. There must be a closer relation between the victim and the author of the crime; there must be an act done which displays not only a preparation for an attempt, but a commencement of execution, a step in the commission of the actual crime itself.

The trial judge erred in charging the jury that "they could be prosecuted for attempting to rob a bank" and "the attempt is complete when they take any steps in connection with it." This confused the issue and was prejudicial to the accused. The question of whether the bandits were guilty of an attempt is foreign to the case. Their common unlawful purpose to hold up and rob the bank and to assist each other in the prosecution of that purpose, having been frustrated, was obviously not pursued, and it was not therefore in the prosecution of such purpose that the murder was committed.

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It was for the jury to say, if in view of the evidence the appellant had been a party to a conspiracy, if such conspiracy was ever formed; and it was also within their exclusive province to find, after having been properly instructed, that he had detached himself from any further association with the other conspirators.

APPEAL by the accused from the judgment of the Court of Appeal for British Columbia (1) (O'Halloran J. dissenting) dismissing his appeal from his conviction, at a trial before Manson J. and a jury, on a charge of murder. The appeal was on the grounds of dissent taken by O'Halloran J.A. (who held that there should be a new trial.)

John Groves Gould for the appellant.

Alfred Bull K.C. for the respondent.

KERWIN J.:—Attention should first be directed to the question as to whether in law what was done with the intent to rob the bank was, or was not, only preparation for the commission of that offence and too remote to constitute an attempt to commit it as provided by subsection 2 of section 72 of the *Criminal Code*. This subsection sets forth the considerations that are to govern in deciding this question of law and, with respect, I find very little assistance in considering the circumstances in other reported cases and I do not find it conducive to the solution of the problem to attempt to paraphrase the wording of the subsection. It is necessary to determine this point first, because if the proper conclusion be that there was no attempt, then Mr. Bull admitted that as the case was put to the jury by the trial judge on the basis of their being an attempt as well as on the basis of his wider proposition, it would be impossible to say upon what ground the jury proceeded and, therefore, for that reason there would have to be a new trial. In leaving the question to the jury, the trial judge certainly did not prejudice the accused because the circumstances in this case satisfy me that as a matter of law what was done falls within the provisions of the subsection so as to constitute an attempt. I do not detail these circumstances because on another ground there is to be a new trial.

If upon such new trial there is evidence of a common intention to rob and to escape with violence, the question

(1) [1948] 1 W.W.R. 1.

should specifically be left to the jury as to whether the accused had desisted from participation in such common intention. And if it be claimed by the Crown that, irrespective of any agreement to rob, there was a common intention to flee from the police officers using force, then a defence that Henderson was not a party to such common intention should also be put to the jury. These defences were raised by the accused at his trial and while in discussing the Crown's case the trial judge did refer to those features, he did not specifically deal with them when he came to charge the jury as to what the defences were. With some hesitation I am unable to dissent from the view of those members of this Court who find that these defences were not adequately put to the jury.

TASCHEREAU J.:—The appellant Henderson and one Harry Medos were jointly indicted at Vancouver, B.C. for the murder of Charles Boyes, a police officer. The two accused were given separate trials, as a result of which Medos was found guilty and executed, and Henderson who was tried before Manson, J. was also convicted.

It appears from the evidence that the appellant, Medos, and one Carter conspired together to commit a holdup at the premises of the Royal Bank of Canada, on the east side of Renfrew Street, directly opposite the Java Inn at Vancouver. The next day, the three men were seen in a maroon Mercury car, coming west, on 2nd Avenue. It was observed that the car turned into the first lane facing south, and backed out to 2nd Avenue again, and then went east, from whence it had come, and proceeded to the stop sign at Renfrew Street, and turned north on Renfrew Street in the direction of the bank, but proceeded only about two car lengths when it swerved to the right, making a U turn and proceeded at a fast rate of speed east on 2nd Avenue. The bandits who were on their way to the bank to commit the intended hold-up, had obviously detected a Police car that was parked in front of the Java Inn facing south, and found that the occasion was not favourable to carry out their plot. After having made this U turn, they proceeded in their car for about a mile and a half, and then abandoned it on Kitchener Street, and walked west towards the Great Northern Railway yards.

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They had admittedly been under close observation by the police, for when they arrived in the yards, Officers Boyes and Ledingham drove their car into the yards near the roundhouse, and accosted them on the railway track where all five crossed the line of tracks they were on, to another set of tracks. A few seconds later, Detective Sergeant Hoare arrived, and standing directly opposite the appellant, he said: "Who are you fellows anyway?" and coming nearer the appellant, Hoare said: "What is your name?" These two questions remained unanswered, and looking at the appellant, Hoare saw a gun tucked in the top of his overalls which he pulled out. He had just taken this gun, when the whole line of men broke up and the appellant, Medos and Carter sprang in different directions. Medos who was the first to move was pursued by Officer Boyes, Ledingham going after Carter. Medos had hardly ran six or seven steps whe he turned and shot Boyes, and Carter fired at Ledingham. Medos then aimed at Hoare. Unfamiliar with appellant's revolver, and therefore unable to use it, Hoare moved rapidly towards a pile of steel plates, trying to reach for his gun, but a bullet struck him in the left thigh and he fell to the ground. He however tried to get his gun out of the holster, but was at that same moment struck by another bullet in the upper part of his right arm, and another shot passed by the left side of his face. He succeeded in sitting up, and he saw Boyes lying dead on the ground, and Medos still running. He then raised his gun on his right knee, and aimed at Medos, but seeing Carter running in a north-westerly direction, he transferred his aim to Carter and shot him to the ground. He then aimed at Medos who fell. He fired another shot which killed Carter, and a second shot at Medos.

As a result of the shooting, Officer Boyes and Ledingham and Carter were killed. Medos succeeded in escaping with the appellant, but both were discovered soon after in the basement of a house on 5th Avenue where they were arrested. In the interval, appellant had changed his outer clothing, and later Medos' gun was found in the basement containing one live shell. The gun taken from Henderson by Detective Sergeant Hoare was fully loaded with live shells, and in appellant's pocket were found also five other live shells which fitted his gun.

It is the contention of the Crown that Henderson, together with Medos and Carter, formed a common intention to commit a crime by violence, viz. to hold up and rob the Royal Bank of Canada on Renfrew Street, and to assist each other therein, and that it was a part of the common intention to overcome all resistence by force of arms, either in the bank or outside the bank, and to resist lawful apprehension by the police, and if pursued to shoot if necessary. The Crown further states that such common intention *was at no time abandoned* by appellant, that the common design was frustrated by the police and that it was only the presence of a Police car immediately across the street from the bank, which caused the bandits to change their mind, so that instead of continuing their unlawful purpose, they then directed their attention to resisting lawful apprehension.

The Crown further submits that in view of section 69 (2) of the *Criminal Code,* which reads as follows:—

2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

the jury being properly instructed by the learned trial judge, could find that such a common intention was formed, and that in the *prosecution* of such common purpose one or more of the trio shot and killed Officer Boyes, and that the commission of that offence was or ought to have been known to be a probable consequence of the *prosecution* of such common purpose.

The Crown also submits and it was put to the jury by Crown counsel, that even if the jury could not find that the common purpose was as comprehensive as was put to them, there was another view which could be taken, namely, that when the trio abandoned the motor car on Kitchener Street, they had already committed a crime, that is to say, they had *attempted* to hold up and rob the bank, within the meaning of section 72 of the *Code* which is in the following words:—

72. Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

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2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

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It is said that these three men, when their attempt to hold up the bank was frustrated, formed a common intention to resist lawful apprehension, which is in itself an unlawful purpose within the meaning of section 69, and that during the *prosecution* of such common purpose, murder was committed by one of their number.

The Court of Appeal for British Columbia dismissed Henderson's appeal, Mr. Justice O'Halloran dissenting (1). The points of dissent are the following:—

(1) The jury were left in a state of confusion by three inconsistent directions given by the learned judge apparently in purported compliance with *Code* S. 72 (2).

(2) The jury were not instructed under Code S. 72 (2) upon the distinction in law between acts of preparation as such and acts which could constitute an attempt to hold up the bank; and further, following what the learned judge ought to have instructed them in law upon the distinction between "preparation" and "attempt" (but which he did not do), the jury were not instructed that it was for them to find whether there was evidence to support an attempt or merely acts of preparation within the meaning of what the learned judge ought to have told them constituted "attempt" and "preparation" respectively. Instead the learned judge decided the facts as well as the law and instructed the jury an attempt in law had occurred;

(3) The learned judge misdirected both himself and the jury upon the legal meaning of attempt;

(4) The learned judge erred in law in directing the jury that what occurred constituted an attempt in law to hold up the bank;

(5) The learned judge in legal effect took away from the jury Henderson's defence of abandonment of the common intention under S. 69 (2) to hold up the bank;

(6) Alternatively, the learned judge erred in law in directing the jury that an attempt to hold up the bank excluded any defence of abandonment of the common intention to hold up the bank;

(7) Alternatively, the learned judge did not leave it to the jury to decide whether any common intention under S. 69 (2) existed after the virtual arrest of Henderson *et al* by officers Boyes and Ledingham;

(8) Alternatively, the learned judge did not leave it to the jury to decide whether Henderson, disarmed before the gun battle in which he took no part, had any common intention with Medos within the meaning of S. 69 (2), to take part in the gun battle in which the murder occurred;

(9) The learned judge, having put the Crown's case to the jury with great power, did not present Henderson's case so as to bring out its full force and effect. Read as a whole, the charge points always to guilt and nothing but guilt;

(1) [1948] 1 W.W.R. 1.

(10) The learned judge, in the course of presenting Henderson's defence, did not bring to the jury's attention the importance of reasonable doubt when related to (*a*) common intention regarding abandonment of the hold-up; (*b*) absence of any common intention in Henderson to escape after his virtual arrest by officers Boyes and Ledingham; and (*c*) absence of any common intention in Henderson to take part in the gun battle in which the murder occurred;

(11) The learned judge ought to have instructed the jury the Crown had not made out a case in law to convict Henderson of constructive murder.

I would like first to deal with the contention that the three conspirators while on their way to the bank, were guilty of *an attempt* to commit a hold-up and rob the Royal Bank of Canada. With deference with other views expressed, I cannot agree with this submission. Of course, the conspiracy to rob the bank was complete and this in itself was a crime, but I do not believe that the subsequent facts revealed by the evidence show the essential ingredients of an attempt, within the meaning of section 72 of the *Criminal Code*.

An intent, an act of preparation, and an attempt must not be confused. A mere intent is not punishable in criminal law, even if coupled with an act of preparation. As it was said in *Regina* v. *Eagleton* (1) at p. 538:—

> The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are * * *.

It was Sir James Stevens in his *Digest of the Criminal Law*, who defined an attempt as follows:—

> An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.

In *Principles and Practice of the Criminal Law* 14th ed., Harris at page 11 says:—

> Through a mere intention is not punishable if no steps are taken to carry it into effect, an *attempt* to commit either a felony or a misdemeanour is itself a crime, and therefore the subject of punishment. An attempt may be said to be the doing of any of the acts which must be done in succession before the intended object can be accomplished, with the limitation that it must be an act which directly *approximates to the offence*, and which, if the offence were committed, would be one of its *actual causes*, as distinct from a mere act of preparation.

(1) [1855] Dears. C.C. 515; 169 E.R. 826 at 831.

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Mr. Justice Blackburn once observed (*Roscoe's Criminal Evidence*, 15th ed., p. 415):—

> There is no doubt a difference between the preparation antecedent to an offence and the actual attempt, but if the actual action has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.

In *Roberts Case* (1) Jervis, C.J. says:—

> It is difficult and perhaps impossible * * * to define what is, and what is not such an act done, in furtherance of a criminal intent, as will constitute an offence * * * Many acts, coupled with the intent, would not be sufficient. For instance, if a man intends to commit a murder, and is seen *to walk towards the place* of the contemplated scene, that would not be enough.

In *Rex* v. *Harry Robinson* (2) which I believe is the leading case, the accused was convicted of the offence of attempting to obtain money by false pretence. The Court of Criminal Appeal held that there was no attempt to commit the offence, but only a preparation for the commission thereof, and quashed the conviction. At page 1152, Lord Reading said:—

> Now in this case the real difficulty consists in this, that there is no evidence that anything done by the appellant ever reached the ears of the underwriters. They were the persons whose minds must be induced to part with the moneys payable under the policy; they were the persons from whom the money was to be obtained . . . There must, however, be some further act on the part of the appellant before it can be said that the attempt to commit the offence for which he has been indicted is complete. Applying the test laid down by Baron Parke, (In *Regina* v. *Eagleton*) we come to the conclusion that, in order to constitute an attempt to commit the offence, the act relied on must be an act directly *connected* with the commission of the complete offence.

I entirely agree with what Mr. Justice O'Halloran says in his dissenting judgment (3):—

> For an act to be an attempt, it must take place between the attemptor and the attemptee and be proximate to the crime about to be committed.

Here, the trio were seen in an automobile in the direction of the bank; but the plot was frustrated by the presence of the police. There was nothing done by the trio, no overt act *immediately connected* with the offence of hold-up and robbing. Although it may be said that no one could doubt the express purpose of the bandits, I do not believe that it can be held that the mere fact of going to the place where the contemplated crime is to be committed, consti-

(1) (1855) Dears. 539 at 550.
(2) [1915] 2 K.B. 342; 83 L.J.K.B. 1149.
(3) [1948] 1 W.W.R. 1 at p. 12.

tutes an attempt. There must be a closer relation between the victim and the author of the crime; there must be an act done which displays not only a preparation for an attempt, but a commencement of execution, a step in the commission of the actual crime itself.

If any further authority is needed on this question, *vide*: *Rex* v. *Rump* (1) at p. 40; *Rex* v. *Labourdette* (2); *Rex* v. *Woods* (3); *Rex* v. *Singh* (4); *Rex* v. *Linneker* (5); *Rex* v. *Punch* (6).

Section 72, para. 2 of the *Criminal Code* says that the question whether an act done or omitted with intent to commit an offence, is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

The jury were told by the learned trial judge that:

> they (trio) could not be prosecuted for robbing a bank, but they could be prosecuted for attempting to rob a bank * * * the attempt is complete when they take any steps in connection with it.

This statement of law, is, I think, erroneous. The jury might have thought that it was while trying to escape, after having committed an act, which they were told was *a crime,* that the bandits started the shooting as a result of which the killing ensued. This obviously confused the issue and was prejudicial to the accused.

I further believe, however, that the question whether or not the bandits were guilty of an attempt, is entirely foreign to the case.

There is no possible doubt that the three accused in view of the evidence produced, were guilty of conspiracy. The common unlawful purpose was to hold up and rob the Royal Bank of Canada, and it is also common ground that they intended to assist each other in the prosecution of that purpose. But, their common purpose having been frustrated, was obviously not pursued, and it was not therefore in the *prosecution* of such common purpose that Officer Boyes was killed.

(1) (1929) 41 B.C. 36.
(2) (1908) 13 B.C. 443.
(3) (1930) 22 C.A.R. 41.
(4) (1918) 26 B.C. 390.
(5) (1906) 75 L.J.K.B. 385.
(6) (1927) 20 C.A.R. 18.

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To my mind the real issues are the following:—

Was there at any moment a concerted plot formed by Medos, Carter and Henderson to resist legal apprehension with violence? It may well be that this plot if it did exist, was made originally when it was agreed to rob the bank, or it may be that it was formed after the bandits were frustrated in the prosecution of the hold-up. If such a plot did exist, the shooting being the result of a conspiracy, the two of course might be guilty of murder. The common intention would then be to resist legal apprehension; that would be the unlawful purpose. Each one of the trio would be a party to any other offence, committed by any one of them, in the prosecution of the common purpose, if he had known, or ought to have known, that it was a probable consequence of the original common purpose. It may happen, however, and this was for the jury to determine, that Henderson had ceased to be a party to the conspiracy, and that the shooting which started after he had been disarmed and under virtual arrest, was the spontaneous act of Medos. Then, the act of one, would not have been the act of all.

In order that section 69 (2) may find its application, the co-conspirators must form not only a common intention to prosecute an unlawful purpose, but they must agree also "to assist each other therein", and therefore, if a man is disarmed and made incapable of furnishing the promised assistance, the situation is obviously changed. It is settled law that a person who has been a party to prosecute a common illegal purpose, may disassociate himself with his original co-conspirators. As early as in 1828, in *Rex* v. *Edmeads,* Baron Vaughan said at the Berkshire Assizes (Carrington & Paynes Reports, Vol. 3):—

> If it could be shown that either of them separated himself from the rest, and shewed distinctly that he would have no hand in what they were going, the objection would have much weight in it.

In *Rex* v. *Whitehouse* (1) Mr. Justice Sloan, now Chief Justice of British Columbia, said:—

> After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to disassociate themselves from the con-

(1) (1940) 55 B.C. 420 at 425.

sequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. *That must depend upon the circumstances of each case* but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

In *Rex* v. *Croft* (1) it was held that the agreement may be expressly determined and that if it comes to an end before the crime is committed, the party who has put an end to the agreement is not guilty. The question whether the agreement has been put to an end, must be judged in view of all the circumstances revealed by the evidence, and I have no doubt that it is a question for the jury. It was for them to say, if in view of the evidence the appellant had been a party to the conspiracy, if such a conspiracy was ever formed, and it was also within their exclusive province to find, after having been properly instructed, that he had detached himself from any further association with the other conspirators.

Unfortunately, all these aspects of the case were not dealt with, and these omissions were, I believe, highly prejudicial to the accused. The defence was not presented so as to give it all its force and effect. It is true that no witnesses were called on behalf of the appellant, but it is nevertheless the duty of the trial judge, in his charge to the jury, to explain the exculpatory effect of the evidence, whether it is given by the witnesses for the Crown or for the accused. *Wu.* v. *The King* (2). It was the fundamental right of the appellant, who has been charged of murder, purely by construction of the law, which in this particular case creates a presumptive guilt, to have all the features of his defence adequately put to the jury.

(1) [1944] 1 K.B. 295. (2) [1934] S.C.R. 609.

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I have to come to the conclusion that this has not been done, and that the Crown has not established to my satisfaction that the verdict would have been the same, if the proper direction had been given.

The appeal should be allowed, the conviction quashed and a new trial directed.

KELLOCK J.:—The appellant not having himself taken part in the actual shooting, being unarmed at the time, the Crown rested its case against him upon section 69, subsection 2, of the *Code*.

With respect to the common intention to prosecute an unlawful purpose the Crown put forward two theories. The one, to which Mr. Bull referred as the more comprehensive, was that the three participants, Medos, Carter and the appellant, had planned the armed robbery of the Renfrew Street branch bank and resistance of arrest by violence if necessary. The second theory was that when the would be robbers retreated from the vicinity of the bank upon sighting the police car parked across the street they formed a new agreement of the same character to escape or resist arrest. He contended that such common intention was still operating at the moment of the shooting, and that there was nothing in the evidence indicating any abandonment of such common intention on the part of the appellant, but rather that the evidence indicated the contrary.

The important thing for the Crown to establish to the satisfaction of the jury beyond reasonable doubt, was that at the time of the shooting which resulted in the deaths of the two constables, Boyes and Ledingham, the one having been killed by Medos and the other by Carter, the appellant was a party to a common intention with the other two to escape or resist arrest by the use of violence and to assist each other therein, and that the murder which resulted was or ought to have been known to the appellant to have been a probable consequence of the prosecution of the common purpose.

The state of mind of the three men was therefore the matter to which the attention of the jury had to be directed

on the evidence. Whether or not the three had actually committed a crime or crimes when they turned away in their approach to the bank was to my mind not the basic question, but rather whether the evidence furnished sufficient ground for the jury to conclude that the three had formed a common unlawful intention of the character mentioned above, an important element in which would be the view which the three might reasonably be taken to have entertained as to whether their conduct up to that time had amounted to the commission of a crime or crimes. No doubt they had been guilty of a breach of section 573 of the *Code*. Whether or not it was likely that they realized that and for that reason had determined not to be taken and to use violence to prevent being taken, was for the jury. The same may be said with respect to the offence described in section 464 (*b*) or any others which might be suggested on the evidence including the offence of attempted robbery while armed. The question after all was whether the jury would conclude on the evidence that the men had sufficient reason for thinking they had rendered themselves liable to arrest for matters involving sufficiently unpleasant consequences that they had determined to resist arrest to the extent of using violence if that should prove necessary.

While it was open to the jury on the evidence to conclude that the appellant at the time of the shooting was a party to the prosecution of such an unlawful purpose, it was also, in my opinion, open to them to come to a contrary conclusion if they were of opinion that even had there been an earlier unlawful intention it had, so far as the appellant was concerned, been abandoned. With this Mr. Bull agrees. Before the appellant could be convicted therefore, it was essential that these alternatives should have been adequately presented to the jury by the learned trial judge from the standpoint of the defence as well as from that of the Crown. With great respect I think that was not done.

The learned judge in his summing up, after instructing the jury on matters of general application and the relevant law, laid before them first, the case for the prosecution, then the substance of what had been said by the various

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witnesses and, finally, the case for the defence. On reaching the case for the defence, the learned judge proceeded as follows:

> Now, Mr. Foreman, I have reviewed the evidence pretty fully and it is my duty now to put to you the defence. I gave you the Crown's case as they put it forward; I have reviewed the evidence. Now the defence says this * * *

The learned judge then told them that the defence contended that the Crown had not proved, beyond a reasonable doubt, that the appellant was one of several persons who had formed an intention to prosecute an unlawful purpose and to assist each other therein during the prosecution of which the offence occurred which the appellant knew, or ought to have known, was a probable consequence; that the Crown had failed to establish such common intent affirmatively and that, in addition, the evidence negatived it. He then said that the defence had pointed out that the appellant did not resist; that the movement in the line of the five men, consisting of the three confederates and the two police officers, (which immediately preceded the shooting) had commenced at the end of the line farthest away from the appellant; that it was said that the latter could have done nothing else than run in order to get out of the line of fire; and that immediately prior to his ultimate apprehension he had given himself up. The learned judge also referred to the fact that the confederates had walked slowly on the Flats and that there was no shooting when the two policemen came up with them. I find nothing else material in the charge dealing with the case for the defence.

In my opinion this was not adequate to put before the jury what the appellant was entitled to have put, namely, that should the jury come to the conclusion that any unlawful purpose which they might find to have existed at an earlier time had been abandoned prior to the shooting in such a way that the appellant was no longer involved and that what occurred had arisen without any common unlawful intention to which the appellant was a party, as to which they should give him the benefit of any reasonable doubt, they should acquit. I am not saying that it was necessary that this should have been said in so many

words but the jury should have been clearly instructed on this aspect from the standpoint of the defence.

In *Wu* v. *The King* (1) Lamont, J., in delivering the judgment of this court said at page 616:

> There is no doubt that in the trial court an accused person is ordinarily entitled to rely upon all alternative defences for which a foundation of fact appears in the record, and, in my opinion, it makes no difference whether the evidence which forms that foundation has been given by the witnesses for the Crown or for the accused, or otherwise. What is essential is, that the record contains evidence which, if accepted by the jury, would constitute a valid defence to the charge laid. Where such evidence appears it is the duty of the trial judge to call the attention of the jury to that evidence and instruct them in reference thereto.

It is a paramount principle of law that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury; *Rex* v. *Dinnick* (2).

In my opinion, therefore, with respect, there is no escape from the conclusion that there should be a new trial.

ESTEY J.:—The accused Henderson's conviction of the murder of Charles Boyes was affirmed by the Appellate Court of British Columbia (1). Mr. Justice O'Halloran, who dissented, was of the opinion that the learned trial Judge had erred in not instructing the jury with regard to the defence of abandonment and in instructing the jury that the accused and his associates were guilty of an attempt to rob the Royal Bank of Canada.

The evidence disclosed that in the evening of February 25th the accused, Medos and Carter agreed that on the following morning they would rob the Royal Bank of Canada on Renfrew Street in the City of Vancouver. About noon on the 26th of February they proceeded to do so but as they approached the bank they observed the presence of the police, turned back and in a short time abandoned their automobile and walked to the Great Northern railway yards where they were met by the police who had pursued them. There the shooting occurred which resulted in the death of two policemen, Boyes and Ledingham, and one of the three parties, Carter.

The evidence established that Medos fired the shot that killed Boyes, but the Crown contends that Henderson, within the provisions of section 69 (2) was a party to, and

(1) [1934] S.C.R. 609.
(2) (1909) 3 Cr. A.R. 77 at 79.
(3) [1948] 1 W.W.R. 1.

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with Medos guilty of the offence of that murder. It is provided by section 69 (2) of the *Criminal Code* that:

> 69. (2) If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

The Crown's contention is that Henderson, Medos and Carter had formed a common intention to prosecute the unlawful offence of robbing The Royal Bank of Canada on Renfrew Street, to assist each other in the course thereof, and after its commission to escape and to do whatever was necessary under the circumstances to effect that escape.

Counsel for Henderson submits that, upon the evidence for the Crown (no evidence was given on behalf of the defence), granting the three parties had a common design to rob the bank, the evidence warranted a conclusion that prior to the shooting the three, or at least Henderson, had abandoned any intention to prosecute an unlawful purpose, that therefore at the time of the shooting each of the three parties was acting upon his own and not pursuant to any previously agreed upon plan or design. The common intention had been abandoned and the conduct of the one did not then involve the others in any responsibility therefor. This defence of abandonment was the principal contention of the accused and was supported by references to specific portions of the evidence upon which, because a new trial must be had, I make no comment.

The learned trial Judge in his charge to the jury reviewed the submissions of the Crown and the evidence. Several times in the course thereof he referred to abandonment, but as incidental to his presentation of the Crown's case and the review of the evidence. Then, having completed that review, the learned Judge stated:

> Now Mr. Foreman, I have reviewed the evidence pretty fully and it is my duty now to put to you the defence. I gave the Crown's case as they put it forward; I have reviewed the evidence.

In what followed the learned Judge referred to certain portions of the evidence particularly stressed by counsel for the accused, but omitted any reference to the defence of abandonment, nor at any point throughout the charge did he discuss abandonment as a defence in relation to the

evidence in support thereof. This was the principal defence raised on behalf of the accused. It is the right of every accused to have his defence fairly presented by a trial judge in his charge to the jury.

A majority of the Court is of the opinion that, in view of the unfortunate failure of the learned trial judge to present to the jury the principal ground of defence put forward by the appellant, his conviction cannot be sustained. *Brooks* v. *The King* (1)

See also *MacAskill* v. *The King* (2).

With deference to the learned trial judge, and to the learned judges who have expressed a contrary opinion, in view of the omission to so present the defence of abandonment a new trial must be had.

Medos had fired the fatal shot. Henderson would only be a party thereto if the evidence established the presence of a common intention within the meaning of section 69 (2) between Henderson and Medos up to and at the moment of the shooting. Among the alternative bases for this common intention the Crown contended that the three parties had gone so far that they had in law committed an attempt to rob the bank, had a common intention to escape and to do whatever was necessary in order to effect that escape, and that such intention had persisted up to and was their intention at the time of the shooting. The learned trial judge held, and the majority of the Court of Appeal, that what the three parties did in this case was beyond preparation and not too remote to constitute an attempt in law.

The evidence is all to the effect that the three parties had concluded their plan to rob the bank in question on the previous night. They had obtained the equipment they deemed necessary, including each a revolver and ammunition, and on the morning in question had set out in an automobile to accomplish their purpose, that they proceeded to the block of Renfrew Street upon which the bank was located and where immediately they would have completed their robbery had the presence of the police not frustrated their effort.

An attempt is defined in section 72 of the *Criminal Code*:

72. Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

(1) [1927] S.C.R. 633 at 634. (2) [1931] S.C.R. 330.

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(2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

Counsel for the accused referred to a number of cases in which the attempted crime was either against the person or that of obtaining by false pretences. He contended that any act not "immediately connected with" the completed crime would be too remote to constitute an attempt. Even under the cases which he cited the accused may still have one or more acts to do, and these be separated by an intervening period of time, in order to complete the offence and yet may be guilty of an attempt. This is illustrated with respect to false pretences by *Rex* v. *John Laitwood* (1) and in a case of murder *Rex* v. *White* (2). In the latter Bray J., in delivering the judgment of the Court of Criminal Appeal, stated at p. 129:

* * * that the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing.

Counsel for the accused further submitted that in order to constitute an attempt there must be "some direct association or link between the attemptor and the attemptee", and referred to the case of *Rex* v. *Robinson* (3) where Lord Chief Justice Reading stated at p. 349:

We think the conviction must be quashed, * * * upon the broad ground that no communication of any kind of the false pretence was made to them.

Robinson, with the intention of obtaining money by false pretences from his underwriters, was engaged in procuring the evidence upon which he hoped eventually to induce them to pay him a sum of money. Lord Chief Justice Reading stated that such was preparation and "only remotely connected with the commission of the full offence".

A false representation is one of the essentials in the offence of obtaining by false pretences, but there is nothing comparable to such nor its communication in a robbery such as Henderson and his associates were here engaged

(1) (1910) 4 Cr. App. R. 248.
(2) [1910] 2 K.B. 124.
(3) (1915) 2 K.B. 342 at 349.

upon. No case has been cited with respect to this type of offence by which the parties had in any practical sense covered the distance and in effect reached their objective only to be frustrated by the police. In the type of offence with which we are here concerned, it is the sudden and unexpected show of violence that makes the commission of the crime possible. It seems only proper that such factors should be taken into account when considering the question of remoteness.

In the *Robinson case* Lord Chief Justice Reading quoted at p. 348 as a safe guide the language of Baron Parke in *Rex* v. *Eagleton* (1) at p. 538:

> The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are.

Then there is the oft quoted statement of Blackburn, J. in *Rex* v. *Cheeseman* (2).

> There is, no doubt, a difference between the preparation antecedent to an offence, and the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime. Then, applying that principle to this case, it is clear that the transaction which would have ended in the crime of larceny had commenced here.

In that case the accused was found guilty of an attempt to steal meat. He had used a false 14-lb. weight in weighing same, which was discovered before the meat had actually been taken away. Notwithstanding that fact, he was found guilty of an attempted larceny.

Henderson and his associates had, with a common intention to rob the Royal Bank, perfected their plan, acquired the equipment they deemed necessary, including their respective revolvers and ammunition. All that completed, they had entered upon a course of conduct for the purpose of immediately accomplishing their object. They had proceeded so far that within sight of the bank they were frustrated by the presence of the police. These circumstances in relation to the nature and character of the offence intended constitute an attempt.

(1) Dears. 515.

(2) (1862) Le. Ca. 140 at 145; 169 E.R. 1337 at 1339.

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With deference to those who hold a contrary view, I am of the opinion that within the meaning of section 72 the accused Henderson and his associates had committed an attempt to rob the bank.

The appeal should be allowed and a new trial directed.

LOCKE J.:—I agree with Mr. Justice Robertson (1) that the evidence disclosed that what was done by Henderson, Medos and Carter went beyond mere preparation for the robbery and that there was evidence upon which the jury might properly find that there had been an attempt to commit the offence within sec. 72 (1) of the *Code*. I also agree with his conclusion that in spite of the misdirection on this aspect of the matter there was no prejudice to the accused.

I am, however, of the opinion that there should be a new trial on the ground that what appears to me to have been the principal defence of the accused was not adequately put to the jury by the learned trial Judge. It was conceded in argument before us that Henderson, with Medos and Carter, formed a common intention to rob the Renfrew Street branch of the Royal Bank with the aid of firearms and that they were on their way to the bank to carry out this unlawful purpose when they detected the presence of the police car in front of the bank whereupon they left the vicinity. Counsel for the accused, however, disputes the theory of the Crown that it was part of the original unlawful purpose to resist arrest by violence after robbing the bank, or that Henderson was a party to such an unlawful purpose in connection with the attempt, and alternatively contends that if such had been the purpose it was abandoned by the three men prior to or at the time they were taken in charge by the police officers: further it is said that in the case of Henderson his submitting to being disarmed by Detective Hoare and his conduct after Medos and Carter started to run away indicated that, if there was then a continuing unlawful purpose on the part of the others to resist apprehension or to escape from custody by violence, he had disassociated himself from that purpose in such manner that he was no longer responsible in law for the unlawful acts of his former confederates. With

(1) [1948] 1 W.W.R. 1 at 25.

great respect for the learned trial Judge, I have come to the conclusion that his charge to the jury was inadequate to put these vital issues clearly before them. It is true that in the course of dealing with the case for the Crown comment was made on the question of the abandonment of any unlawful purpose by Henderson and that in dealing with the defence the matter was mentioned in the following words:—

> It was pointed out that Henderson did not resist, that the movement started at the south end of the line. It was suggested that Henderson could not do anything else because he was in the line of fire except to run. It was pointed out that he said: "I will not run away, I will give myself up. This is not my gun, it is his." That was at the very end of the chapter. It was pointed out that they were walking slowly on the Flats. It was pointed out that they did not shoot, if they had such common intention, when Boyes and Ledingham came up, that they did not all move together, and that by way of explanation of Henderson's conduct immediately after the shooting you are entitled to take into consideration the fact he is of tender years, that is to say he is a boy of seventeen.

It was, however, of vital concern to the accused that the attention of the jury should have been directed to the actions relied upon by him as evidence of the abandonment of the original unlawful purpose by the three conspirators and of the acts on his part which it was contended indicated that he had so disassociated himself from any unlawful purpose as to relieve him from any criminal responsibility. While no objection was made at the conclusion of the Judge's charge it was the prisoner's right to have the jury instructed upon this feature of the case *MacAskill* v. *The King* (1) Duff, J. at 335.

There should be a new trial.

Appeal allowed, conviction quashed, and new trial directed.

Solicitor for the appellant: *John Groves Gould.*

Solicitor for the respondent: *E. Pepler.*

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(1) [1931] S.C.R. 330.