1957

*Jan. 28, 29, 30 Feb. 15

HER MAJESTY THE QUEEN .....APPELLANT;

AND

JAMES CAREY .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Parties to offences—Carrying out common unlawful purpose —Attempt to commit robbery—Killing by one participant—Charge to jury—The Criminal Code, 1953-54 (Can.), c. 51, ss. 21, 24, 201, 202.

G and C were jointly indicted for the murder of a police constable, the Crown's case being that while the two men were engaged in an attempt to rob the premises of W. Co., G shot the constable and that C, "in complicity with [G], was a party with [G] to the said crime of murder". Both accused were convicted and appealed. G's appeal was dismissed but a new trial was ordered for C on grounds of misdirection. The Crown appealed.

Held (Locke and Cartwright JJ. dissenting): The appeal should be allowed and the conviction should be restored.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ.: There was evidence that G and C formed an intention in common to carry out the unlawful purpose of robbery with violence, and to assist each other therein, that in carrying out that common purpose G committed murder, and that C knew, or ought to have known, that murder would be a probable consequence. It was unnecessary to decide whether the words "in carrying out the common purpose" in s. 21(2) of the *Criminal Code* should be construed as requiring acts going beyond mere preparation for an offence and amounting to an attempt as defined in s. 24, because in this case the evidence disclosed that the acts of the two accused did in fact amount to an attempt to rob.

Section 24(2) requires the presiding judge to determine, as a matter of law, whether or not the acts of the accused constitute an attempt, but that determination must be in substance a finding of fact. His function is not merely to decide, in a given case, that there is no evidence of an attempt and therefore withdraw that issue from the jury, but

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Abbott JJ.

also to decide, as a question of fact and law, whether what was done, if found by the jury, amounted to an attempt. *Regina v. Miskell*, [1954] 1 W.L.R. 438 at 440, does not express the law of Canada as laid down in s. 24(2).

There was no evidence from which the jury could have found that the common intention had been abandoned before the constable was shot. In any event, this issue was not withdrawn from the jury; it was left to them to find whether it had been proved beyond a reasonable doubt that the common intention persisted.

Per Rand J.: Assuming that the Crown, because of the position taken by counsel in opening, was bound to prove an intent to rob W. Co. rather than a mere intent to reconnoitre with or without an intent to rob generally, the trial judge had made it clear to the jury that the intent that they must find was the specific one to rob W. Co. It was by no means clear that s. 21(2) was restricted to cases where an attempted offence had been reached but, in any event, the trial judge's finding that the acts alleged, if the jury found them to have been done, amounted to an attempt, could not be successfully challenged. Although there was no direct evidence that it was part of the common intention to overcome all resistance by force of arms, that intention could be found as an inference from the total circumstances of the case. The question of an abandonment of the intent to rob had not been withdrawn from the jury.

Per Locke J., *dissenting*: It is not a necessary element of liability under s. 21(2) that the acts done in carrying out the common purpose should be such as to amount to an attempt, as defined in s. 24, but what was said by the trial judge in this case amounted to taking away from the jury the decision of the question of fact as to whether there had been an attempt.

Further, there was evidence on which the jury might have found that, even assuming that there had been an attempt, it had been abandoned at the time of the shooting. Although the trial judge told the jury that this question was for them, he also told them on two occasions that there was no evidence that the attempt had been abandoned, and the effect of this would be that the jury would not consider the matter.

Per Cartwright J., *dissenting*: If, as was probable from the charge, the jury were directing their minds to s. 202(*d*)(i) in connection with C's guilt, it was of vital importance that they should consider whether G caused the constable's death while committing or attempting to commit robbery. Assuming, without deciding, that the trial judge was right in telling the jury that if they found the facts which he outlined to them they must accept his ruling that both the accused had committed the offence of attempted robbery, he was wrong in withdrawing from them (as in fact he did) the question whether the attempt had been abandoned before the firing of the fatal shots. What he told them in effect was that if they once found that the attempt to rob was made, they had no choice but to find that that attempt continued up to the time of the shooting. Since there was evidence on which the jury might have found that the attempt, if made, had been abandoned, the verdict could not stand.

1957

THE QUEEN v. CAREY

APPEAL from the judgment of the Court of Appeal for British Columbia (1), setting aside the conviction of the respondent for murder, and ordering a new trial. Appeal allowed.

William A. Schultz, Q.C., for the appellant.

Norman D. Mullins, for the respondent.

The judgment of Kerwin C.J. and Taschereau, Fauteux and Abbott JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the Attorney-General for British Columbia from a decision of the Court of Appeal for that Province (1) setting aside the conviction of murder of the respondent Carey and directing a new trial. The appeal is based upon the grounds of dissent of Mr. Justice Sidney Smith.

Carey and Gordon were jointly indicted for the murder of police constable Sinclair on December 7, 1955, at the city of Vancouver, the allegation being that Gordon fired the bullet, or bullets, which killed Sinclair and that Carey "in complicity with the said Joseph Gordon, was a party with the said Joseph Gordon to the said crime of murder". A motion by Carey for a separate trial was denied. Gordon called witnesses and testified himself in an endeavour to prove an alibi but Carey elected to call no witnesses and did not go into the witness-box. At the conclusion of a very lengthy trial both accused were found guilty. Gordon's conviction was affirmed by the Court of Appeal and his application for leave to appeal to this Court was dismissed.

In his factum Mr. Mullins, counsel for the respondent, set forth the three matters of dissent to which the Crown was restricted in its appeal as:

(1) misdirection by the trial judge "with respect to preparation as opposed to attempt";

(2) misdirection by the trial judge "in failing to distinguish between intent to rob generally and intent to rob Watkins Winram";

(3) misdirection by the trial judge "with respect to abandonment".

Mr. Schultz, for the Crown, may have put the points of dissent in a different form but the substance is the same.

(1) (1956), 20 W.W.R. 49, 116 C.C.C. 252, 25 C.R. 13.

So far as the events of December 7, 1955, are concerned, the main, but not the only, evidence against the respondent depended upon the testimony of Mr. and Mrs. Nielson and of one Goll; and also upon the testimony, apparently given unwillingly, as might be expected, of (a) Noreen Lewry, who was living with the respondent although not married to him, and (b) Robert Smith, a friend of both accused who accompanied them, together with Mrs. Lewry and the six weeks' old child of her and the respondent, to the vicinity of the fatal shooting. There was evidence that, within the meaning of subs. (2) of s. 21 of the *Criminal Code,* 1953-54 (Can.), c. 51, Gordon and the respondent formed an intention in common to carry out an unlawful purpose (*i.e.,* to rob with violence) and to assist each other therein. There was also evidence that in carrying out that common purpose Gordon committed the offence of murder and that the respondent knew or ought to have known that murder would be a probable consequence of carrying out the common purpose. Mr. Justice Davey considered that the trial judge erred in omitting reference to the suggestion that Gordon had a strong personal motive to kill and that, therefore, the shooting was not part of a common purpose. While it is necessary for a trial judge to put to the jury any defence which is open, I am unable to find in the present case any evidence to found such a contention.

About 5.30 o'clock in the afternoon of December 7, 1955, Gordon arrived at the premises where the respondent lived with Mrs. Lewry and their child. The respondent and Mrs. Lewry had just finished eating a meal when Gordon arrived. Shortly thereafter the respondent left his suite and during his absence Gordon picked up a duster, tied a knot in the top, and placed it over his head and Mrs. Lewry cut out two eyeholes, thereby making a mask. Gordon stated to Mrs. Lewry that he needed $2,000 by the afternoon of December 8, on which day he expected to be committed for trial on a bank robbery charge and that he intended to obtain the $2,000 by armed robbery. Gordon had in his possession a .38-calibre Webley revolver and wrapped it in the mask and placed both in one pocket of his overcoat. A .45-calibre semi-automatic pistol, which it was proved had been in the possession of the respondent in the previous month, appeared on December 7 on the kitchen table in

1957

THE QUEEN v. CAREY

Kerwin C.J.

the respondent's premises, although Mrs. Lewry testified that she did not know how it had got there. Upon the respondent's return to the kitchen Gordon took the .45 pistol from the table and put it in the other pocket of his overcoat.

Mrs. Lewry, the baby and the respondent left the latter's premises in an automobile driven by Gordon. On the trip Mrs. Lewry noticed an automobile driven by Robert Smith, who left his car and entered Gordon's. She had already testified that it had been agreed between her and the accused that they should go to a friend's house for dinner in Burnaby, but that would be to the east, whereas the car proceeded west. It stopped at Skilling Brothers fuel office. Whatever may be the description of the attention paid to those premises Gordon drove farther west and parked his car under the new Granville Street bridge about 200 feet directly west of the rear of Watkins-Winram fuel office, the front of which faced Granville Street. Before parking the car Gordon had driven north on Granville Street past the front of the Watkins-Winram premises, which were lighted and wherein two employees working in the office could be seen, together with a vault and a safe.

Mr. and Mrs. Nielson saw two men, who the jury might believe were Gordon and the respondent, examining the rear of the Watkins-Winram premises. One of the men drew on a pair of white gloves and the other man was seen to perform movements which indicated that he was doing the same thing. One of the men placed a mask on his head. Two men proceeded north on what is described as the north-south lane to Third Avenue. It was as a result of a telephone message by Nielson that the police were alerted and police constable Sinclair was shot and killed. After the shots which killed Sinclair were fired, the respondent and Gordon ran in different directions. Gordon's car which, in the meantime, had been moved by Smith to a different location, but still generally speaking at the rear of the Watkins-Winram premises, was, with Mrs. Lewry and the infant as passengers, driven by Smith from its last position to Fourth Avenue where it stopped and shortly thereafter was entered by the two accused. The car then proceeded to the north-west corner of Fifth Avenue and Fir Street where the two accused alighted from the car and ran in different directions.

Before entering an apartment building on west Fifth Avenue the respondent threw the .45-calibre semi-automatic pistol on the lawn of adjoining premises, whence it was recovered within a half-hour and bore no fingerprints. Gordon was taken into custody that same night but the respondent was not located until a long time later in Toronto, Ontario.

The evidence was overwhelming and the trial judge, in a charge that was necessarily lengthy, left it to the jury to find, as regards the respondent, what was necessary in order to substantiate his guilt, including an intention in common with Gordon to carry out an unlawful purpose of robbing with violence, in general. In the course of his able argument Mr. Mullins contended that the words in subs. (2) of s. 21 of the *Criminal Code* "in carrying out the common purpose" should be construed in the same way as the words in subs. (1) of s. 24, "does or omits to do anything for the purpose of carrying out his intention", and should be related to subs. (2) of s. 24:

> The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

It is not necessary to determine that point because, even if the argument be sound, the evidence discloses that in carrying out the common purpose of robbery much more than mere preparation took place and in fact that there was an attempt. The charge to the jury was sufficient upon the question of "carrying out the common purpose" of robbery in general.

Because of the fact that the accused and Gordon were being tried jointly and because of Gordon's defence of an alibi, it was necessary that the trial judge should deal with the charge against the two accused in a comprehensive manner. As to point no. 2, that he failed to distinguish between intent to rob generally and the intent to rob Watkins-Winram, some members of the Court of Appeal considered that in his charge the trial judge after itemizing a number of events dealt with the matter in such a way as to confuse the jury. In my opinion, with respect, this is not so and the trial judge did in fact distinguish between the two cases. As to the carrying out of the intention to rob Watkins-Winram,

1957

THE QUEEN v. CAREY

Kerwin C.J.

the trial judge told the jury that in accordance with subs. (2) of s. 24 of the Code, he had determined as a matter of law that certain facts relied upon by the Crown were not too remote to constitute an attempt to commit the offence of robbing Watkins-Winram with violence. Following the listing of the events referred to, the trial judge said this, which is particularly objected to: "It is not necessary that you find positively all but at least if you find substantially all these facts have been established beyond a reasonable doubt, then my instruction to you is that there was an attempted robbery." In my opinion the subsection requires the presiding judge to determine as a matter of law the point mentioned but that determination must be in substance a finding of fact. Mr. Justice Coady considered that this would invade the province of the jury and referred to a number of cases, none of which, however, in my view, so holds. In *Regina v. Miskell* (1), Hilbery J. stated:

> Once it is decided by the court that what the accused has done can be an attempt to commit the crime, it is a question of fact for the jury whether what was done should be decided to have been an attempt.

Even if that be so at common law, it is not the position under subs. (2) of s. 24 of the *Criminal Code*. The jury must, of course, decide the question of intention and consider any other defence raised on behalf of the accused, but the question of attempt or no attempt is for the judge. His function is not merely to decide in a given case that there is no evidence of an attempt and, therefore, withdraw that issue from the jury, but also to decide as a question of fact and a question of law whether what was done, if found by the jury, was an attempt. There is nothing inconsistent with this in the decision in *Henderson v. The King* (2), or in any of the other cases referred to. Here it was left to the jury to determine whether the facts had been proved beyond a reasonable doubt. It is said that the effect of his charge was to withdraw from the jury the consideration of all the other circumstances but upon a careful reading of the charge, in which at several points it was made clear that the jury was the arbiter of facts, in my opinion this is not so.

(1) [1954] 1 W.L.R. 438 at 440, [1954] 1 All E.R. 137 at 138-9, 37 Cr. App. R. 214 at 217.

(2) [1948] S.C.R. 226, 91 C.C.C. 97, 5 C.R. 112.

As to the third ground of dissent, Mr. Justice Coady considered that there was some evidence for the jury to consider, assuming the intention and attempt to rob Watkins-Winram was established, that the two accused were not continuing their attempt but had abandoned it. With respect, I can find no evidence of abandonment. Even if there be such evidence, I am satisfied that it was left to the jury to find whether it had been proved beyond a reasonable doubt that the common intention either to rob generally or to rob Watkins-Winram persisted down to the time of the firing of the shots by Gordon. The last sentence of the following extract is relied upon as indicating that this point was removed from the consideration of the jury:

> Then counsel takes another position: He says, "If you think I was there and this venture was more than a preparation, was actually an attempt, then we abandoned it; we didn't go through with it, and if we have abandoned it, then the section won't apply, because we were not engaging in attempting to commit a robbery." Well, that is a matter for you. The only evidence we have on that point is that two men were seen, one with the mask, and then after they had looked in the window of Watkins-Winram they came around the corner and along Third Avenue. We have no evidence except the gun shot after that, two bullets. If you conclude there was an attempt, we have no evidence that it was ever abandoned; at least, I think that is the situation; it is a matter for you. But, to be frank, I could not quite follow Mr. LePage in his argument that there was an abandonment. I can recall no evidence that there was—if there was an attempt, there was no evidence that that attempt was abandoned.

However, in view of the earlier part where the judge told the jury that it was a matter for them and in view of the many other places in the charge where he made it clear that they were the judges of the facts, my conclusion is that the matter was not withdrawn from their consideration.

When the trial judge was dealing with the defences of provocation, accident and self-defence he left no doubt that he was withdrawing them from the jury, as is shown by the following:

> I accept the responsibility of directing you that there is no evidence here that the offender acted in the heat of passion caused by sudden provocation. Now, if there was some evidence I would have to leave the matter with you. If I am convinced that there is no evidence, then I take the responsibility, and I do take the responsibility, there was no provocation. I likewise direct you that there is no evidence that the shooting was done by accident or in self-defence. You are relieved from considering provocation, accident and self-defence.

1957

THE QUEEN v. CAREY

Kerwin C.J.

The jury could not fail to be impressed by a comparison between that language and what was said by the trial judge in connection with the point of abandonment.

It was argued that the opening by counsel for the Crown indicated that the Crown was proposing to prove only that the common intention was to rob Watkins-Winram and not to rob generally and that if that had not been understood the accused might have been put in the witness-box. When one reads the indictment and the opening address of Crown counsel it is impossible to say that the scope of the case alleged against the respondent was restricted.

Mr. Mullins, as he was entitled to do, referred to the following additional points which had been raised by him on behalf of the respondent before the Court of Appeal but which were not dealt with by the members of that Court, in view of the disposition made of the appeal:

(a) *Comment on the character of the accused.* None of the matters referred to in this heading appear to me to have any substance.

(b) *Comment on the failure of the accused to testify.* Having considered the extracts relied on in connection with the entire charge, I am of opinion that there was no such comment.

(c) *Misdirection by twisting, misinterpretation, and misconception of evidence.* I can find no evidence of this in the charge of the trial judge. If there was any slight error as to what had been said by any of the witnesses, the trial judge made it abundantly clear that the members of the jury were to rely upon their own recollection as to the evidence and he pointed out that in case of any question arising, reference could be had to the notes of the reporter.

(d) *Misdirection by deprecating and rebutting defence submissions and failing to put the defence as fully and fairly as the Crown's case.* I can find no basis for this objection.

The appeal should be allowed, the order of the Court of Appeal set aside and the conviction of the respondent restored.

RAND J.:—I agree generally with the reasons and conclusions of the Chief Justice, but in the particular circumstances I think it desirable to state in my own words the considerations which to me seem controlling.

Mr. Mullins contended that the prosecution had, on opening the case, bound itself to the view that both Gordon and Carey, in carrying out their purpose, that is, to rob Watkins-Winram, had been guilty of an attempt to commit that offence. As a result, it was said, of having taken this position, the accused was not called as a witness and, on the footing that attempt had not been reached, the Crown could not now urge that the death could be inferred as a probable consequence of a general purpose to rob.

I find it unnecessary to examine this contention. I will assume, though I do not accept it, that the Crown is so bound but for the reasons which follow the point ceases to be material.

The ground on which Davey J.A. proceeded was based upon the absence in the charge of an adequate distinction between the intent to reconnoitre with or without an intent to rob generally, and the intent specifically to rob Watkins-Winram, and the relation of that failure both to the question of attempt and of murder being a probable consequence under s. 21(2). He seems, also, to have assumed the Crown to have committed its case to the specific intent and that the acts done amounted to an attempt. Thus he says (1):

> If there had been only an intent to rob such likely victim as the prisoners might find during the reconnaissance, and that intent had not crystallized into an intention to rob Watkins Winram Ltd.—and it was open to the jury to so find—it would necessarily follow that there had been no atempt to rob Watkins Winram Ltd. upon which the Crown based its case against Carey, for without such intent there could be no attempt to carry it out as required by s. 24(1).

When Manson J., in considering s. 24, stressed the intent to commit an offence, he made it abundantly clear that what he meant was the offence of robbing Watkins-Winram; and his finding that an attempt had been made was made equally clearly to depend upon that crystallized and accompanying intent. The other interpretation of the facts, that, in the critical period and circumstances, there was mere reconnaissance for some future purpose, was also brought out plainly and distinctly. That was the substantial defence and to imagine the jury to have lacked full appreciation of it would be doing much less than justice to the intelligence of its members. Limited to the specific

(1) 20 W.W.R. at pp. 57-8.

1957

THE QUEEN v. CAREY

Rand J.

sense of intent and to the attempt, what was given the jury on the question of probable consequence under s. 21(2)—and it was given on no other basis—was in fact more favourable to the accused than seems to have been called for, because it is by no means clear that s. 21(2) is restricted to cases where an attempted offence has been reached. Assuming, as I think to be the case, the charge in relation to intent in both aspects to have been unobjectionable, the finding by Manson J. that the acts done did amount to an attempt cannot, in my opinion, be successfully challenged.

Coady J.A. comments first upon the statement in the opening address

> . . . that it was a part of the common intention to overcome all resistance by force of arms either whether that resistance was encountered outside the premises or inside the premises and to prevent arrest or detention by the police by shooting if necessary.

It is said that no evidence relating to such an intention was offered; nothing direct, certainly, but that it could not have been found as an inference from the total circumstances is, in my opinion, untenable.

He then proceeds to consider the manner in which the matter of attempt was dealt with and he concludes that the trial judge improperly took that question from the jury. What the latter did was to summarize the material facts with the direction that if they were found against Carey and his acts had been carried out with the intent to rob Watkins-Winram, they constituted an attempt to do that. It is said that other matters, not specified, but relevant to the intent, were in effect excluded. The interpretation of the main or significant facts as well as the intent obviously had to be determined in the light and background of the entire situation. That was reviewed in its details and their relevance to the determinative facts was obvious. Under s. 24(2) it is for the judge to rule whether the act "is or is not mere preparation", and having ruled that it was not, it necessarily followed here that there was an attempt. What the judge determines is the point, in the line of events between the first motion towards a criminal act and its commission, at which preparation ceases; that done, in such circumstances as we have here, I know of no intervening area between that stage and attempt. The acts must be done in carrying out the purpose, admittedly, but no question of that arises here

where the intent to rob specifically was required and has been found: with that intent accompanying them, there could have been no other object than the specific purpose in doing them. The direction in this respect is what is given every day to juries that if they find certain facts, including intent, their verdict will be so and so.

The final submission was that if there had been an attempt it had been abandoned. I cannot agree that that question was withdrawn from the jury. What Manson J. said was that, in his opinion, there was no evidence of it—a view in which I concur—but that it was for them, the jury, to decide. The last remark in the paragraph quoted by my brother Cartwright simply repeats what had previously been said and was expressly qualified to be the trial judge's opinion only.

Unnecessary complication seems to have been injected into the case. The broad features are simple and it tends only to confusion to treat them as being subtly and intricately involved. The second essential question, whether what happened was a probable consequence in the carrying out of the common and unlawful purpose of robbing Watkins-Winram, was left with the jury on these, among other, significant matters of evidence: that the two men had been together alone for some minutes shortly after Gordon entered Carey's home, that they had passed the front of the office of Watkins-Winram on Granville Street through the window of which a safe and vault were visible, that together, after parking their car a short distance to the west, they had reached the scene of the alleged purpose in the rear of the premises, that gloves were put on, that one at least was armed with a revolver, that they looked through a rear window, that the accused had remained near a rear door for several minutes with a hood on his head though not drawn down over his face while Gordon went a short distance northerly toward adjoining premises, that upon his return they walked northerly together on a lane to Third Avenue and turned east toward Granville Street on which, as mentioned, fronted the Watkins-Winram premises, a direction opposite to that of their car, and that both had fled the point of the shooting. A mask was found on a pile of tires a few feet from that point, and the gun from which the bullet was fired was traced to Gordon who was in possession

1957

THE QUEEN v. CAREY

Rand J.

of it at the time to the knowledge of Carey. On these damaging facts, supported as they were by those going back to the arrival of Gordon at the Carey home, the charge, although susceptible of minor criticism in parts of its order or structure, presented the determinative issues in such a manner as could be grasped adequately by the jury.

I would, therefore, allow the appeal and restore the conviction.

LOCKE J. (*dissenting*):—The charge of murder against the respondent Carey was based upon subs. (2) of s. 21 of the *Criminal Code* which reads:

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

It is not, in my opinion, a necessary element of the offence thus defined that the acts done in carrying out the common purpose referred to are such as to amount to an attempt, within the meaning of that expression in the *Criminal Code*. It was, however, made clear in the opening address to the jury on behalf of the Crown that it was contended that the unlawful purpose was to hold up and rob the premises of the Watkins-Winram company, to overcome any resistance by force of arms, whether that resistance was encountered inside or outside the premises, and to prevent arrest by the police by shooting if necessary and that at the time Gordon and Carey encountered Sinclair the offence of attempted robbery had been committed. In the concluding argument of counsel for the Crown the matter was put rather differently, the unlawful purpose being then stated as that of robbery generally, but it was repeated that an attempt had been or was being made when it was interrupted by the arrival of the police officer.

Counsel for the present respondent contended before the jury that it was an essential element of the offence alleged that there had been an attempt to rob the Watkins-Winram company and that the murder was committed while such attempt was being made and argued that Gordon, who

actually fired the shots which killed Sinclair, was only making a reconnaissance of the premises, presumably with the purpose of robbing them later.

It was necessary under these circumstances that the jury should be charged as to what constituted in law an attempt to commit an offence and it is the manner in which this was done which constitutes one of the two main grounds upon which the Court of Appeal has proceeded in directing that there should be a new trial.

Subsection (1) of s. 24 declares that every one who, having an intent to commit an offence, does anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence. Subsection (2) declares that whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence and too remote to constitute an attempt is a question of law.

Before dealing with ss. 21 and 24 the learned trial judge explained to the jury the provisions of ss. 201 and 202. In so far as the accused Gordon was concerned, it would appear upon the evidence that nothing more was required than to explain s. 201. In Carey's case, however, s. 202 was of vital importance if there had been in fact an attempt to rob, within the meaning of s. 24, and that attempt was continuing at the time the men were intercepted by Constable Sinclair. Carey was shown to have been aware that Gordon carried a loaded revolver and, if the attempt were in progress when Sinclair was shot or if he and Gordon were in flight after attempting to commit the offence of robbery, he would have been a party to the offence defined in cl. (*d*) of s. 202, whether or not he knew that the commission of the offence would be a probable consequence of carrying out the common purpose within subs. (2) of s. 21.

The learned trial judge informed the jury that it was necessary for them to find whether or not there had been an attempt in which Carey was involved and, after saying that an intention to commit the offence of robbery was necessary in order to find guilt, explained the difference between what was mere preparation and what would be in law an attempt. The explanation given was in accordance with that given

1957

THE QUEEN v. CAREY

Locke J.

by Blackburn J. in *Regina v. Cheeseman* (1), and that approved in the judgment of this Court in *John v. The Queen* (2). Thereafter, after reciting a number of the acts of Carey and Gordon before they arrived at the premises of the Watkins-Winram company and while they were there, the learned judge instructed the jury that if they found that substantially all those facts had been established there had been an attempted robbery. He did not include among the facts enumerated the fact that, after whichever of the two men had worn the mask had removed it, they had gone north in the lane and turned east on Third Avenue, a means by which they might have reached the front of the premises, as an act done in the course of the attempt.

With the greatest respect for the learned and experienced trial judge, I think that, for the reasons given by Coady J.A., this really amounted to taking the decision of the question of fact as to whether there had been an attempt from the jury. Whether the actions of Carey and Gordon when they were at the rear of the premises and when they were going east on Third Avenue when they met the police officer were merely to reconnoitre the premises with the view of coming at some later time and robbing the place, or whether they actually intended then and there to attempt to rob, were matters for the jury alone.

I am further in agreement with the majority of the learned judges of the Court of Appeal that the issue as to whether, assuming there had been an attempt, that attempt had been abandoned at the time of the shooting was in effect taken away from the jury. The passage from the charge dealing with this matter is quoted in other reasons to be delivered and it is unnecessary to repeat it. It is true that the learned judge said that the matter was one for the jury, but the question as to whether there was any evidence of abandonment was one of law and for him and not for the jury and, in the passage quoted, the jury was told twice that there was no evidence that the attempt was abandoned. In my opinion, the effect of this would be that the jury would not consider the matter. While the evidence was that when the two men reached Third Avenue they turned

(1) (1862), Le. & Ca. 140 at 145, 169 E.R. 1337 at 1339.
(2) (1888), 15 S.C.R. 384 at 387.

to the east, which was away from the direction in which their waiting car stood, it was at least arguable that by proceeding to the corner and going from there south on Granville Street they could more quickly reach their car than by proceeding west on Third Avenue. In my view, the evidence of abandonment was weak, but there was some, and that was a matter for the jury.

I would accordingly dismiss this appeal.

CARTWRIGHT J. (*dissenting*):—The respondent was tried, jointly with one James Gordon, before Manson J. and a jury on the following charge:

JOSEPH GORDON AND JAMES CAREY stand charged:

THAT at the City of Vancouver, in the County and Province aforesaid, on the seventh day of December, in the year of our Lord one thousand nine hundred and fifty-five, they, the said JOSEPH GORDON and the said JAMES CAREY, unlawfully did murder Gordon Sinclair, contrary to the form of the Statute in such case made and provided, and against the peace of our Lady the Queen her Crown and Dignity, in that, at the place and on the date aforesaid, the said JOSEPH GORDON did in fact fire the bullet or bullets which killed the said Gordon Sinclair and did thereby commit murder, contrary to the Criminal Code, while the said JAMES CAREY, in complicity with the said Joseph Gordon, was a party with the said Joseph Gordon to the said crime of murder.

Both accused were convicted.

A summary of the subsequent proceedings and of the effect of portions of the evidence is given in the reasons of other members of the Court and I shall endeavour to avoid repetition.

In his factum, counsel for the appellant summarizes the errors of law which he alleges are to be found in the reasons of the majority in the Court of Appeal as follows:

It is submitted that the Court of Appeal, the Honourable Mr. Justice Sidney Smith dissenting, erred in holding:—

(1) That the learned trial Judge misdirected the jury in his instructions on "attempt" under section 24(2) of the Criminal Code, when the learned trial Judge directed the jury that if the jury found certain enumerated facts to have been proved beyond a reasonable doubt, then the acts constituted an attempt to commit robbery, as distinguished from mere preparation to commit the offence and too remote to constitute an attempt.

(2) That the learned trial Judge misdirected the jury by instructing the jury that there was an attempt to commit robbery under section 24(1) of the Criminal Code.

(3) That the Appellant's case against the Respondent, under section 21(2), upon which the Appellant chose to go to the jury was (a) that the common intention to carry out an unlawful purpose

1957

THE QUEEN
v.
CAREY

Cartwright J.

was to rob Watkins Winram Ltd. and (b) that murder of Sinclair occurred during an attempt to rob Watkins Winram Ltd., so that the learned trial Judge misdirected the jury on section 24(1) of the Criminal Code by failing to instruct the jury that the jury must find an intent to rob Watkins Winram Ltd. specifically before the jury was required to determine the facts of preparation or attempt under section 24(2), in order to find an attempt to rob Watkins Winram Ltd.

(4) That the learned trial Judge failed to put the theory and evidence of the defence relating to (3) in the manner required by *Azoulay v. The Queen,* [1952] 2 S.C.R. 495.

(5) That the learned trial Judge withdrew from the jury the theory of "abandonment" of an attempt to commit robbery.

(6) That there was any evidence to support the theory of "abandonment" of an attempt to commit robbery.

(7) That the foregoing (1) to (6), inclusive, or any of them, constituted misdirection going to the substance of any vital issue in the case of the Respondent under section 21(2) of the Criminal Code, or misled the jury, so as to constitute a substantial wrong or miscarriage of justice, for which the Respondent should be granted a new trial.

While Sidney Smith J.A. did not deal separately with each of these points, he expressed the view that the charge of the learned trial judge was accurate and adequate; and the right of the Attorney-General to appeal to this Court pursuant to s. 598(1)(*a*) of the *Criminal Code* was not challenged.

After having put to the jury the theory of the Crown that Gordon fired the fatal shots under such circumstances that he was guilty of murder under s. 201(*a*)(i) of the *Code* in that he meant to cause Sinclair's death, the learned trial judge also dealt with s. 202 and in so doing related the terms of that section particularly to the respondent. He said in part:

> Now we pass on to s. 202. That is the section that you would fall back on so far as Gordon is concerned if you had any doubt at all about his guilt under s. 201. Mind you, if you find that Gordon was present and that he fired the shots, then you do not need to worry about anything after 201, it seems to me. It is for you, of course. Gordon would be, I am sure, found to be a person who intended to kill Sinclair. However, he is not the only man who is charged here, and for that reason I want to correlate 202 to the evidence.

The learned trial judge instructed the jury that if Gordon while attempting to commit robbery used a revolver or had it upon his person and the death of Sinclair ensued as a consequence then Gordon was guilty of murder. This instruction was doubtless correct under s. 202(*d*)(i).

When the learned judge came to deal with s. 21(2) he made it plain to the jury that if they found that Gordon and Carey formed a common intention to rob and to assist each other in so doing and, while they were engaged in an attempt to rob, Gordon used a revolver and Sinclair's death ensued as a consequence, then Carey as well as Gordon would be guilty of murder if he knew or ought to have known that the commission by Gordon of murder, as defined in s. 202(*d*)(i), would be a probable consequence of carrying out the common purpose to rob. After reading and rereading the charge I think it most probable that it was on this view of the evidence that the jury proceeded in finding Carey guilty. Certainly this may have been the view on which they proceeded, for they had, in the passage quoted above, been invited to direct particular attention to s. 202(*d*)(i) in considering their verdict as to Carey.

If, as I think probable, the jury were directing their minds to s. 202(*d*)(i) it was of vital importance that they should consider the question whether Gordon caused Sinclair's death while committing or attempting to commit robbery. It is obvious that if the jury concluded that, at the crucial moment, the two accused were still engaged in an attempt to rob they would answer this question adversely to the respondent.

Assuming, without deciding, that the learned trial judge was right in telling the jury that, if they found the list of facts stated by him, they must accept and follow his ruling that both accused had committed the offence of attempted robbery, he was, in my respectful opinion, wrong in withdrawing from them the question whether the attempt had been abandoned before the firing of the fatal shots.

I agree with the conclusion of the majority in the Court of Appeal that the learned trial judge did withdraw this question from the jury. He deals with it in only one passage in his charge, which is as follows:

> Then counsel takes another position: He says, "If you think I was there and this venture was more than a preparation, was actually an attempt, then we abandoned it; we didn't go through with it, and if we have abandoned it, then the section won't apply, because we were not engaging in attempting to commit a robbery." Well, that is a matter for you. The only evidence we have on that point is that two men were seen, one with the mask, and then after they had looked in the window of Watkins Winram they came around the corner and along Third Avenue.

1957

THE QUEEN v. CAREY

Cartwright J.

> We have no evidence except the gun shot after that, two bullets. If you conclude there was an attempt, we have no evidence that it was ever abandoned; at least, I think that is the situation; it is a matter for you. But, to be frank, I could not quite follow Mr. LePage in his argument that there was an abandonment. I can recall no evidence that there was—*if there was an attempt, there was no evidence that that attempt was abandoned.*

It is true that twice in this passage the learned judge tells the jury that it is a matter for them; but, in my opinion, the concluding words which I have italicized would be taken by the jury as the final word of the judge that there was no evidence of abandonment for them to consider and would prevent them from giving any further consideration to the matter.

It appears to me that the learned trial judge told the jury, in effect, that if they once found that the attempt to rob was made, they had no choice but to find that such attempt was continuing at the crucial moment.

I share the view of the majority in the Court of Appeal that on the evidence in the record it was open to the jury to find that if an attempt had been made it had been abandoned and so at the moment the fatal shots were fired the accused were neither committing nor attempting to commit robbery; and, consequently, I agree with their conclusion that the verdict cannot stand.

This renders it unnecessary for me to deal with any of the other matters which were discussed before us.

I would dismiss the appeal.

Appeal allowed and conviction restored, LOCKE *and* CARTWRIGHT JJ. *dissenting.*

Solicitor for the appellant: William A. Schultz, Vancouver.

Solicitor for the respondent: Norman D. Mullins, Vancouver.