REGINA v. BURDEN

64 C.C.C. (2d) 68

British Columbia Court of Appeal
Bull, McFarlane and Aikins JJ.A.

OCTOBER 14, 1981

Assault — Common assault — Elements of offence — Degree of force required — Whether requires use of some strength or power — Whether mere placing of hand on stranger's thigh sufficient — Cr. Code, s. 244.

An accused commits an assault within the meaning of s. 244(a) (rep. & sub. 1974-75-76, c. 93, s. 21) of the Criminal Code, which provides that a person commits an assault when "without the consent of another person ... he applies force intentionally to the person of the other, directly or indirectly", notwithstanding he exerts no degree of strength or power when touching the victim. Thus, the accused commits an assault when, without her consent, he merely places his hand on a woman's thigh for five to 10 seconds.

APPEAL by the Crown from the accused's acquittal of common assault.

C. A. Ryan, for the Crown, appellant.

A. P. Serka, for accused, respondent.

MCFARLANE J.A. (orally)

BULL J.A. (orally)

AIKINS J.A. (orally)

MCFARLANE J.A. (orally)

MCFARLANE J.A. (orally):—Following trial before His Honour Judge Spencer, as he then was, in the County Court of Vancouver, the respondent was acquitted on a charge of indecent assault on a female.

No criticism is advanced by the Crown in this Court of the finding that there was no indecency involved in the assault, if there were an assault, and there is no appeal brought from that part of His Honour's judgment. The Crown does, however, appeal from the second part of His Honour's decision which was that, indecency aside, there was no assault here.

The Crown's appeal is, of course, restricted to a question of law alone, and that is by reason of the provisions of s. 605 [am. 1974-75-76, c. 105, s. 15] of the Criminal Code.

I will take a few short extracts from the reasons for judgment of the County Court Judge in order to show with some precision what were his findings of fact on the essential matter. The first extract: The facts as I find them to be were that the complainant, Miss Bakonyi, was sitting on a practically empty bus when the accused boarded it, looked around briefly, and noticed she was sitting alone on a seat, and came and sat down beside her. Nearly every other seat on the bus was empty at the time, there being, I think, only two other passengers on it. He sat beside her, stared at her for a short while, then put his hand on her thigh for a period of time which she says was between five and ten seconds.

Again the trial Judge said. "The accused put his hand on her thigh and because she was sitting I must infer it was on the upper top aspect of the thigh rather than anywhere else."

Again the trial Judge said: "It was a stupid thing to do. It was a fresh thing to do, using fresh in its colloquial sense, but not everything that is stupid or fresh is necessarily indecent and I am not satisfied that this was indecent."

Those are the findings, in concise form, of fact made by the trial Judge.

I turn now to his consideration of the law, and this is the matter of which the Crown complains in this appeal. I will take again a few extracts from the Judge's comments about the law.

He said: "I have described the act which consisted only of his placing his hand upon her thigh."

Again: "It is clear that not much force is required but some force is."

Again: "I must then consider how much strength or power is necessary before the word 'force' is appropriate to describe what was done."

Again: "There must be something more than the mere touching."

And again:

I am of the opinion that unless there is a degree of strength or power exerted which would inevitably attract the person's attention to it and which would be more than the mere casual touching of a person then there is not sufficient force to qualify for the use of that word as it appears in s. 244(a) of the Criminal Code of Canada.

That, of course, brings us to the provision of the law which applies here, s. 244 of the Criminal Code, and in the final analysis the decision in the present appeal must depend upon a proper interpretation of the relevant parts of that section and the application of that interpretation to the facts as found. The relevant parts of s. 244 [rep. & sub. 1974-75-76, c. 93, s. 21] are simply this:

244. A person commits an assault when

(a) without the consent of another person or with consent, where it is obtained by fraud, he applies force intentionally to the person of the other, directly or indirectly; (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;

I have referred to para. (b) not because it has any direct application to this case but because, in my opinion, it helps us to understand what was meantwhen Parliament used the words in para. (a) "he applies force intentionally".

I agree with the argument presented here on behalf of the Crown that s. 244 of the Criminal Code is patently based upon the common law of England which can be referred to to assist in interpreting it. In particular, I refer to Taschereau's Criminal Code of the Dominion of Canada (1893), and the extract there quoted from Hawkins, Pleas of the Crown, vol. 1 (1716-1721), at p. 110. I will not read it all, but s. 2, part of it dealing with battery, seems to me particularly apposite to the question before us. The extract is this:

"Section 2: As to the second point. What shall be said to be a battery. It seems that any injury whatsoever, be it ever so small, being actually done to the person of a man, in an angry or revengeful or rude or insolent manner, as by spitting in his face, or any way touching him in anger or by violently jolting him out of the way are batteries in the eyes of the law."

And later from the same source in Taschereau's Criminal Code, dealing with the subject of battery, the conclusion is stated in these words:

"Battery seemeth to be when any injury whatsoever, be it ever so small, isactually done to a person of a man in an angry or avengeful or rude or insolent manner ... For the law can not draw the line between different degrees of violence, and therefore, totally prohibits the first and lowest stages of it, every man's person being sacred, and no other having a right to meddle with it in any, the slightest manner:"

Having regard to those considerations it is my opinion that when the trial Judge found in the circumstances of this case that the respondent put his hand on the woman's thigh, as described, he did intentionally apply force to her person within the meaning of Code, s. 244(a). It follows, in my opinion, that the trial Judge was in error when he failed to apply the correct interpretation of the section to the facts which he had found.

The result is, in my opinion, that the Crown's appeal must be allowed and the acquittal set aside.

The final question for this Court then is whether we should send the case back for a new trial, or whether this Court should, in the circumstances, itself enter a conviction, having regard to the power of this Court under s. 613(4) [am. 1974-75-76, c. 93, s. 75] of the Criminal Code.

The Crown asks that a conviction be entered by this Court, and counsel for the respondent I think I can say concurred in that result, on the assumption that this Court was allowing the appeal. In any event, I think that he was right in the circumstances here not to insist upon a new trial.

I would, therefore, allow the appeal, set aside the acquittal and direct that a conviction of common assault be entered and the matter of sentence to be dealt with at a future time.

BULL J.A. (orally):--I agree.

AIKINS J.A. (orally):--I agree.

MCFARLANE J.A. (orally):--The appeal is allowed and a conviction of common assault should be entered.

Appeal allowed.