C. A. 1934

SIMMONS v. RUSSELL FINANCIERS, LD.

Maugham L.J.

in accordance with the provisions of the First Schedule to this Act." It seems to me that following that provision all the matters referred to have been set out in the note or memorandum in the present case. I venture to express the opinion that the Legislature might well have made a provision that the note or memorandum of a contract of loan must be so worded that the borrower shall be made aware of the duration of the loan or shall be told in plain language precisely what it is that he is expected to pay on each occasion when a sum becomes payable. I am, however, satisfied that on the true construction of the Act it is impossible to say that any such term or provision can be implied in s. 6 of the Act, and accordingly I have come to the conclusion, although, as I have said, with some regret, that the judgment of the learned judge must be reversed.

Appeal allowed.
Judgment entered for defendants.

Solicitors for appellants : *Osborn & Osborn.*

R. F. S.

C. C. A. 1934

June 18, 25; *July* 27.

THE KING *v.* DONOVAN.

Criminal Law—Unlawful act—Indecent Assault—Defence of Consent—Burden of Proof—Questions for Jury.

The appellant, being charged with caning a girl of seventeen for purposes of sexual gratification, pleaded in defence that the prosecutrix had consented, and the chairman of quarter sessions in summing-up directed the jury that "consent or no consent" was the vital issue in the case:—

Held, that there was misdirection, in that the question should have first been put to the jury, whether the blows struck were likely or intended to do bodily harm. If this were answered in the negative, then only would it have been necessary for the jury to consider the further question, whether the prosecutrix had proved absence of consent.

An act, unlawful per se as being criminal, cannot be rendered lawful because the person to whose detriment it is done consents to it.

C.C. A.
1934
REX
v.
DONOVAN.

Exceptions to this rule discussed and classified.
Observations of Cave J. in *Reg.* v. *Coney* (1882) 8 Q. B. D. 534 at p. 539 considered.
Burden of proof and questions for jury, where consent is in issue, explained.

APPEAL against conviction.

The appellant was charged at Surrey Quarter Sessions with (*a*) indecent assault, and (*b*) common assault, upon a girl aged seventeen. The case for the prosecution was that on the evening of March 8, 1934, he induced her to accompany him to his garage at Morden in the county of Surrey, and that he there beat her with a cane. The defence raised was that the girl had consented to everything which the appellant had done, and that the onus was upon the prosecution to prove absence of consent. He was found guilty by the jury and sentenced by the learned chairman to eighteen months' imprisonment for the indecent assault, and to six months for common assault, the sentences to run concurrently. From this conviction he appealed on the ground of misdirection by the learned chairman in his summing-up to the jury in certain respects, which appear clearly from the following judgment of the Court of Criminal Appeal. A second ground of appeal was that the verdict was unreasonable and could not be supported upon the evidence.

G. B. McClure for the appellant. The direction to the jury as to the incidence of the burden of proof in relation to consent was wrong. The facts proved showed that the jury might reasonably find consent on the part of the prosecutrix, and the chairman should have directed them that the burden of proof was on the prosecutrix to negative consent: *Rex* v. *May*. (1)

Secondly, the conduct of the prosecutrix should be looked at as a whole, and if the jury had been directed to this effect it is possible that they would have found consent upon her part and would have acquitted the appellant. Thus in *Reg.* v. *Tolson* (2) it was laid down that a bona fide belief

(1) [1912] 3 K. B. 572, 575. (2) (1889) 23 Q. B. D. 168.

C. C. A. 1934

REX v. DONOVAN.

on reasonable grounds that the husband was dead constituted a good defence on a charge of bigamy. The appellant may have been mistaken in thinking that the girl was consenting, but the belief remains good as a defence to a charge of indecent assault. This applies to all offences at common law or under statute, unless some injury to the public is involved. Again in *Reg.* v. *Flattery* (1), which was a case of rape, Denman J. said: "There may be cases where a woman does not consent in fact, but in which her conduct is such that the man reasonably believes she does." This is subject to the general limitations laid down in *Reg.* v. *Coney* (2), in which Stephen J. said: "When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured." Again, Hawkins J. said in the same case: "As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all." He goes on to say that "it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution." But it is submitted that these limitations do not apply here. The act complained of is not illegal in itself and the injuries are only the marks of a cane which would appear in administering ordinary corporal punishment. There was no breach of the King's peace, nor was there any injury to the public, as in a prize fight, nor any unfriendly relationship. The question of the degree of violence in the assault was a matter which should have been left to the jury. It cannot be said that this Court should not interfere, because the verdict of the jury would have been the same if the misdirection were cured. If the

(1) (1877) 2 Q. B. D. 410, 414. (2) 8 Q. B. D. 534, 549, 553.

summing had been adequate, the case could not have come before this Court. Furthermore, the proper questions should have been put to the jury before this verdict could be given.

C. G. L. Du Cann for the Crown. The consent of the prosecutrix here would be no defence, for the assault is one which would be likely to cause a breach of the peace, or at least an injury to the public, and consent is immaterial, as explained by Cave J. in *Reg.* v. *Coney*. (1) The exceptions there stated to the rule that consent cannot operate as a defence to a criminal act do not cover flagellation for purposes of sexual gratification. In cases of indecent assault consent is only a defence where the act itself is not one likely to produce injurious consequences. There is no parallel to the case of rough play, where the act of assault only becomes unlawful if the person affected is not a consenting party.

[DU PARCQ J. referred to *Reg.* v. *Bruce*. (2)]

Here the assault is of a kind prohibited as being contrary to public morality, and no consent on the part of the individual affords an answer to a criminal charge. If a prize fight is an assault for which there is no condonation, this is an a fortiori case. As to the jury's answer to the question " consent or no consent " it is justified so far as it goes, for mere non-resistance or submission does not constitute permission on the part of the prosecutrix. The directions given to the jury by the learned chairman may not have been adequate as regards the degree of violence in the assault, but they satisfy the rules laid down in *Rex* v. *May* (3), and the verdict should stand.

McClure in reply. The questions put to the jury and the answers which they gave are so defective that this Court would have to substitute a verdict of its own if the conviction were to stand. Unless the blows struck by the appellant were such as to cause bodily harm, the question of consent was relevant, and the onus was upon the prosecution to negative consent. This the prosecution failed to do, and

(1) 8 Q. B. D. 534, 539. (2) (1847) 2 Cox, C. C. 262.
(3) [1912] 3 K. B. 572.

C. C. A. 1934

REX v. DONOVAN.

as to this the jury were not properly directed, so that the conviction here should be quashed.

At the conclusion of the argument the Court (LORD HEWART C.J., SWIFT and DU PARCQ JJ.) allowed the appeal, and Lord Hewart C.J. said that as questions of importance were involved, the considered judgment of the Court would be given at a later date.

July 27. SWIFT J. In this case the Lord Chief Justice has asked me to read the judgment of the Court.

The appellant was convicted at the Surrey Quarter Sessions upon an indictment charging him with indecent assault and common assault on Norah Eileen Harrison. He was sentenced to eighteen months' imprisonment with hard labour upon the count for indecent assault, and to six months' imprisonment with hard labour upon the count for common assault, the sentences to run concurrently. He was given leave to appeal against conviction. There was no appeal against sentence. The appellant complained that the chairman misdirected the jury in the summing-up and in the reply which he gave to a question put to him by the jury, and that the verdict was unreasonable and could not be supported upon the evidence. It was established by the evidence, and was not in dispute, that on March 8 last, in the evening, the appellant induced Norah Eileen Harrison, a girl seventeen years of age, to go with him to a garage at Morden, and there he beat her with a cane in circumstances of indecency. The defence was that it lay upon the prosecution to prove absence of consent, and that in fact the girl had consented to everything that was done by the appellant. It is not necessary to narrate the facts in detail. It appeared that the appellant was addicted to a form of sexual perversion, and there was no doubt that during a series of telephone conversations he had made suggestions to the prosecutrix which, if they were taken seriously, meant that he intended or desired to beat her. According to the evidence of the appellant, and of a young

woman who said that she had overheard some of the telephone conversations, there was talk between the appellant and the prosecutrix which left no doubt that she had expressed her willingness to submit herself to the kind of conduct to which he was addicted. On the evening of March 8 she met him for the first time, and met him, according to her evidence, in the belief that she was to be taken to a place of entertainment, "the pictures." They met by appointment at the Marble Arch. It was common ground that his first remark was: "Where would you like to have your spanking, in Hyde Park, or in my garage?" but the prosecutrix said that she did not treat the question seriously. She went with him, however, on the Tube railway to Morden, and then to a garage, either, as she said, because she was compelled or induced by fear to do so, or, as he maintained, willingly and in pursuance of a common design. The garage is described as being in a passage-way between two houses. There the alleged offences were committed. In addition to the girl herself, three witnesses were called on behalf of the prosecution. A doctor who had examined her at 9.40 P.M. on March 10, said that there were seven or eight red marks upon her body, and expressed the opinion that these marks indicated that she had suffered a "fairly severe beating." He found no sign of any other injury. A married sister of the prosecutrix deposed that she had returned home just after 10 o'clock on the night of the alleged assault looking pale and ill, and had made a complaint which was consistent with her evidence. A detective inspector who arrested the appellant on March 13 proved that he found in the possession of the appellant a sealed envelope, the terms of which left no doubt as to the nature of the practices to which he was addicted.

The appellant gave evidence on his own behalf, asserting that the prosecutrix had so acted throughout as to make it plain that she consented to all that he did. The young woman who has already been mentioned was called, and gave evidence about the telephone conversations to which she had listened. It is enough to say that her evidence,

C. C. A. 1934

REX v. DONOVAN.

if believed, showed that the prosecutrix went to the garage with full knowledge of the appellant's intentions, and without reluctance.

At the close of the case for the defence, and before counsel addressed the jury, counsel for the Crown submitted (in the absence of the jury) that, in the circumstances of the case, it was unnecessary for the prosecution to prove absence of consent. After hearing the argument, the justices ruled against this submission. The jury returned into Court, and the chairman summed up to them upon the footing that the question " consent or no consent " was the vital issue. If it be assumed that a verdict of guilty could be justified in this case only by proof that there was absence of consent, certain observations may properly be made. First, it was of importance that the jury should be left in no doubt as to the incidence of the burden of proof in relation to consent. In *Rex* v. *May* (1) the principle applicable to cases of this kind was laid down by this Court in these words: " The Court is of opinion that if the facts proved in evidence are such that the jury can reasonably find consent, there ought to be a direction by the judge on that question, both as to the onus of negativing consent being on the prosecution and as to the evidence in the particular case bearing on the question."

We have no doubt that the facts proved in the present case were such that the jury might reasonably have found consent; it is, indeed, difficult to reconcile some of the admitted facts with absence of consent. It was therefore of importance (if consent was in issue) that there should be no possibility of doubt in the minds of the jury upon the question whether it was for the Crown to negative consent, or for the defence to prove it. A second observation which may fairly be made is that consent, being a state of mind, is to be proved or negatived only after a full and careful review of the behaviour of the person who is alleged to have consented. Unless a jury is satisfied beyond reasonable doubt that the conduct of the person has been such that,

(1) [1912] 3 K. B. 572, 575.

viewed as a whole, it shows that she did not consent, then the prisoner is entitled to be acquitted. It is evident to the Court that the chairman was at pains to sum up an unusually difficult case with impartiality and precision. We think, nevertheless, that if the summing-up be looked at in the light of the observations which we have made, it will be seen to be defective in two respects. First, we cannot find that the chairman ever gave a clear direction to the jury that the onus of negativing consent was on the prosecution. In that part of the summing-up where this aspect of the case is specifically dealt with, the chairman, after using the words "if there is consent, that is a complete answer," went on to say: "Next you get to this vital question in the case, and that is whether the complainant in this case . . . . was, as she alleges, compelled by fear to submit to the defendant's wishes, or whether, as he alleges, there was no compulsion; that is the point. Because if there was no compulsion, if she was not, as she alleges, compelled by him to comply with his wishes, then she was a consenting party, and that is a good defence to each of the charges." This material passage from the summing-up is, we think, so phrased as to leave the jury in doubt where the burden of proof lay on this part of the case, if, indeed, it did not lead them to believe that it was for the appellant to establish the defence of consent. Other words were used in the summing-up and in the observations made by the chairman in answer to questions put to him by the jury after he had concluded his summing-up which have some bearing upon this point, but we think it unnecessary to comment upon them in detail, inasmuch as it was conceded by the learned counsel for the Crown that he could not point to any direction which fulfilled the requirement laid down in the passage from *Rex* v. *May* already mentioned. (1)

The second matter of complaint is a direction given to the jury in answer to a question. After a retirement which lasted for one hour, the jury returned into Court and handed a note to the chairman. The shorthand note of what then

(1) [1912] 3 K. B. 572.

C. C. A. 1934

REX v. DONOVAN.

took place is as follows: "(The Chairman): Members of the jury, the question put to me is: If a man has reason to think that consent has been given, does that constitute consent? The answer is definitely 'No.' It is a question of fact. Do you want to retire again? (The foreman of the jury): I do not think we need retire again." The jury then "shortly conferred without leaving the jury box," and returned their verdict of "Guilty." In our view this direction is open to grave objection. It is no doubt true that consent is a question of fact. The state of a person's mind is a question of fact, but, as we have said, it can be ascertained only by considering and weighing the ascertained facts about that person's conduct. The proper answer to the jury's question would have been that if they as reasonable persons thought that the conduct of the prosecutrix, viewed as a whole, was consistent with consent, they ought not to find that the prosecution had negatived consent. It is, in our view, at least possible that such a direction, coupled with a correct and unambiguous direction as to the burden of proof, would have resulted in the acquittal of the appellant, and we are, therefore, compelled to come to the conclusion, notwithstanding the evident desire of the chairman to do justice to the appellant's case, that the trial was not satisfactory.

This conclusion would have been enough to dispose of the case were it not for the fact that the learned counsel for the Crown relied in this Court upon the submission which he had unsuccessfully made at the trial, and argued that, this being a case in which it was unnecessary for the Crown to prove absence of consent, this Court ought not to quash the conviction.

We have given careful consideration to the question of law which this submission raises. The learned counsel on both sides referred us to passages in the judgments in the case of *Reg.* v. *Coney*. (1) The subject-matter of that case was very different from that of the present case, but the judgments undoubtedly contain statements of the law which are of great value for the present purpose. Much reliance was placed, on

(1) 8 Q. B. D. 534, 539.

behalf of the Crown, upon the following passage from the judgment of Cave J.: "The true view is, I think, that a blow struck in anger, or which is likely or intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial." We have considered the authorities upon which this view of the learned judge was founded, and we think it of importance that we should state our opinion as to the law applicable in this case. If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected. What is, in one case, an innocent act of familiarity or affection, may, in another, be an assault, for no other reason than that, in the one case there is consent, and in the other consent is absent. As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial. We are aware that the existence of this rule has not always been clearly recognized. In his Digest of the Criminal Law (6th edition), Art. 227, Sir James FitzJames Stephen enunciates the proposition that "every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim." This may have been true in early times when the law of this country showed remarkable leniency towards crimes of personal violence, but it is a statement which now needs considerable qualification. It is to be observed, indeed, that in Art. 230 of his Digest, the learned author says: "It is uncertain to

C. C. A. 1934

REX v. DONOVAN.

what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another."

In early works of authority, such as Foster's Crown Law and East's Pleas of the Crown, much learning upon the distinction between lawful and unlawful acts is to be found in the chapters dealing with homicide. At p. 259 of the former work (third edition), Sir Michael Foster gives his reason for the proposition that a man who beats another "in anger or from preconceived malice" is responsible if fatal consequences ensue, in the following words: "What he did was malum in se, and he must be answerable for the consequence of it. He certainly beat him with an intention of doing him some bodily harm, he had no other intent, he could have no other; he is therefore answerable for all the harm he did." If an act is malum in se in the sense in which Sir Michael Foster used the words, that is to say, is, in itself, unlawful, we take it to be plain that consent cannot convert it into an innocent act.

There are, as we have said, well established exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act. One of them is dealt with by Sir Michael Foster in the chapter just cited, where he refers to the case of persons who in perfect friendship engage by mutual consent in contests, such as "cudgels, foils, or wrestling," which are capable of causing bodily harm. The learned author emphasizes two points about such contests: (1.) that bodily harm is not the motive on either side, and (2.) that they are "manly diversions, they intend to give strength, skill and activity, and may fit people for defence, public as well as personal, in time of need." For these reasons, he says that he cannot call these exercises unlawful.

Another exception to the general rule, or, rather, another branch of the same class of exceptions, is to be found in cases of rough and undisciplined sport or play, where there is no anger and no intention to cause bodily harm. An example of this kind may be found in *Reg.* v. *Bruce.* (1) In such cases the act is not in itself unlawful, and it becomes unlawful only

(1) 2 Cox, C. C. 262, 263.

if the person affected by it is not a consenting party. It is not necessary to deal in this judgment with other exceptions to the rule which are wholly remote from the present case, such as the reasonable chastisement of a child by a parent or by a person in loco parentis. In the present case it was not in dispute that the motive of the appellant was to gratify his own perverted desires. If, in the course of so doing, he acted so as to cause bodily harm, he cannot plead his corrupt motive as an excuse, and it may truly be said of him in Sir Michael Foster's words that " he certainly beat him with an intention of doing him some bodily harm, he had no other intent," and that what he did was malum in se. Nothing could be more absurd or more repellent to the ordinary intelligence than to regard his conduct as comparable with that of a participant in one of those " manly diversions " of which Sir Michael Foster wrote. Nor is his act to be compared with the rough but innocent horse-play in *Reg.* v. *Bruce.* (1) Always supposing, therefore, that the blows which he struck were likely or intended to do bodily harm, we are of opinion that he was doing an unlawful act, no evidence having been given of facts which would bring the case within any of the exceptions to the general rule. In our view, on the evidence given at the trial, the jury should have been directed that, if they were satisfied that the blows struck by the prisoner were likely or intended to do bodily harm to the prosecutrix, they ought to convict him, and that it was only if they were not so satisfied, that it became necessary to consider the further question whether the prosecution had negatived consent. For this purpose we think that " bodily harm " has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.

This being our view of the law, we considered the question whether, in all the circumstances, it would be right to quash the conviction. The whole case was conducted, in so far as it was conducted in the presence of the jury, upon the footing that the issue of consent was the " vital question in the case."

(1) 2 Cox, C. C. 262.

C. C. A. 1934

REX v. DONOVAN.

It is not too much to say that, in all probability, the only question which the jury felt called upon to decide, as the case was left to them, was the question whether in fact the prosecutrix was shown to have consented. We may summarize the position by saying that, of the two questions which should have been left to the jury, the first was not left at all, while the second was left to them with an inadequate and misleading direction. It may well be that, if the first question had been left to the jury, they would have answered it by saying that the appellant intended to cause and inflicted blows likely to cause bodily harm to the prosecutrix, so that the second question would not have arisen. But, although we think it probable that this would have been the jury's view, it is, in our opinion, impossible to say that they must inevitably have so found. There are many gradations between a slight tap and a severe blow, and the question whether particular blows were likely or intended to cause bodily harm is one eminently fitted for the decision of a jury upon evidence which they have heard. We may have little doubt what that decision would have been in this case, but we cannot, consistently with the practice of this Court, substitute ourselves for the jury and decide a question of fact which was never left to them. It is, therefore, impossible to say that facts have been proved which show the appellant's act to have been unlawful in itself. Without proof of such facts, he could be convicted only if the prosecution negatived consent, and upon the issue of consent there was a misdirection which may have led to a wrong verdict. For these reasons we came to the conclusion that the conviction must be quashed and the appellant discharged.

Appeal allowed.

Solicitors for appellant: *Wilkinson, Howlett & Moorhouse.*
Solicitors for prosecution: *Wontner & Sons.*

F. P. F.