AMELIA MACKENZIE (PLAINTIFF) . APPELLANT;

1921

*Oct. 14.
*Nov. 21.

AND

ROBERT PALMER (DEFENDANT) . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Seduction—Evidence—Indecent assault—Damages. Sec. 13 Cr. C.

In an action framed for damages for indecent assault, although the plaintiff's evidence of force and want of consent on her part is discredited, the court can, nevertheless, accept her evidence that the defendant is the father of the child and find that there was seduction. Cassels J. dissenting.

Judgment of the Court of Appeal (14 Sask. L.R. 117) reversed, Cassels J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Taylor J. at the trial (1), and dismissing the appellant's action.

This action is one for damages by the appellant against the respondent alleging that the latter did carnally know her against her will, whereby she became pregnant. The appellant testified that she did not consent to the intercourse with the respondent. The trial judge disbelieved this evidence, but found that she had been seduced by the respondent and that the defendant was the father of her child, and he allowed her $2,500 damages. The Court of Appeal

*PRESENT:—Idington, Duff, Anglin, Mignault JJ. and Cassels J. *ad hoc.*

(1) [1921] 14 Sask. L.R. 117.

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held that, as the appellant's evidence of force and want of consent on her part was discredited, and as there was no other evidence than appellant's that she had been seduced, the respondent denying any connection at all, the court could not find that there was seduction.

W. S. Gray for the appellant. It was open to the trial judge to accept the appellant's evidence in part and reject it in part. *E.* v. *F.* (1); *Brown* v. *Dalby* (2).

H. Fisher for respondent. The appellant failed to prove her action as brought for criminal assault. The appellant on the evidence is not entitled to a judgment for damages for seduction. *Gibson* v. *Rabey* (3).

IDINGTON J.—I am of the opinion that this appeal should be allowed with costs and the judgment of the learned trial judge be restored.

I agree so fully with the reasons assigned by Mr. Justice Lamont in his dissenting judgment in the Court of Appeal that I need not repeat same here.

DUFF J.—The judgment of Mr. Justice Taylor was reversed by the Court of Appeal on the ground that the evidence of the plaintiff established that there was no seduction within the meaning of the statute. Mr. Justice Taylor's view evidently was that the plaintiff's account of the occurrence to the effect that she was overwhelmed by force could not be accepted in view of certain facts which he considered established.

(1) [1905] 10 Ont. L.R. 489; [1906] 11 Ont. L.R. 582.

(2) [1883] 7 U.C.R. 160.

(3) [1916] 9 Alta. L.R. 409.

These facts he thought incompatible with the hypothesis of serious resistance by the plaintiff. Is the plaintiff precluded by her own evidence given on cross-examination from maintaining the allegations of her statement of claim which are the essential allegations of a cause of action under the statute? The question is not without difficulty; but on the whole I think it may properly be answered as Mr. Justice Taylor impliedly answered it. If the rejection of the plaintiff's account necessarily involved the assumption that she had committed perjury then I think the law would not permit her to recover a judgment based on that assumption. But here no such assumption was involved; the learned trial judge might very properly, as he did, conclude that in the plaintiff's state of health, the plaintiff's impression of what occurred had become blurred and could not be wholly relied upon as an accurate register of what actually happened and that the only safe course was to draw the inference properly arising from certain physical facts which pointed as he thought very clearly to the conclusion at which he arrived. As a general rule, no doubt, where a party calls a witness with his eyes open with full knowledge of what the witness is likely to say (and more especially where the witness is the party), it is not competent to that party to contradict him on a vital point. That was held in *Sumner* v. *Brown* (1), by Mr. Justice Hamilton. I think that rule is inapplicable to this case. It is, I think, a question for the tribunal of fact to determine in such a case whether statements made on cross-examination by such a witness as the plaintiff with respect to such an occurrence was one which, having regard to all the circumstances, ought to be treated as conclusive against her.

(1) [1909] 25 Times L.R. 745.

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Assuming in any case that there was an absence of consent there was still a right of action for assault.

It has been laid down (see *Smith* v. *Selwyn* (1)), that where the facts constituting the foundation of a cause of action in themselves constitute a felony the right of action for tort is suspended until the plaintiff has prosecuted the defendant if the plaintiff is the person on whom the duty of prosecution falls; but this is an objection which cannot be raised as a defense to an action on the pleadings and it is not a proper ground for non-suit. The defendant's proper course is to raise it by an application to stay. Section 13 of the Criminal Code of Canada professes to abolish this rule. It may be questioned whether this is a subject within the competence of the Parliament of Canada as appertaining to the domain of the criminal law or as a proper subject for the exercise of ancillary jurisdiction in the enactment of a Criminal Code. But at least there is a declaration in the most deliberate and solemn form by the legislative authority having jurisdiction over the criminal law, that the rule is no longer necessary in the interests of public justice. As the rule has its foundation in the supposed interests of public justice, it is at least, I think, exceedingly doubtful whether in this country any action ought to be stayed on such a ground.

That is a question which does not strictly arise here because no application was made for a stay of the action and the rule, if not entirely obsolete, ought at least to operate only within the straitest limits allowed by precedent.

(1) [1914] 3 K.B. 98.

ANGLIN J.—I had occasion very fully to consider the chief question which arises on this appeal in the case of *E.* v. *F.* (1). I have had no reason to change the views there expressed. The only difference between that case and the case at bar is that there the plaintiff was the father whereas in the present case the girl herself brings the action by virtue of a statutory provision enabling her to do so. That difference in my opinion does not suffice to render inapplicable here the ground of decision in *E.* v. *F.* (1). I agree with the view of Mr. Justice Lamont that where, in an action constituted as is that at bar, the plaintiff either in examination-in-chief or in cross-examination gives evidence of circumstances which negative the existence of violence sufficient to establish a case of ravishment, her right to recover is not necessarily destroyed because she has alleged and sworn to such violence. The reasons assigned by that learned judge in his dissenting opinion are so satisfactory that I feel I cannot usefully add to them.

I would therefore with respect allow this appeal with costs here and in the court of appeal and would restore the judgment of the learned trial judge.

MIGNAULT J.—The appellant testified that the respondent had connection with her, but that it was without her consent and by force. The learned trial judge discredited this latter statement, and indeed under the circumstances described by the appellant it seems impossible that the respondent could have succeeded in having connection with her unless she had allowed him to do so. But the learned trial judge none the less believed that connection had taken place and that the respondent was the father of the child to whom the appellant had given birth.

(1) 10 Ont. L.R. 489; 11 Ont. L.R. 582.

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Mignault J.

The respondent argues that the appellant's action was an action for an assault amounting to rape; that in such an action the learned trial judge could not give her judgment for seduction; and that the appellant could not obtain a judgment for assault, because her statement that connection with her was had by force and without her consent was rejected by the trial judge.

In my opinion the learned trial judge could credit one part of the appellant's testimony and disbelieve the other part as being grossly improbable, not to say impossible. If, notwithstanding her statement that she was not a consenting party but was overcome by force the learned trial judge really believed, under all the circumstances, that a case of seduction had been made out, he was certainly entitled to give the appellant judgment for seduction. Of course, the position of the appellant on this appeal is somewhat extraordinary for she, or her counsel for her, is forced to contend that a part of her testimony was rightly discredited by the trial judge. But there is no doubt in my mind that the judge at the trial could partly accept and partly reject the appellant's story, as unquestionably a jury could do. That is all I need to say, for I feel that I can add nothing to the dissenting opinion of Mr. Justice Lamont in which I fully concur.

The judgment of the Court of Appeal should be reversed and the judgment of the trial judge restored.

CASSELS J. (dissenting).—I would dismiss this appeal. I agree with the reasons of the learned Chief Justice. The plaintiff, Amelia MacKenzie, was at the date of the alleged assault or rape (1st July, 1917) of the age of twenty years. On the 30th

of June, 1920, she was twenty-three years of age. Her story as well as her conduct is full of inconsistencies and in my opinion it would be a dangerous precedent to allow a judgment to stand based on evidence such as that given on behalf of the appellant.

Appeal allowed with costs.

Solicitors for the appellant: *Laidlaw, Blanchard & Co.*

Solicitors for the respondent: *Bothwell, Campbell & Roth.*