HER MAJESTY THE QUEEN .... APPELLANT;

1960 *June 7 Nov. 21

AND

BAPTISTE ROOSEVELT WILLIAM GEORGE .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Robbery with violence—Acquittal on ground of drunkenness rendering accused incapable of forming specific intent to commit robbery—Omission of Crown to raise issue of included offence of common assault at trial—Drunkenness as a defence to a charge of common assault—Mens rea—Criminal Code, 1953-54 (Can.), c. 51, ss. 288, 569(1)(a).

Respondent was charged under s. 288 of the *Criminal Code* with robbery with violence, and was acquitted by the trial judge on the ground that he was so intoxicated as to be incapable of forming the specific intent to commit robbery. In appealing this decision the Crown contended that the trial judge did not consider the included offence of common assault and, in the result, failed to direct himself with respect to the divisibility of the charge laid and to the incidence of drunkenness as a defence to a charge of common assault, as distinguished from a charge of robbery with violence. The appeal was dismissed by the Court of Appeal, and the Crown then sought and obtained the leave of this Court to appeal from that judgment.

Held (Locke J. *dissenting*): The appeal should be allowed, the verdict of acquittal with respect to common assault set aside, and a verdict of guilty of that offence entered.

Per Taschereau and Fauteux JJ.: As provided by s. 569(1)(*a*) of the Code, when the commission of the offence charged, as described in the enactment creating it or as charged, includes the commission of another offence, the charge is divisible, and the accused may be convicted of the offence so included, if proved, notwithstanding that the whole offence that is charged is not proved. *The King v. Wong On* (No. 3), 8 C.C.C. 423; *Rex v. Stewart,* 71 C.C.C. 206, referred to.

In a like situation, the offence included is part of the case which the accused has to meet under the law. The mere omission of the Crown to raise the issue cannot *per se* and without more relieve the trial judge from the duty imposed upon him under the section. The words *"may convict"* give an authority which must be exercised when the circumstances described in the section are present. *Rex v. Bishop of Oxford,* (1879) 4 Q.B.D. 245, applied; *Wexler v. His Majesty The King,* [1939] S.C.R. 350, distinguished.

Contrary to what is the case in the crime of robbery, where, with respect to theft, a specific intent must be proved, there is no specific intent necessary to constitute the offence of common assault. Here the manner in which force was applied by the respondent to his victim was not accidental or unintentional. *Re Beard,* [1920] A.C. 479, referred to.

---

*PRESENT: Taschereau, Locke, Fauteux, Martland and Ritchie JJ.

1960
THE QUEEN
v.
GEORGE

The finding of the trial judge that the accused had not the capacity to form the specific intent to commit robbery did not justify the conclusion reached in appeal that he could not then have committed the offence of common assault.

Per Martland and Ritchie JJ.: Pursuant to s. 569 of the Code the trial judge was under a duty to consider the included offence of assault, and the fact that his report to the Court of Appeal contained a statement "that common assault was not raised by Crown counsel at the trial" is not sufficient ground for concluding that he did not consider this offence.

The duty which rests upon the trial judge to consider all included offences of which there is evidence can, in no way, be affected by the fact that the Crown has omitted to make reference to such offences, and it follows that where the trial judge has wrongly applied the law applicable to an included offence the Crown is not deprived of its statutory right of appeal because of its omission at trial to address the Court on the matter.

The offence of robbery requires the presence of the kind of intent and purpose specified in ss. 269 and 288 of the Code, but the use of the word "intentionally" in defining "common assault" in s. 230(*a*) is exclusively referable to the physical act of applying force to the person of another.

Per Locke J., *dissenting*: The Crown's contention that where a trial judge hearing a criminal charge fails not to deal with, but to consider independently, an offence included in the offence specifically charged, and this is done with the approval of counsel for the Crown, the provisions of s. 584 of the Code may be invoked to again place the accused in jeopardy, should be rejected.

The right of the Crown to appeal, while given in clear terms, may not be exercised in all circumstances, as was decided in *Wexler v. R., supra.* To construe the section differently would mean that accused persons could be subjected to a succession of trials for the same offence on grounds that were not advanced at the first and succeeding previous trials, and which the accused person had not accordingly attempted to meet. *The King v. Miles,* (1890) 24 Q.B.D. 423, referred to.

Although s. 569 imposes a duty upon the judge to consider the included offence of assault, his failure to do so does not render the proceeding defective and a new trial necessary. *The King v. Wong On, supra,* applied; *The Queen v. Bishop of Oxford, supra,* referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Morrow C.C.J. Appeal allowed, Locke J. dissenting.

J. Urie, for the appellant.

E. P. Newcombe and *R. Cleary,* for the respondent.

The judgment of Taschereau and Fauteux JJ. was delivered by

[1] 126 C.C.C. 127.

FAUTEUX J.:—Respondent was charged with robbery with violence and tried by Morrow C.C.J., in the County Court of Cariboo holden at Prince George in the Province of British Columbia. In answer to the charge, the accused raised, amongst others, the issues of identification and drunkenness. At the end of a lengthy hearing, the trial Judge acquitted him and, in doing so, said in part:

(i) *as to identification.*

I have reached the conclusion, therefore, without any doubt, that it was the accused who committed the offence on the night in question.

(ii) *as to drunkenness.*

The law seems to be that in the case of intoxication an accused person can claim that drunkenness need not result in absolute incapacity rendering the accused incapable of awareness of the nature of his physical act, but it is sufficient if there is a degree of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime.

I will be frank and say that this defence of drunkenness in this instance is one that caused me much concern. To me it is very much a border line case. That being so it is my duty to give the accused the benefit of the doubt on the defence of drunkenness that has been set up in my mind.

Having announced the acquittal, the trial Judge then addressed these remarks to the accused:

You are being acquitted not because you didn't do it—there is no doubt in my mind that you did do it—you are being acquitted because I have found that you were so drunk on the night in question that you were unable to form an intent to do it. In that respect, you have been very fortunate, and perhaps fortunate in another respect in that you were not up on a charge of murder, because anyone that tackles a man as you did and the man survives after an attack of double pneumonia, you can only put it down to good luck. Perhaps this will be a warning to you. The next time, you see, you may not be so fortunate. This defence of drunkenness does not excuse a crime, it merely is a defence under the circumstances that we have had during this rather lengthy trial.

In the reasons for judgment, there is nothing expressed or implied with reference to common assault, an offence included in the major offence of robbery with violence.

The Crown appealed this decision to the Court of Appeal for the Province, on grounds stated as follows in the notice of appeal:

(i) The learned trial Judge erred in holding that drunkenness was a defence to said charge at all;

(ii) In the alternative, the learned trial Judge erred in not convicting the respondent of common assault;

(iii) The learned trial Judge misdirected himself on the defence of drunkenness and its effect on question of intent.

1960
THE QUEEN
v.
GEORGE
Fauteux J.

In clear reference to the second ground, the trial Judge, in his report to the Court of Appeal, stated that common assault had not been raised by Crown counsel at the trial. From this statement, the Crown contended in the Court below, one must infer that common assault was not considered by the trial Judge who, in the result, failed to direct himself with respect to the divisibility of the charge laid and to the incidence of drunkenness as a defence to a charge of common assault, as distinguished from a charge of robbery with violence.

In dismissing the appeal[1], O'Halloran J.A., with the concurrence of Bird J.A., rejected as ill-founded the inference drawn by the Crown from the report of the trial Judge and further expressed the view that "if the respondent could not, through the effect of liquor, have the intent to rob, then he could not, because of liquor's effect upon him, have the intent to assault and steal, where as here these two essential ingredients of robbery occurred concurrently and integrated in the robbery as charged."

Sheppard J.A. declared that if, as suggested, the trial Judge omitted to consider the included offence of common assault, such an omission was entirely due to the failure of Crown counsel to raise that issue as part of the case to be met by the accused. Assimilating such a situation to the one considered in *Wexler v. His Majesty the King*[2], he concurred in the dismissal of the appeal.

The Crown then sought and obtained leave of this Court to appeal from this judgment. As stated in appellant's factum, the questions submitted for determination are:

1. Whether or not evidence of drunkenness falling short of insanity can be used as a defence not only to negative the capacity of the accused to form a specific or special intent, but also to negative the ordinary mens rea which is a constituent of all crime.

2. Whether or not the Court of Appeal should substitute a conviction for the included offence of common assault, or order a new trial with respect thereto, when Crown counsel at the trial of the accused did not raise the issue of the accused's capacity to commit the included offence of common assault.

That the trial Judge did not consider the included offence of common assault is, in my view, the reasonable inference flowing from his statement in the report to the Court of Appeal. This is specially so when this statement, made in

[1] 126 C.C.C. 127. [2] [1939] S.C.R. 350, [1939] 2 D.L.R. 673.

reference to the second ground raised by the Crown in its notice of appeal, is considered in the light of the reasons given by the trial Judge in support of the acquittal.

In the circumstances of this case, it was the duty of the trial Judge to consider common assault. For when, as in the present case, the commission of the offence charged, as described in the enactment creating it or as charged, includes the commission of another offence, the charge is divisible, and the accused may be convicted of the offence so included, if proved, notwithstanding that the whole offence that is charged is not proved. The law and the jurisprudence in this respect are clear. Section 569(1)(*a*) Cr. C. reads as follows:

569. (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

(*a*) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved, or

See *The King v. Wong On (No. 3)*[1]; *Rex v. Stewart*[2].

In a like situation, the offence included is part of the case which the accused has to meet under the law. The mere omission of counsel for the Crown to have raised the issue cannot *per se* and without more relieve the trial Judge from the cardinal duty imposed upon him under the section. This is not a civil but a criminal case. The words *"may convict"*, appearing in the opening phrase thereof, give an authority which must be exercised when, as in this case, the circumstances described in the section are present. In *Reg. v. Bishop of Oxford*[3] it was held that

so long ago as the year 1693 it was decided in the case of *R. v. Barlow,* that when a statute authorizes the doing of a thing for the sake of justice or the public good, the word "may" means "shall" and that rule has been acted upon to the present time . . . .

This proposition was relied on in *Welch v. The King*[4] where, at page 426, this Court said:

For new and extraordinary would be a rule of construction stating that, being empowered to make an order required by justice, a Court of justice would be free to refrain from making it when the occasion to do so arises.

[1] (1904), 8 C.C.C. 423 at 437, 10 B.C.R. 555.
[2] 71 C.C.C. 206, [1938] 3 W.W.R. 631.
[3] (1879), 4 Q.B.D. 245 at 258.
[4] [1950] S.C.R. 412, [1950] 3 D.L.R. 641.

1960
THE QUEEN
v.
GEORGE
Fauteux J.

With deference, the decision of this Court in *Wexler v. His Majesty the King, supra,* has no application in the matter. The question of divisibility did not arise in that case. What the Court decided was simply that subsection 4 of section 1013 Cr.C. was not intended to confer jurisdiction upon an appellate court to set aside a verdict of acquittal and so entitle the Crown to an order for a new trial for the purpose of presenting an entirely new case against the accused. Furthermore, the circumstances which gave rise to that decision are entirely different from those present in this case. As stated by Sir Lyman Duff, C.J., at pp. 351 and 352:

> The case presented by the Crown was that the appellant had intentionally shot the deceased Germaine Rochon with the intention of killing her. The defence relied upon the testimony given by the appellant himself. It was agreed by both counsel for the Crown and for the defence, and the learned trial Judge so instructed the jury, that if they believed the account given by the accused he was entitled to be acquitted. I quote the words of the learned judge in which he summed up the whole matter at the request of counsel for the defence after the jury had retired and had been recalled:
>
> > The COURT: Gentlemen, I have been asked by the defence attorneys, to give a further explanation on a certain point. I have told you that, if you are satisfied with the explanation given by the accused, that the shooting was an accident, that he was entitled to an acquittal, but I must add—and I think I did—I must add, even on that evidence, he is entitled to the benefit of the doubt; that is, if you are not reasonably sure that his explanations are not true, that you must give him the benefit of the doubt and acquit him.
> >
> > That is, the accused is entitled to the benefit of the doubt on the entire evidence. You must be reasonably sure that he has committed the offence before finding him guilty.
>
> We are left in no doubt that this instruction by the learned trial judge was accepted as satisfactory by counsel both for the Crown and for the accused and that it correctly formulated the single issue of fact which both counsel put before the jury as the sole issue upon which it was their duty to pass.

In the present case, the record does not indicate any agreement between counsel, or any suggestion that robbery was the only issue or that common assault which, under the law, was part of the case that the accused had to meet, was excluded. Nor was there any occasion for counsel to approve or disapprove the manner in which the trial Judge directed himself. The *Wexler* case, *supra,* is no authority for the proposition that the mere omission of the Crown to raise the issue of common assault amounted to an approval of

the trial Judge's failure to direct himself in the matter or to a circumstance relieving him of the duty he had under s. 569(1)(*a*).

It must then be held that the failure of the trial Judge to consider common assault amounted to non-direction.

It follows that the appeal of the Crown should have been allowed, unless it be shown by respondent that, but for this error, the verdict would necessarily have been the same.

This indeed is the view which appears to have been reached by O'Halloran and Bird JJ.A., who, as above indicated, said in substance that if, as found by the trial Judge, the accused did not, owing to drunkenness, have the capacity to form the specific intent required as a constituent element of the crime of robbery, he could no more, for the same reason, have had the intent to assault and steal.

With deference, I do not think that this conclusion legally follows from the premises upon which it rests.

In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.

Contrary to what is the case in the crime of robbery, where, with respect to theft, a specific intent must be proved by the Crown as one of the constituent elements of the offence, there is no specific intent necessary to constitute the offence of common assault, which is defined as follows in s. 230 Cr.C.:

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

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

(*b*) he attempts or threatens, by an act or gesture, to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has present ability to effect his purpose.

1960
THE QUEEN v. GEORGE
Fauteux J.

The word "intentionally" appearing in s. 230(*a*) is exclusively related to the application of force or to the manner in which force is applied. This, indeed, is also made clear in the French version, reading:

> 230. Commet des voies de fait, ou se livre à une attaque, quiconque, sans le consentement d'autrui, ou avec son consentement, s'il est obtenu par fraude,
>
> *a*) *d'une manière intentionnelle,* applique, directement ou indirectement, la force ou la violence contre la personne d'autrui, ou
>
> *b*) tente ou menace, par un acte ou un geste, d'appliquer la force ou la violence contre la personne d'autrui, s'il est en mesure actuelle, ou s'il porte cette personne à croire, pour des motifs raisonnables, qu'il est en mesure actuelle d'accomplir son dessein.

(The italics are mine).

There can be no pretence, in this case, that the manner in which force was applied by respondent to his victim was accidental or—excluding at the moment, from the consideration, the defence of drunkenness—unintentional.

On this finding of fact, the accused was guilty of common assault unless there was evidence indicating a degree of drunkenness affording, under the law, a valid defence.

The rules for determining the validity of a defence of drunkenness have been stated by the House of Lords in the well known case of *Beard*[1]:

> (i) Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged.
>
> (ii) Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
>
> (iii) Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

The first rule has no relevancy here for there is no pretence that, owing to drunkenness, respondent was insane, even temporarily, at the time of the assault.

The second rule was relevant and indeed properly applied by the trial Judge who entertained a doubt on the question whether the Crown had proved, as part of its case, that the

[1] [1920] A.C. 479 at 500 et seq., 89 L.J.K.B. 437.

accused had, owing to drunkenness, the capacity to form the *specific intent* required in the offence of robbery, i.e., the intent to steal.

However, and consequential to the applicability of the rule of divisibility, the included offence of common assault is to be considered independently of the major offence of robbery, and the law as to the validity of a defence of drunkenness has to be related to that particular included offence.

Hence, the question is whether, owing to drunkenness, respondent's condition was such that he was incapable of applying force intentionally. I do not know that, short of a degree of drunkenness creating a condition tantamount to insanity, such a situation could be metaphysically conceived in an assault of the kind here involved. It is certain that, on the facts found by the trial Judge, this situation did not exist in this case.

The accused was acquitted of the offence of robbery, not on the ground that he could not have applied force intentionally, but because of the doubt entertained by the trial Judge on the question whether he had the capacity to form the specific intent required as a constituent element for the offence of theft.

In these views, the finding of the trial Judge that the accused had not the capacity to form the specific intent to commit robbery did not justify the conclusion reached in appeal that he could not then have committed the offence of common assault; nor is it shown that, had the trial Judge considered common assault, the verdict would necessarily have been the same.

In these circumstances, the Court of Appeal should have allowed the appeal from the acquittal and should have proceeded to make an order pursuant to its authority under s. 592(4)(*b*), to wit, either enter a verdict of guilty with respect to the offence of which, in its opinion, formed in the light of the law applicable in the matter, the accused should have been found guilty but for the error in law, and pass a sentence warranted in law, or order a new trial.

Under section 600 Cr. C., this Court is given the authority to make any order that the Court of Appeal might have made. At the hearing before this Court, it was intimated

that should the appeal of the Crown be maintained, this case should be finally disposed of, if possible, and that in such event, respondent could appropriately be given a suspended sentence.

Being of opinion that the accused should have been found guilty of common assault, had that offence been considered in the light of the law applicable to the facts of this case, I would maintain the appeal, set aside the verdict of acquittal with respect to common assault and enter a verdict of guilty of that offence. Prior to his acquittal in the Court below, respondent has been incarcerated during a number of weeks. It would appear more consonant with the representations made with respect to sentence, to sentence respondent to the time already spent by him in jail; and this is the sentence that I would pass.

LOCKE J. (*dissenting*):—This is an appeal by the Crown pursuant to leave granted by this Court from a judgment of the Court of Appeal for British Columbia, which dismissed an appeal from the acquittal of the respondent by His Honour Judge Morrow, Judge of the County Court Judges' Criminal Court for the County of Cariboo, on a charge that:

> He did on the 8th day of February, 1959, at the City of Prince George, in the County of Cariboo, Province of British Columbia, unlawfully and by violence steal from the person of Nicholas Avgeris the sum of Twenty-two dollars, contrary to the form of Statute in such case made and provided.

The charge appears to have been laid under the provisions of s. 288 of the *Criminal Code*. The evidence disclosed that the respondent, an Indian, had gone on the afternoon of the day in question to the home of Avgeris, a man 84 years of age who apparently purchased furs, and was informed that the latter would not purchase a fisher skin which the respondent offered for sale. Later that night, or early the next morning, the respondent returned to the home of Avgeris demanding money, beating him severely with his fists, breaking his nose and causing other grievous bodily injuries and obtaining a sum of $22. According to Avgeris, the respondent, in addition to beating him, threatened to kill him unless he gave him money and wrenched the telephone in the house from the wall.

The defence advanced on behalf of the respondent was that he had been drinking heavily during the day, apparently following the first occasion that he went to the house of Avgeris, and that this reduced him to such a state that he was unable to form the intent of committing the offence charged against him. At the conclusion of the hearing the learned trial judge acquitted the accused, saying that while he was satisfied that he had committed the offence he was being acquitted because:

> I have found that you were so drunk on the night in question that you were unable to form an intent to do it.

While two questions of law were raised in the factum filed on behalf of the Crown, only the second of these was argued before us. This was expressed in the following terms:

> Whether or not the Court of Appeal should substitute a conviction for the included offence of common assault, or order a new trial with respect thereto, when Crown counsel at the trial of the accused did not raise the issue of the accused's capacity to commit the included offence of common assault.

While the question, therefore, as to whether the learned County Court judge was right in acquitting the respondent of the offence charged on the ground above stated is not questioned, some reference should be made to the evidence. The only account of what had occurred was that given by Avgeris who described the severe beating he had received before he gave his attacker the sum of $22. He was, however, unable to identify the respondent. The latter, however, after his arrest gave two statements to the Royal Canadian Mounted Police. In the first of these, which appears to have been expressed in the language employed by the respondent, he said that he had been drinking heavily and did not remember where he had gone but that he had gone to a house and remembered hitting a man. In the second statement he described in more detail his movements on the day in question, saying that he had brought a fisher fur from Summitt Lake and had gone to a fur buyer and tried to sell the fur to an old man who came to the door and who said he did not want to buy it. After describing the drinking he had done after this, he then said:

> Then I blacked out and the next thing I remember I was in a house. It was the house I was at in the afternoon where the fur buyer lived. I remember hitting a man in this house. I was hitting him with my fists.

1960
THE QUEEN
v.
GEORGE
Locke J.

I had mitts on. The person I was hitting was old and I think he was wearing a kimona. I think it was the fur buyer I had talked to in the afternoon. I remember seeing the same furniture in the house then as I had seen in the afternoon. Then I don't remember anything.

The constables by whom these statements were taken swore that they were made voluntarily, that the respondent had been duly warned and that no promises or threats had been made to induce him to make the statements, and the learned County Court judge admitted both of them in evidence. They had both been signed by the respondent.

While the first statement had been couched in the language of the respondent, the second was in the language of the police officer who took the statement, being his interpretation of what the respondent had said. The respondent did not deny having signed the statements but denied having said that he remembered hitting the man and said that the police had told him to sign the statement. The learned judge apparently did not believe this but, while holding the second statement admissible in evidence, said that he considered that, as it was not in the language of the prisoner but of that of the police officer, he should not attach any weight to it.

Section 569 of the *Criminal Code* reads in part:

A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

(*a*) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved.

Section 288 of the *Criminal Code*, so far as relevant, reads:

Every one commits robbery who

(*a*) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property,

(*b*) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person.

That violence was used for the purpose of extorting and stealing money from Avgeris was proved and this upon the evidence involved an assault within the meaning of that term in s. 230 of the *Criminal Code*, and an assault occasioning bodily harm within s. 231(2).

In the reasons for judgment delivered by O'Halloran J.A., with whom Bird J.A. agreed, that learned judge said that it followed rationally in the circumstances that the judge must also be deemed to have found that the respondent was equally incapable, for the same reason, of having an intent to commit an assault and that if he could not have the intent to commit robbery he could not have the intent either to assault or to steal, and did not say that he disagreed with this conclusion.

The offences described in subss. (*a*) and (*b*) of s. 288 of the Code include the offence of assault described in s. 230 and it was, in my opinion, the duty of the learned trial judge to consider this offence upon the hearing of the charge of robbery with violence. In view of the severity of the injuries inflicted upon Avgeris by the brutal beating to which he was subjected, it is clear that George might properly have been charged with assault occasioning bodily harm under s. 231. That had not been done and that offence is not an included offence within the meaning of s. 569. In respect of the offence charged and the offence of assault, it was necessary to prove that force was applied intentionally and in the case of the charge under s. 288 that it was done with intent to steal, and the case of the Crown has been argued on the footing that it is only the latter question that was considered by the learned judge in arriving at the conclusion that the prisoner should be acquitted.

It is not made clear in the reasons for judgment delivered at the trial that the learned judge had not considered the included offence and O'Halloran and Bird JJ.A. were of the opinion that it was to be assumed that he had done so. They do not, however, mention the judge's report referred to by Sheppard J.A. This is required by s. 588(1) of the Code. The report is not in the case and the only information we have relating to it is in the reasons of Sheppard J.A. who says that it "states that common assault was not raised by Crown counsel at the trial." In my opinion, the proper inference to be drawn from this is that the trial judge did not consider the question of common assault and we should deal with the appeal on that footing.

1960
THE QUEEN
v.
GEORGE
Locke J.

The effect of the acquittal extended to both offences and the basis of the appeal taken by the Attorney-General to the Court of Appeal of British Columbia under the provisions of s. 584 of the Code, in so far as the included offence of common assault was concerned, was that the learned judge had not considered whether or not the accused was intoxicated to such an extent that he was incapable of forming the intent to assault Avgeris. The appeal proceeded, of necessity, on the footing that the accused had been acquitted of the charge.

The decision to be made in these circumstances is of general importance in dealing with the Crown's right of appeal under s. 584 of the Code. That right was first given by the amendment of s. 1013 of the *Criminal Code* effected by s. 28 of c. 11 of the Statutes of 1930. The long-standing principle of the common law that was affected by this enactment was stated by Hawkins J. in *The King v. Miles*[1] in the following terms:

> Where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence.

In Hawkins' Pleas of the Crown, vol. 2, p. 515, it is stated:

> The plea of autrefoits acquit is grounded on this maxim that a man should not be brought into danger of his life for one and the same offence more than once.

The right of appeal thus given to the Attorney-General is a departure from this long-established principle of the common law. The appeal is on a question of law alone. The question of whether George was at the time of the commission of the offence capable of forming the intent to assault Avgeris was a question of fact and not of law. The trial judge did not consider it and this was obviously due to the fact that he was not asked to do so by counsel for the Crown and, apparently, overlooked the fact that the offence of common assault was included in the charge laid under s. 288.

[1] (1890), 24 Q.B.D. 423 at 431, 59 L.J.M.C. 56.

Had the matter been tried before a jury, it would clearly have been the judge's duty to have instructed them that they were to consider not merely the offence of robbery with violence, but also that of common assault. The question, and indeed the only question, that arises on this appeal is whether in these circumstances the Crown may ask that the accused be again placed in jeopardy.

Sheppard J.A. considered that the question as to whether a new trial should be ordered was affected by the decision of this Court in *Wexler v. R.*[1]. In *Wexler's* case the charge was murder. The defence was that the shooting was the result of an accident. The evidence of the accused was that at the time in question he had intended to commit suicide and informed Rochon, the woman who was killed, of his intention to do so: that she had seized hold of the revolver to prevent this and that while they were struggling it had accidentally discharged, killing her. The case for the Crown was that the killing of the woman had been intentional and the jury were not charged by the trial judge on manslaughter or upon an issue suggested on appeal that, as upon his own admission the accused was in the course of committing the unlawful act of suicide, the killing of the woman was murder. The jury acquitted the accused but this verdict was set aside on appeal to the Court of King's Bench and a new trial ordered. On the appeal to this Court the judgment at the trial was restored.

In that case the trial judge had, with the consent of both counsel, charged the jury that if they accepted Wexler's account of what had occurred, they should acquit him. As a matter of law, the jury should also have been charged upon both of the issues suggested in this Court. These were not, of course, included offences within the meaning of that expression in the present section 569, but were offences of which the accused might have been found guilty if the jury reached certain conclusions on the evidence. As all of the judgments delivered show, it was by reason of the course of the trial that the order for a new trial was held to be error.

In the present case, the learned judge dealt only with the charge of robbery with violence with the apparent consent and approval of counsel for the Crown, overlooking

[1] [1939] S.C.R. 350, [1939] 2 D.L.R. 673.

1960
THE QUEEN
v.
GEORGE
Locke J.

the fact that it was his duty to deal with the included offence. In this respect, *Wexler's* case touches the matter and must be considered.

Stated bluntly, the contention of the Crown is that where a trial judge hearing a criminal charge fails not to deal with, but to consider independently, an offence included in the offence specifically charged, and this is done with the approval of counsel for the Crown, the provisions of s. 584 may be invoked to again place the accused in jeopardy. I do not think that it was ever contemplated when the legislation was enacted that it might be exercised in circumstances such as these.

The principle of law referred to by Hawkins J. in *Miles'* case was, prior to 1930, as firmly imbedded in the criminal law of this country as the principle that a man is to be presumed innocent until the contrary is proven in a court of competent jurisdiction. The right to appeal, while given in clear terms, may not be exercised in all circumstances, as was decided by this Court in *Wexler's* case. To construe the section differently would mean that accused persons could be subjected to a succession of trials for the same offence on grounds that were not advanced at the first trial and succeeding previous trials, and which the accused person had not accordingly attempted to meet. The section should not be construed as permitting in criminal prosecutions a course so contrary to this long-established principle and, in my opinion, to the public interest.

In my opinion, the decision in *The Queen v. Bishop of Oxford*[1], does not affect the question. In that case a section of the *Church Discipline Act* (3 & 4 Vict. (Imp.), c. 86) reading that "it shall be lawful" in defined circumstances for the Bishop of a diocese to issue a commission of enquiry, was held to be imperative rather than permissive. The proceedings were instituted by a parishioner for a *mandamus* to the Bishop to compel the issue of a commission to enquire into a charge made against the rector. From this it may be suggested that the word "may" in s. 569 should be construed as meaning "shall" and that, accordingly, the failure of the judge to consider the included offence renders the proceedings defective and a new trial necessary. I agree that the section imposes such a duty

[1] (1879), 4 Q.B.D. 245.

upon the judge but I do not agree that his failure to do so has the suggested consequences. It was also the duty of the judge who presided at the trial in *Wexler's* case to charge the jury that upon the evidence they might return a verdict of manslaughter or a verdict of murder if they were of the opinion that it was while endeavouring to commit suicide that Wexler had fired the shot that killed Rochon. The law is as stated by Hunter C.J. in *The King v. Wong On*[1], in these terms:

> The cardinal duty of the judge in his address to the jury is to define the crime charged and to explain the difference between it and any other offence of which it is open to the jury to convict the accused.

a statement concurred in by Drake and Duff JJ. The trial judge was not relieved of that duty by the views asserted by the counsel at the trial. The duty was not discharged but it was held by this Court that, in the circumstances, an appeal did not lie.

As to the question of fact as to whether the respondent was at the time capable of forming the intent necessary to constitute the crime of assault, I express no opinion in view of my conclusion upon the point of law.

I would dismiss this appeal.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia[2] affirming the acquittal of the respondent by Morrow C.C.J. of the charge that he did "unlawfully and by violence steal from the person of Nicholas Avgeris the sum of Twenty-two Dollars".

The learned trial judge has found that:

> . . . a man of 84, was violently manhandled by an Indian on the date noted in the Indictment . . . as a result of which he was in hospital for a month. During this scuffle he was badly injured, dumped into a bathtub and pulled out again when he agreed to give the Indian what money he had, $22.

and he has also

> . . . reached the conclusion . . . without any doubt that it was the accused who committed the offence on the night in question.

[1] (1904), 8 C.C.C. 423 at 437, 10 B.C.R. 555.
[2] 126 C.C.C. 127.

1960
THE QUEEN
v.
GEORGE
Ritchie J.

The learned trial judge continued:

The first statement perhaps should be considered. It was obviously written in the words of someone who has not had too much education. In his second paragraph after recalling the drinking period, he said: "Then I came to and I was in house and I remember hitting man and I don't remember where I went after."

Notwithstanding these findings, the learned trial judge acquitted the respondent, saying:

To me it is very much a border line case. That being so it is my duty to give the accused the benefit of the doubt on the defence of drunkenness that has been set up in my mind.

After acquitting him, the learned trial judge addressed the accused in part as follows:

You are being acquitted not because you didn't do it—there is no doubt in my mind that you did do it—you are being acquitted because I have found that you were so drunk on the night in question that you were unable to form an intent to do it.

From this acquittal the Crown appealed to the Court of Appeal of British Columbia, and in rendering the decision of the majority of that Court Mr. Justice O'Halloran said[1]:

I am unable with respect to accept Crown counsel's submission that in failing to convict respondent of assault upon this charge of robbery, the learned trial Judge omitted to instruct himself regarding any difference between the intent to commit the robbery and a specific intent to commit assault as one of the essential ingredients of the robbery with which he was charged.

In my judgment, with respect, a sufficient answer thereto is; that having found the respondent so incapacitated by liquor that he could not form an intent to commit the robbery, it follows rationally in the circumstances here, that he must also be deemed to have found that respondent was equally incapable for the same reason of having an intent to commit the assault. If he could not have the intent to commit the robbery, viz. to assault and steal as charged, then he could not have the intent either to assault or to steal when both occurred together as charged; the charge reads "by violence steal".

Mr. Justice Sheppard dismissed the appeal on another ground, namely, that the Crown's case at the trial was confined to the charge of robbery with violence, and that in any event a conviction of assault should not be entered in the Court of Appeal without the accused having been given an opportunity to meet that included offence as the failure to do so in the circumstances of this case may have

[1] 126 C.C.C. at 128.

been due to his having been misled by Crown counsel presenting the case as solely that of robbery with violence. In the course of his decision Mr. Justice Sheppard said[1]:

> The learned trial Judge in his report states that common assault was not raised by Crown counsel at the trial. It, therefore, appears that the case presented by the Crown at the trial was that of robbery with violence; that is the sole offence which the accused was here called upon to meet.

It is to be noted that the report of the learned trial judge was not part of the record before this Court and this observation by Mr. Justice Sheppard is the sole reference made to it in the course of the proceedings.

Leave to appeal to this Court was granted pursuant to an application made on behalf of the Attorney-General of British Columbia. No appeal was taken from the acquittal of the respondent on the charge of robbery and the first five grounds of appeal are, in large measure, devoted to the question of whether a distinction should be drawn "between the degree of drunkenness required to negative the existence of" that intent which is, under the *Criminal Code,* an essential ingredient of the crime of robbery and the degree of drunkenness which is necessary to negative such intent as is an ingredient of common assault.

The sixth ground of appeal was directed to the decision of Mr. Justice Sheppard and the appellant put the question thereby raised in the following terms:

> Whether or not the Court of Appeal should substitute a conviction for the included offence of common assault, or order a new trial with respect thereto, when Crown counsel at the trial of the accused did not raise the issue of the accused's capacity to commit the included offence of common assault.

Pursuant to s. 569 of the *Criminal Code,* the learned trial judge was under a duty to direct his mind to the "included offence" of assault, and in the absence of any evidence to the contrary, I do not think that it should be assumed that he did not do so. Whether or not he properly directed himself as to the effect of drunkenness in negativing the intent to commit this offence is another question.

The report of the learned trial judge is not before us, and, with the greatest respect for those who may take a contrary view, I do not consider that the fact that it contains

[1] 126 C.C.C. at 130.

1960

THE QUEEN
v.
GEORGE

Ritchie J.

a statement "that common assault was not raised by Crown counsel at the trial" is sufficient ground for concluding that the learned trial judge did not consider this offence.

In my opinion, the duty which rests upon the trial judge to direct himself with respect to all included offences of which there is evidence can, in no way, be affected by the fact that the Crown Prosecutor has omitted to make reference to such offences. It follows, in my view, that in a case where the trial judge has wrongly applied the law applicable to such an offence the Crown is not deprived of its statutory right of appeal because of the omission of its agent at the trial to address the Court on the matter.

The fact that the learned trial judge found, as I think he did, that the respondent had "violently manhandled" an old man but was not guilty of assault because he was drunk at the time raises the question of law posed by the appellant as to whether, under the circumstances as found by the trial judge, drunkenness is a valid defence to common assault.

In considering the question of *mens rea,* a distinction is to be drawn between "intention" as applied to acts done to achieve an immediate end on the one hand and acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object on the other hand. Illegal acts of the former kind are done "intentionally" in the sense that they are not done by accident or through honest mistake, but acts of the latter kind are the product of preconception and are deliberate steps taken towards an illegal goal. The former acts may be the purely physical products of momentary passion, whereas the latter involve the mental process of formulating a specific intent. A man, far advanced in drink, may intentionally strike his fellow in the former sense at a time when his mind is so befogged with liquor as to be unable to formulate a specific intent in the latter sense. The offence of robbery, as defined by the *Criminal Code,* requires the presence of the kind of intent and purpose specified in ss. 269 and 288, but the use of the word "intentionally" in defining "common assault" in s. 230(*a*) of the *Criminal Code* is exclusively referable to the physical act of applying force to the person of another.

I would adopt the following passage from Kenny's Outlines of Criminal Law, 17th ed., p. 58, para. 42, as an authoritative statement on this subject. He there says:

> . . . in *Director of Public Prosecution v. Beard,* (1920) A.C. 479 . . . it was laid down that evidence of such drunkenness as "renders the accused incapable of forming the specific intent, essential to constitute the crime, should be taken into consideration, with the other facts proved, in order to determine whether or not he had this intent". In such a case the drunkenness, if it negatives the existence of the indispensable mental element of the crime "negatives the commission of that crime". Thus a drunken man's inability to form an intention to kill, or to do grievous bodily harm involving the risk of killing, at the time of committing a homicide, may reduce his offence from murder to manslaughter (which latter crime requires no more than a realization that some bodily harm may be caused). Drunkenness may likewise show that a supposed burglar had no intention of stealing, or that wounds were inflicted without any "intent to do grievous bodily harm", or that a false pretence was made with no "intent to defraud". But it must be remembered that a man may be so drunk as not to form an intention to kill or do grievous bodily harm while yet in sufficient control of his senses to be able to contemplate some harm and so to be guilty of manslaughter or of an unlawful wounding.

The decision of the learned trial judge, in my opinion, constitutes a finding that the respondent violently manhandled a man and knew that he was hitting him. Under these circumstances, evidence that the accused was in a state of voluntary drunkenness cannot be treated as a defence to a charge of common assault because there is no suggestion that the drink which had been consumed had produced permanent or temporary insanity and the respondent's own statement indicates that he knew that he was applying force to the person of another.

In view of the above, I would allow the appeal, and, having regard to the circumstances mentioned by him, I would dispose of this appeal as proposed by my brother Fauteux.

Appeal allowed, Locke J. *dissenting. Accused found guilty of common assault and sentenced to time already spent in gaol.*

Solicitor for the appellant: V. L. Dryer.

Solicitor for the respondent: E. A. Alexander.