Regina v. Brooks

47 C.C.C. (3d) 276

Alberta Court of Appeal
Kerans, Bracco and Hetherington JJ.A.

JANUARY 4, 1989

Constitutional law — Charter of Rights — Equality rights — Sex discrimination — Offence under Criminal Code for male to have sexual intercourse with a female under age of 14 years — Offence not violation of equality rights — While section of Criminal Code referring only to offences committed by men on young females, other provisions of Criminal Code penalizing seduction of immature males and females — Fact that latter provisions not carrying as high maximum penalty not violation of equality rights — Law not discriminatory merely because it delegates discretionary power that may be exercised unfairly — Canadian Charter of Rights and Freedoms, s. 15 — Cr. Code, s. 146, 246.1.

Constitutional law — Charter of Rights — Equality rights — Age discrimination — Offence under Criminal Code for male to have sexual intercourse with female under age of 14 years — Fact that children 14 years of age and older not protected not rendering provision unconstitutional — Discrimination on basis of age in circumstances constituting reasonable limit - - Parliament entitled to make age discriminations in order to protect children — Age of 14 years traditional means to define immaturity — Deeming those children under 14 years of age as in need of protection reasonable distinction — Canadian Charter of Rights and Freedoms, s. 1, 15 — Cr. Code, s. 146.

R. v. Boyle (1988), 40 C.C.C. (3d) 193, 25 O.A.C. 43, consd

[page277] Other cases referred to

R. v. Lucas (1985), 46 C.R. (3d) 172, 16 C.R.R. 1; revd 27 C.C.C. (3d) 229, 51 C.R. (3d) 296, 20 C.R.R. 278, 14 O.A.C. 124; R. v. Neely (1985), 22 C.C.C. (3d) 73; revd 27 C.C.C. (3d) 229, 51 C.R. (3d) 296, 20 C.R.R. 278, 14 O.A.C. 124; R. v. D. (1985), 47 C.R. (3d) 382; R. v. Bearhead (1986), 27 C.C.C. (3d) 546, 22 C.R.R. 211; R. v. Monk (1985), 43 Sask. R. 318; R. v. Drybones (1985), 23 C.C.C. (3d) 457, [1986] N.W.T.R. 161; R. v. Smith (1985), 16 W.C.B. 286; R. v. Barrons (1985), 70 A.R. 107; R. v. Big M Drug Mart Ltd. (1985), 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 60 A.R. 161, 13 C.R.R. 64, 85 C.L.L.C. (para)14,023; Edwards Books & Art Ltd. v. The Queen (1986), 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, [1986] 2 S.C.R. 713, 55 C.R. (3d) 193, 71 N.R. 161, 86 C.L.L.C. (para)14,001

Constitutional law -- Charter of Rights -- Fundamental justice

Constitutionallaw — Charter of Rights — Fundamental justice — Absolute liability offences — Offence under Criminal Code for male to have sexual intercourse with female under age of 14 years — No defence that accused believed complainant was over 14 years of age — Provision offending principles of fundamental justice — Provision of no force and effect — Appropriate remedy that accused be tried on included offence of sexual assault for which mistake constituting qualified defence — Cr. Code, s. 146, 246.1 — Canadian Charter of Rights and Freedoms, ss. 1, 7.

The accused was charged with having sexual intercourse with a female under the age of 14 years contrary to s. 146 of the Criminal Code. This section has now been repealed but at the time made it an offence for a male person to have sexual intercourse with a female person who was not his wife and was under the age of 14 years "whether or not he believes that she is 14 years of age or more". Prior to trial, the accused sought to quash the indictment on the basis that s. 146(1) of the Criminal Code was inconsistent with ss. 15 and 7 of the Canadian Charter of Rights and Freedoms. The judge found that the provision was constitutionally invalid and quashed the indictment.

On appeal by the Crown from the order quashing the indictment, held, the appeal should be allowed and an order made that the case proceed to trial on a charge of sexual assault contrary to s. 246.1 of the Criminal Code.

Former s. 146(1) offends the principles of fundamental justice as guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms because it denies to an accused the defence of mistake as to the age of the victim. It is unjust to brand as morally culpable an act done innocent of awareness of the very fact that makes it blameworthy in the eyes of society and where a reasonable person in the circumstances also would not be aware of that fact and where the accused cannot be said to have been indifferent about the existence of that fact. This violation of s. 7 was not shown to be a reasonable limit within the meaning of s. 1 of the Charter. Of particular importance in this respect is that Parliament had amended the Criminal Code to offer the defence of honest mistake to all sexual assaults. This indicates that Parliament accepts that its absence in the former s. 146(1) offence was not justifiable. Accordingly, s. 146(1) must be declared invalid. However, the appeal should be allowed in this case. As worded, the indictment also alleges the offence of sexual assault contrary to s. 246.1 of the Criminal Code and by virtue of s. 139 of the Criminal Code, mistake is a qualified defence to such an offence. This recent amendment to the Criminal Code must be given retrospective application at least for a trial, after enactment of charges under s. 246.1 that are based upon events after the Charter but before the amendment to the Criminal Code. ***[page278]*** R. v. Vaillancourt (1987), 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 81 N.R. 115, 68 Nfld. & P.E.I.R. 281, 32 C.R.R. 18, apld

R. v. Stevens (1988), 41 C.C.C. (3d) 193, 51 D.L.R. (4th) 394, [1988] 1 S.C.R. 1153, 64 C.R. (3d) 297, 86 N.R. 85, 35 C.R.R. 107, consd

Other cases referred to

R. v. St. Pierre (1974), 17 C.C.C. (2d) 489, 3 O.R. (2d) 642, 16 R.F.L. 26; R. v. Volk (1973), 12 C.C.C. (2d) 395, 24 C.R.N.S. 166, [1973] 6 W.W.R. 29; R. v. Beare (1988), 45 C.C.C. (3d) 57, 55 D.L.R. (4th) 481, [1988] 2 S.C.R. 387, 66 C.R. (3d) 97, [1989] 1 W.W.R. 97, 88 N.R. 205, 71 Sask. R. 1, 36 C.R.R. 90; R. v. Sandercock (1985), 22 C.C.C. (3d) 79, 48 C.R. (3d) 154, [1986] 1 W.W.R. 291, 40 Alta. L.R. (2d) 265, 62 A.R. 382; R. v. Martineau (1988), 43 C.C.C. (3d) 417, [1988] 6 W.W.R. 385, 61 Alta. L.R. (2d) 264, 89 A.R. 162; Whitfield v. Todd (1843), 1 U.C.Q.B. 223; Re Grier and Alberta Optometric Ass'n (1987), 42 D.L.R. (4th) 327, [1987] 5 W.W.R. 539, 53 Alta. L.R. (2d) 289, 79 A.R. 36

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15

Criminal Code, R.S.C. 1970, c. C-34 -- now R.S.C. 1985, c. C-46; ss. 139 (enacted 1987, c. 24, s. 11), 140 (rep. & sub. 1980-81-82-83, c. 125, s. 5 -- now s. 151), 146 (rep. & sub. 1987, c. 24, s. 2 -- now s. 153), 244 (rep. & sub. 1980-81-82-83, c. 125, s. 19 -- now s. 265(4)), 246.1 (enacted 1980-81-82- 83, c. 125, s. 19 -- now s. 271), 246.1(2) (repealed 1987, c. 24, s. 10)

APPEAL by the Crown from a judgment of Burger J., 56 Alta. L.R. (2d) 185, 85 A.R. 25, quashing an indictment charging the accused with the offence of unlawful intercourse, contrary to s. 246(1) of the Criminal Code.

J. Watson, for the Crown, appellant.

G.C. Bolton, for accused, respondent.

The judgment of the court was delivered by

KERANS J.A.

KERANS J.A.:— The issues in this case are whethers. 146(1) of the Criminal Code (repealed effective January 1, 1988) was inconsistent with either ss. 15 or 7 of the Canadian Charter of Rights and Freedoms.

The accused was charged that he did, between February 7th and March 1, 1986, have sexual intercourse with a female under the age of 14 years. He was committed to trial but raised a preliminary objection when the indictment was preferred in Queen's Bench. The objection, which was that the charging section was constitutionally invalid, was accepted by the Queen's Bench judge. For reasons published November 1, 1987, he quashed the indictment. The Crown appeals.

Section 146(1) provided:

[page279] 146(1) Every male person who has sexual intercourse with a female person who

(a) is not his wife, and
(b) is under the age of fourteen years,

whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life.

Section 140 provided:

140. Where an accused is charged with an offence under section 146 in respect of a person under the age of fourteen years, the fact that the person consented to the commission of the offence is not a defence to the charge.

Section 15(1) of the Charter provides:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

15(1) La loi ne fait acception de personne et s'applique egalement a tous, et tous ont droit a la meme protection et au meme benefice de la loi, independamment de toute discrimination, notamment des discriminations fondees sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'age ou les deficiences mentales ou physiques.

Section 7 of the Charter provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit a la vie, a la liberte et a la securite de sa personne; il ne peut etre porte atteinte a ce droit qu'en conformite avec les principles de justice fondamentale.

The learned Queen's Bench judge held that the charging section offended s. 15 because it offered capricious and arbitrary distinctions both on the basis of age and gender, and rejected the argument that these were protected by s. 1 of the Charter. Both before and since his decision, many courts have considered the same problem and have not agreed on the answers: see R. v. Lucas (unreported, May 24, 1985 (Ont. Dist. Ct.)) [reported 46 C.R. (3d) 172, 16 C.R.R. 1]; R. v. Neely (unreported September 6, 1985 (Ont. Dist. Ct.)) [reported 22 C.C.C. (3d) 73] but see 27 C.C.C. (3d) 229, 51 C.R. (3d) 296, 14 O.A.C. 124, 20 C.R.R. 278; R. v. Boyle (1988), 40 C.C.C. (3d) 193, 25 O.A.C. 43 (leave to appeal granted); R. v. Tremblay (1987), unreported (Man. Q.B.); R. v. Holloway (1985), unreported (Nfld. C.A.); R. v. Brown, unreported, May 27, 1985 (Ont. Dist. Ct.); R. v. D. (1985), 47 C.R. (3d) 382 (Ont. Prov. Ct., Fam. Div.); R. v. Mattice, unreported, November 12, 1985 (Ont. Dist. Ct.); R. v. Bearhead (1986), 27 C.C.C. (3d) 546, 22 C.R.R. 211 (Alta. Q.B.); R. v. Monk (1985), 43 ***[page280]*** Sask. R. 318 (Sask. Q.B.); R. v. Drybones (1985), 23 C.C.C. (3d) 457, [1986] N.W.T.R. 161 (N.W.T.S.C.); R. v. Degrace,

unreported October 30, 1985 (Ont. Dist. Ct.); R. v. Smith (1985), 16 W.C.B. 286 (Ont. Prov. Ct., Crim. Div.); R. v. Barrons (1985), 70 A.R. 107 (Alta. Q.B.); R. v. Binder, unreported, December 17, 1985 (Ont. Dist. Ct.). Also, the Supreme Court of Canada has granted leave to appeal from the decision in R. v. Boyle, R. v. Hess (Appeal Nos. 20766 and 20809 respectively).

In my view, any age discrimination in the section should be validated under s. 1. As to gender discrimination, the section viewed in isolation probably offered invidious discrimination, but viewed with other provisions in the Criminal Code of Canada it does not. I do accept, however, that the absence of a defence of honest mistake on reasonable grounds invalidates the law under s. 7. All of this is largely academic, however, because this accused should have gone to trial on the included offence of sexual assault.

I will first deal with the alleged age discrimination. It turns on the fact that children 14 and older are not protected. The accused, of course, is not and cannot be the victim of this discrimination. Absurd though it may seem to be in this case, an accused can nevertheless attack a charging section on the ground that it offends other people's Charter rights: see R. v. Big M Drug Mart Ltd. (1985), 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, [1985] 1 S.C.R. 295 (S.C.C.).

The answer to the attack in this case is simple enough, and involves a summary application of s. 1 rules. It is beyond rational dispute that s. 1 permits age distinctions in order to protect children. Some children are too immature to deal with sexual matters. A law condemning "consensual" activity with the immature protects them from predatory sexual behaviour. The age of 14 years is the traditional means to define immaturity. Below that age, people generally are thought not to be mature enough to give informed consent to anything of that sort. Above that age, the possibility of informed consent exists. In my view, to deem those under 14 ***[page281]*** as in need of protection and those over as not is a reasonable exercise in line-drawing: see Edwards Books & Art Ltd. v. The Queen (1986), 30 C.C.C. (3d) 385 at p. 435, 35 D.L.R. (4th) 1, [1986] 2 S.C.R. 713 at p. 781 (S.C.C.). (I acknowledge that recent amendments to the Criminal Code (see R.S.C. 1970, c. C-34, s. 139) offer a more complex series of rules dealing with age-spread between the offender and the victim. These changes excuse some immature offenders. The basic idea that all those under 14 are deemed to be in need of protection remains undisturbed. Of course, even if I concluded that the section was bad for discriminating unjustifiably against some children in need of protection, it is far from clear that the appropriate remedy would be to strike the law down.)

The other attack is on gender discrimination. It arises in two ways. First, the accused can say that only males who seduce immature females were caught by this law. Females who seduced immature males or females were not. To prosecute one group of offenders but not the other is to offer discrimination on the basis of gender. Secondly, immature male victims of predatory behaviour (by females or males) can complain that they lacked the protection that the law offers to immature females.

Both attacks amount to a complaint about selective prosecution based at least in part on sex. The accused says that other people who did things as heinous as his alleged offence escaped punishment under this law. Selective prosecution on the basis of sex is, in my view, the kind of discrimination that attracts the protection of s. 15. Is this such discrimination?

The simple answer is that this accused is not correct in his complaint. Mature males and females who seduced immature males, and mature females who seduced immature females certainly would have escaped prosecution under s. 146(1). It is not, however, correct to say that they would have escaped prosecution entirely. Subject only to the "three year difference" rule, they all would have been guilty of the crime of sexual assault as it stood defined on the day of this alleged offence. Section 246.1(2) then provided that it was no defence to a charge of sexual assault "... that the complainant consented to the activity that forms the subject-matter of the charge ..." if the complainant was "... under the age of fourteen years ..." except in the case where the accused was less than three years older than the complainant. They arguably would have been guilty also of gross indecency under s. 157: see, for example, R. v. St. Pierre (1974), 17 C.C.C. (2d) 489, 3 O.R. (2d) 642, 16 R.F.L. 26 (Ont. C.A.), and R. v. Volk (1973), 12 C.C.C. (2d) 395, 24 C.R.N.S. 166, [1973] 6 W.W.R. 29 (Alta. C.A.). (Canada, effective January 1, 1988, repealed both s. 146(1) and s. 157 of the Code, and has also amended the crime of sexual assault to create the defence of honest mistake: see 1987, c. 24, ss. 2 and 4. But the accused respondent must base his attack on the law in 1986, when the events occurred that result in this charge.)

In sum, males or females who, in 1986, seduced immature males ***[page282]*** or immature females committed crimes. The only distinction was that their crimes were found in other provisions in the Criminal Code of Canada. The maxim de minimis non curat lex applies to that complaint.

It is true that the maximal penalty for sexual assault was less than that for "statutory rape" (the one was 10 years, the other life). That is not of itself grounds for a suggestion of invidious discrimination. Both were subject to the general law that all sentences must be "fit". The differing maximums did not offer discrimination, only the potentiality for discrimination in the hands of those to whom the power to regulate fitness was given: the courts. One cannot, under s. 15, attack a law as discriminatory merely because it delegates discretionary power that might be exercised unfairly; one must attack instead the exercise of the discretionary power: see Re. v. Beare, a very recent decision of the Supreme Court of Canada published December 1, 1988, 45 C.C.C. (3d) 57, 55 D.L.R. (4th) 481, [1988] 2 S.C.R. 387 (S.C.C.). La Forest J. for the court there said [at p. 76 C.C.C.]:

The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid ...

This court has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice: see R. v. Lyons, supra, at p. 36 C.C.C., p. 348 S.C.R.; see also Jones v. The Queen (1986), 28 C.C.C. (3d) 513 at pp. 540-1, 31 D.L.R. (4th) 569, [1986] 2 S.C.R. 284 at pp. 303-4 (S.C.C.). The court did not add that if, in a particular case, it was established that a discretion was exercised for improper or arbitrary motives, a remedy under s. 24 of the Charter would lie, but no allegation of this kind has been made in the present case.

It is correct that the maximum sentence is a factor for consideration in sentencing. This court in R. v. Sandercock (1985), 22 C.C.C. (3d) 79, 48 C.R. (3d) 154, [1986] 1 W.W.R. 291 (Alta.

C.A.), indicated that the significance of varying maximums in the sentencing process should not be over-emphasized. That factor does not, in my view, attract Charter protection in abstracto.

I conclude that, assessed in the context of the other sections in the Criminal Code, s. 146(1) offered no offence to s. 15(1) of the Charter. My refusal to consider the section in isolation accounts, in the main, for my coming to a conclusion different from that of other courts.

I now turn to the s. 7 analysis. Some judges of the Supreme Court of Canada (the majority did not reach the point for reasons ***[page283]*** not relevant to this case) have questioned the validity of the same law in terms of s. 7 of the Charter: see R. v. Stevens (1988), 41 C.C.C. (3d) 193, 51 D.L.R. (4th) 394, 86 N.R. 85 (S.C.C.). The specific criticism was that its failure to provide for the defence of honest mistake as to the age of the victim offended fundamental justice because, in the words of Wilson J., "An accused can be convicted under this section even though he can show that he made an honest and reasonable mistake about the victim's age". (p. 209 C.C.C., p. 112 N.R.). The decision was published after the factums were filed in this case, but, in a supplementary submission filed July 6, 1988, the Crown said "... the content of these authorities [including Stevens] does not require any change in the basic elements of the Crown argument".

No reason has been given to me why we should not follow the views expressed in Stevens. Indeed, the principle involved had been affirmed by a majority of the Supreme Court in R. v. Vaillancourt (1987), 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, 60 C.R. (3d) 289 (S.C.C.). It is unjust to brand as morally culpable an act done innocent of awareness of the very fact that makes it blameworthy in the eyes of society and where a reasonable person in the circumstances also would not be aware of that fact and where the accused cannot be said to have been indifferent about the existence of that fact: see the recent decision of this court in R. v. Martineau (1988), 43 C.C.C. (3d) 417, [1988] 6 W.W.R. 385, 89 A.R. 162 (Alta. C.A.). Accordingly, I would hold the law apparently invalid pursuant to s. 7.

This point, of course, can also be argued as an equality issue. Other offenders can raise the defence of honest mistake but an offender under s. 146(1) could not. Thus, the offender under s. 146(1) could claim to be the victim of invidious discrimination. I prefer to treat the argument for what it really is: an invocation of s. 7, not s. 15.

Should the law nevertheless be validated? Some decisions have validated this law under s. 1 on the ground that the prospect of the pregnancy of an immature female seduced by a mature male offers a unique and serious reason for special protection. I have two difficulties with this.

First, it appears that, for s. 1 validation, it is the original purpose of the law that must have been valid, not some later justification or defence. This seemed to have been the view of the Supreme Court of Canada in Big M. In that case, it insisted that the Lord's Day Act must be weighed as Sunday observance legislation and not as a family holiday law notwithstanding that the ***[page284]*** former, while perhaps the original purpose, was probably not the reason why the law remained unrepealed after eight decades. In this case, the original purpose of this law seems to have been caught up with ideas other than the need for the protection of children. Its development was parallel to that of the tort of seduction, whose purpose, according to Robinson C.J., in Whitfield v. Todd (1843), 1 U.C.Q.B. 223 at pp. 224-5, related to "the disgrace and

injury inflicted upon the family of the person seduced". See, generally, on the history of the matter: Boyle C., Sexual Assault, (1984). I note that the infertility of either offender or victim has never been a defence or even a mitigating factor for sentence. This indicates to me that the law had to do with something more than the risk of pregnancy. For this reason, I hesitate to accept the rationale about pregnancy offered by modern commentators and accepted by the Ontario Court of Appeal in Boyle, ibid.

In any event, my second concern is that, while a male victim need not fear pregnancy, an immature male who is the victim of seduction by males or females obviously can nevertheless suffer very serious harm, and also stands in need of special protection. So also does an immature and not-yet-fertile female. Indeed, as I have observed, they have for many years been protected by the law. The curious words in s. 146(1) were merely an echo of the past and have not for a long time expressed the complete views of Canadian society about the protection of children.

Another justification might be made: it might be said that the trauma of seduction warrants stern protection, and a "defence" of honest mistake encourages offences by those who might be guilty but who might think they can gain an acquittal by a claim afterwards that they "took all reasonable steps to ascertain the age of the complainant", the words of the new s. 139(5). Most absolute liability offences demand very little of an offender because avoidance of the prohibited act, in this case a forbearance from a sexual activity, is no great sacrifice. On the other hand, the prohibited act raises a very serious risk of harm for the victim. As a matter of social regulation, one could say that the offender should forebear unless he can be absolutely certain that the other person is in fact sufficiently mature to suffer no harm. An answer to this argument may be that legislation of that sort might be permitted, but not if it brands the offender as a criminal in the way that one is stigmatized by a conviction for a Criminal Code offence punishable by indictment.

In any event, Parliament has amended the Criminal Code to ***[page285]*** offer the defence of honest mistake to all assaults: see R.S.C. 1985, c. C-46, s. 265(4). This fact indicates to me that Parliament accepts that its absence is not justifiable: see Re Grier and Alberta Optometric Ass'n (1987), 42 D.L.R. (4th) 327 at p. 337, [1987] 5 W.W.R. 539, 79 A.R. 36 at p. 44 (Alta. C.A.).

In sum, I am of the view that s. 146(1) offended s. 7 of the Charter and must be declared invalid.

Nevertheless, I would allow the appeal from the quashing order. As worded, the indictment also alleges, keeping in mind the words in s. 246.1(2) which is now incorporated in s. 139(1) as enacted by 1987, c. 24, s. 11 (projected by the Editor of Martin's Annual Criminal Code, 1989 to be s. 150.1), an offence under s. 246.1 (now s. 271). The count alleges that the accused had sexual intercourse with a person under the age of 14 years. Ordinarily, an allegation of sexual assault must suggest not only a bodily imposition but also a lack of consent, and the words "sexual intercourse" ordinarily carry an inference of only the first. The allegation of intercourse with a person under 14 obviates the need for an allegation of no consent because s. 246.1(2), as discussed above, vitiates the need for no consent. Therefore, the indictment avers facts to support a charge of sexual assault. I would allow the appeal and order the accused to stand trial on that charge.

It follows that this protracted dispute could have been avoided if the accused had been charged only under s. 246.1 without any reference to s. 146(1). There is no suggestion that the Crown referenced the older section to avoid the "three years difference" rule, or for any other obvious reason. It was for this reason that I accused the Crown, during oral argument, of needlessly posing "exam questions" for this court. I continue to believe that it is a fair criticism.

The point following has not been argued and is not, strictly speaking, before us. Nevertheless, I simply wish to suggest that recent amendments to the Criminal Code offering the qualified "defence" of honest mistake must be given retrospective application at least for a trial, after enactment, of charges under s. 246.1 that are based upon events after the Charter but before the amendment. The evident purpose of the amendment was to shield that law from Charter attack. It would have been absurd for Parliament to insulate cases based on future events from possibly successful Charter attack but deny the same protection to indictments based upon past events. This point will be relevant in the trial I think we should order.

I accordingly would allow the appeal and order that the case ***[page286]*** proceed to trial of the charge under s. 246.1 that I see alleged in the indictment.

Appeal allowed.