Regina v. Cline

[1956] O.R. 539-552
ONTARIO
[COURT OF APPEAL]
PICKUP C.J.O. and LAIDLAW and J.K. MacKAY JJ.A.
14th MAY 1956.

Criminal Law -- Attempt -- Whether Acts Constitute Attempt or Mere Preparation -- Tests to be Applied -- "Unequivocality theory" -- History of Law as to Attempts -- The Criminal Code, 1953-54 (Can.), c. 51, s. 24.

Evidence -- Proof of Similar Acts on Criminal Trial -- When Such Evidence Admissible -- Establishing Guilty Design and Criminal Intent -- Proving Criminal Attempt.

There is no single test that can be applied in all cases to determine whether acts of an accused, tending towards the commission of a crime, go far enough to constitute an attempt to commit the crime, or amount to no more than preparation. A consideration of the nature of a criminal attempt, and the development of the law relating to it, leads to the following propositions that may be accepted as guides; (1) There must be mens rea and also an actus reus to constitute a criminal attempt, but the criminality of misconduct lies mainly in the intention of the accused. (2) Evidence of similar acts done by the accused before the offence with which he is charged, and also afterwards if the acts are not too remote in time, is admissible to establish a pattern of conduct from which the Court may properly find mens rea. (3) Such evidence may be adduced in the case for the prosecution without waiting for the defence to raise a specific issue. (4) It is not essential that the actus reus be a crime or a tort or even a moral wrong or social mischied. (5) The actus reus must be more than mere preparation to commit a crime. But (6) when the preparation to commit a crime is in fact fully complete and ended, the next step done by the accused for the purpose and with the intention of committing a specific crime constitutes an actus reus sufficient in law to establish a criminal attempt to commit that crime.

Review of authorities.

AN APPEAL by the accused from his conviction, by Magistrate Hopkins at Hamilton, of indecent assault on a young boy.

14th May 1956. The appeal was heard by PICKUP C.J.O. and LAIDLAW and J.K. MACKAY JJ.A.

Evidence of similar acts should not have been admitted in the circumstances of this case. The Crown must establish a prima facie case of the crime charged before it can prove similar acts: Popple, Canadian Criminal Evidence, 2nd ed. 1954, p. 33, citing Rex v. Bond, [1906] 2 K.B. 389. The Crown's stated purpose in adducing this evidence was not to prove intent, but to prove identification of the accused, and it is not admissible for this purpose; Rex v. Campbell, 1946 CanLII 364 (BC CA), 63 B.C.R. 279, 86 C.C.C. 410, 2 C.R. 351, [1946] 3 W.W.R. 369, [1947] 1

D.L.R. 904. Further, the evidence of the other boys was not independent and uninfluenced, and should have been rejected on this ground. [PICKUP C.J.O.: Surely that would affect its weight only.]

Indecency is not necessarily required as a question of positive fact. We cannot isolate what happened on this one occasion, but must consider all the surrounding circumstances, including the evidence of similar acts: Rex v. Louie Chong (1914), 1914 CanLII 656 (ON CA), 32 O.L.R. 66, 23 C.C.C. 250. The circumstances need not necessarily be consistent only with indecency: Rex v. Hall, [1952] 1 K.B. 302, [1952] 1 All E.R. 66, 35 Cr. App. R. 167.

My submission is that the pursuit of the boy was with intent to accomplish the indecent purpose, and that only after the accused caught up with the boy did he recant and abandon that purpose.

Evidence of similar acts may be admitted and used for the purpose of showing that the accused is a man with a propensity to commit the type of crime charged against him: Regina v. Straffen, [1952] 1 Q.B. 911, [1952] 2 All E.R. 657, 36 Cr. App. R. 133; Thompson v. The King, [1918] A.C. 221, 13 Cr. App. R. 61. As to the general rules respecting the admission of evidence of similar acts, I refer to Harris v. Director of Public Prosecutions, [1952] A.C. 694, [1952] 1 All E.R. 1044, 36 Cr. App. R. 39; Rex v. Ball, [1911] A.C. 47; Brunet v. The King (1918), 1918 CanLII 505 (SCC), 57 S.C.R. 83, 30 C.C.C. 16, 42 D.L.R. 405; Paradis v. The King, 1933 CanLII 75 (SCC), [1934] S.C.R. 165, 61 C.C.C. 184, [1934] 2 D.L.R. 88; Popple, op. cit., p. 572.

31st May 1956. The judgment of the Court was delivered by

J. Dubeck, for the accused, appellant: The acts proved against the accused did not amount to an indecent assault, or even to an attempt to commit that offence. There must be some element of indecency, and there was none here. [LAIDLAW J.A.: Will not an established intent to commit an indecency give character to the assault?] I submit not.

I rely on this point on Henderson v. The King, [1948] S.C.R. 226, 1948 CanLII 17 (SCC), 91 C.C.C. 97, 5 C.R. 112 at 118; Regina v. Miskell (1953), 37 Cr. App. R. 214; Regina v. McCann and Jevons (1869), 28 U.C.Q.B. 514; Rex v. Bloxham (1943), 29 Cr. App. R. 37.

W.B. Common, Q.C., for the Attorney-General, respondent: I cannot support this conviction for the completed offence of indecent assault, but I ask the Court to substitute a conviction for an attempt to commit that offence.

It is now settled that there can be an attempt to commit an indecent assault: Rex v. Boyer, [1951] O.W.N. 875, 102 C.C.C. 128, 13 C.R. 184.

J. Dubeck, in reply.

Cur. adv. vult.

LAIDLAW J.A.:-- After trial in the Magistrate's Court of the City of Hamilton, the appellant was convicted on the 28th February 1956 of the crime of indecent assault on Peter C., aged 12 years. Thereafter, upon application to the Court, pursuant to s. 661 of The Criminal Code, 1953-54 (Can.), c. 51, and upon hearing evidence adduced in support thereof, the Court found the appellant to be a criminal sexual psychopath. The Court sentenced the appellant to a term of imprisonment of 10 years in respect of the offence of which he was convicted and in addition imposed a sentence of preventive detention. He appeals to this Court from his conviction and asks for leave to appeal from the sentence imposed on him for committing the offence.

I shall summarize the evidence adduced in support of the case for the prosecution.

Peter C., aged 12 years, was sworn after due inquiry by the magistrate. He testified that on Christmas Eve 1955, at about 8 o'clock, he was walking on Cannon Street in the city of Hamilton on the way to his home on that street. The appellant stopped him and asked him if he would carry his suitcases. The appellant had no suitcases with him. Peter said "No" and kept on his way. Peter started to run and the appellant pursued him "down Hughson Street" to a little alley, up that alley, around the school, around the A.& P. Store, up Hughson Street again, and into a yard "where they make pipes for sewers and such things". The appellant caught up with Peter at that place and grabbed him by the sleeve and stopped him. Peter states:
"He told me I didn't have to carry his suitcases unless I wished to do so, and he told me not to tell anybody and said they would be after him if I told anybody, and he gave me some money." The appellant then ran away.

On 18th January 1956, at night-time, Peter was near the corner of Catherine and Cannon Streets when the appellant again approached him and asked him "what street it was" and then "he asked me if I wanted to make a couple of dollars carrying his suitcases". Again the appellant had no suitcases with him. Peter said "No", and the appellant went on his way. On cross- examination Peter stated that the place where he first met the appellant was in front of his school; that it was very dark and the electric light was some distance away from the place where the appellant approached him; that the appellant was wearing big, dark sun-glasses and "they almost covered his whole face".

The Crown Attorney proceeded to adduce evidence of similar acts of the appellant on other occasions. Counsel for the appellant took objection to the admission of such evidence, but the learned magistrate ruled that the evidence was properly admissible.

Joseph G., aged 10 years, was called and after due inquiry was sworn. He lived with his mother on James Street North, in Hamilton, between Robert and Barton Streets. Shortly after 8 o'clock on a night in January 1956 he was on the sidewalk near his home when the appellant approached him and said: "Do you know where 92 James Street is?" Joseph replied that he did not know, and the appellant then said: "Will you carry some suitcases for me?" Joseph said he could not. The

appellant did not have any suitcases with him. He said they were "just on Main Street ... carry them to the bus terminal for me", and when Joseph said he could not go the appellant said: "Come on, I'11;; give you some money." He said: "Two dollars -- I will even give you five." Joseph proceeded on his way up a stairway leading to an apartment where his mother was visiting a friend. The appellant followed him and said: "Do you know where I can find any other kids?" To this Joseph replied: "No." The appellant was wearing dark glasses when he first approached Joseph.

Clayton W. (Sworn after due inquiry), aged 10 years, saw the appellant first on Cannon Street about 7 or 8 o'clock at night, about the 14th September 1955, the date of his birthday. The appellant was wearing big, dark sun-glasses, and approached him at a place between two lamp-posts. The appellant asked him to carry some suitcases. The appellant had no suitcases with him. He told Clayton to go to the new bus terminal and he would be there right afterwards. Clayton went to the bus terminal and the appellant arrived about three minutes later. The appellant walked down the street with Clayton and went into a big yard. The appellant looked into the window of a lighted house and saw some people there. He said: "This ain't the place where the suitcases are." They went down the street to another place. A dog started barking there and the appellant said: "This isn't the place either." The appellant told Clayton to look in the window and there was nobody there. The appellant grabbed the boy and, without his consent, committee an act of gross indecency. He gave Clayton a dollar and then left him.

Dennis C. (sworn after due inquiry), 9 years old, saw the appellant first on Barton Street near the corner of James Street, shortly after 6 o'clock in the evening in January 1956. It was quite dark at that place. The appellant came up to Dennis and asked him "what street this was" and if he wanted to "earn a dollar carrying a suitcase". They walked down the street into a laneway and the appellant did an indecent act, which was undoubtedly done without the boy's consent.

Wayne S. (sworn after due inquiry), 12 years old, saw the appellant first on 18th January 1956, about 7.30 o'clock in the evening. The appellant walked up to him on the street and asked him if he wanted to make "a couple of bucks" carrying a couple of suitcases. Wayne said "No" and the appellant walked away.

Robert H. (sworn after due inquiry), 11 years old, was going home and was near the top of the stairs leading to the apartment where he lived, when the appellant met him and, after asking if a certain man lived there and being told that he did not, the appellant said: "Come on down and help me carry a few suitcases and I will give you a couple of dollars." Robert refused the offer.

Gerald H. (unsworn), 8 years old, in company with another boy, Ray L., was on his way to a Wolf Cub meeting at a church on an evening in January 1956. It was dark. The appellant stopped them. He was wearing dark glasses. He said: "Would you carry a suitcase for me?" He did not have a suitcase with him. Ray went with him and he was going behind the church. Then Ray came running up the street, but the appellant was not in sight.

William A. (sworn after due inquiry), 9 years old, saw the appellant for the first time on 18th January 1956, between 7.30 and 8 o'clock at night, at the corner of John and Catherine Streets. The appellant came up to him and said: "Would you help me carry some suitcases up to a house

on Main?" The appellant did not have a suitcase with him. He was wearing sun-glasses. The boy had a dog with him and the appellant told him to get rid of the dog. The boy said he had better go home and the appellant told him: "When you go home don't tell your mother or father. Just say you have to go out on a trip with somebody." When the boy reached home his father would not permit him to go out again that evening.

There was cross-examination of each witness called for the prosecution, directed chiefly to the matter of identification of the appellant and to the accuracy of their recollection, also as to the manner in which the police constituted and conducted a "line-up" for the purpose of enabling each of the various witnesses to identify the person who approached him. At the conclusion of the case for the prosecution, counsel for the appellant adduced no evidence for the defence.

The main grounds of appeal presented in argument to this Court were that the learned magistrate "erred in admitting all the evidence relating to the alleged 'similar acts'", and that "there was insufficient evidence to constitute the offence". In respect of the sentence, counsel simply set forth in the notice of appeal that the "sentence was excessive".

Early in the course of the argument of counsel for the appellant, the Court intimated to him that although there might not be sufficient evidence to support the conviction for indecent assault, the appellant might be found guilty of an attempt to commit that offence. The argument proceeded then to completion as if the appellant had been convicted of the lesser offence. Counsel for the Crown in opening his argument conceded at once that the conviction for indecent assault could not stand because the evidence did not support it. He contended, however, that the evidence showing acts of similar conduct was properly admitted; that such evidence established a definite pattern of conduct from which the Court could find that on the occasion in question the accused intended to commit the offence of indecent assault; and that the whole evidence established an attempt to commit that offence. He asked the Court to substitute a conviction for such attempt in place of the conviction for the offence as charged, and to impose an appropriate sentence.

I shall discuss, first, the question of admissibility of evidence of similar acts of the appellant. I observe that while counsel for the appellant at trial took objection to the admission of that evidence when counsel for the prosecution announced his intention to adduce it, nevertheless, subsequently in the course of the trial counsel for the appellant stated somewhat incoherently that he did not disagree with the view of the learned magistrate and the basis upon which the evidence in question was admitted. I quote the following passage from the record after evidence was given by a number of witnesses as to similar acts:

"MAGISTRATE" Supposing if what you say is correct, there were no indecent words and he didn't place a hand indecently on the little boy, but Mr. McCulloch establishes a certain plan or scheme about the carrying of suitcases in the mind of the accused, couldn't the Court find the accused guilty of indecent assault based not only on the circumstantial evidence on the case before the Court, the similar acts in the circumstances?

"MR. DUBECK: I have no argument with that proposition of law but I am merely stating this proposition, in no way, there is a stage of preparation and one of attempt in our criminal law, and when we are considering if it will be attempt or commission of an offence, it will be very

dangerous having regard to the evidence adduced to say after a certain approach certain things occurred. In order to say on this particular instance the accused had all sorts of ideas in his mind, which could be considered to be guilty intent, and thereby indicative of indecent assault. My learned friend has succeeded in establishing the manner of design, he has brought out the approach dealing with suitcases, and the manner of design, to go further isn't enough to establish the matter of design, he has succeeded in doing so."

Be that as it may, it is my opinion that the evidence was properly admitted by the learned magistrate. It tended to establish guilty design and criminal intent. It was evidence of the intention of the accused to commit the offence of indecent assault as charged against him.

The principle which governs was laid down by Lord Herschell L.C. in Makin et al. v. The Attorney-General for New South Wales, [1894] A.C. 57 at 65, as follows: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

That case has been followed and the principles have been applied in many cases. I refer only to Rex v. Welford (1918), 1918 CanLII 570 (ON SC), 42 O.L.R. 359 at 361, 30 C.C.C. 156; Paradis v. The King, 1933 CanLII 75 (SCC), [1934] S.C.R. 165, 61 C.C.C. 184, [1934] 2 D.L.R. 88; Rex v. Christakos, 1946 CanLII 250 (MB CA), 53 Man. R. 317, 87 C.C.C. 40, [1946] 1 W.W.R. 166, 1 C.R. 34, and Regina v. Thompson, 1954 CanLII 406 (ON SC), [1954] O.W.N. 156, 107 C.C.C. 373. The evidence in question was admissible notwithstanding that some of the similar acts were done by the accused after the offence charged. They were part of the pattern of conduct and not too remote from that offence:
Regina v. Rhodes, [1899] 1 Q.B. 77 at 81; Regina v. 01lis, [1900] 2 Q.B. 758; Rex v. Wyatt, [1904] 1 K.B. 188 at 192; and it was quite proper for the prosecution to advance all proper evidence tending to prove the charge without waiting until after the accused set up a specific defence calling for rebuttal.

In Harris v. Director of Public Prosecutions, [1952] A.C. 694 at 706, [1952] 1 All E.R. 1044, 36 Cr. App. R. 39, where the cases and principles bearing on the question are discussed at length, Viscount Simon said: "The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell's words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal. Where, for instance, mens rea is an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and thus was acting criminally."

Counsel for the appellant argued next that the acts of the appellant in following and running after the boy and the act of "grabbing" him by the sleeve when he caught up to him were acts done for the purpose of avoiding detection of any prior wrongdoing, and that those acts were too remote to constitute a criminal attempt. I find it unnecessary to decide that point and do not rest my opinion on those acts of the accused.

Counsel then proceeded to his argument that the conduct and acts of the appellant from the moment he approached the boy were innocent in se, and that to constitute an attempt there must be "an act of such nature that it is itself evidence of the criminal intent with which it is done". He endeavoured to apply the "unequivocality theory", so-called, and the test suggested therein to determine whether or not an act done by an accused person is too remote to constitute an attempt to commit a crime. Salmond on Jurisprudence, 10th ed. 1947, s. 140, p. 388, accepts the "unequivocality theory" and likewise the learned editor of Archbold, Criminal Pleading, Evidence and Practice, 33rd ed. 1954, at p. 1489. But the theory is not universally accepted and has been much criticized: see Glanville Williams, Criminal Law; The General Part, 1953, s. 150, p. 495, and Hall, Principles of Criminal Law, 1947, p. 107, where the learned author says: "Despite the high competence of its proponents, it can readily be shown that the unequivocality theory is fallacious."

Other theories and tests have been formulated with a view to finding an answer to the question whether or not an act is sufficient in law to constitute an actus reus: see Hall, op. cit., pp. 104 et seq., also The Cambridge Law Journal, vol. V, 1935, p.236. It is my respectful opinion that there is no theory or test applicable in all cases, and I doubt whether a satisfactory one can be formulated. Each case must be determined on its own facts, having due regard to the nature of the offence and the particular acts in question. Much of the difficulty and confusion is attributable, in my humble opinion, to an insufficient understanding of the nature and gist of the crime of criminal attempt; and arises also in respect of the vexed question whether a particular act is an act of preparation only, or is an attempt. Perhaps, therefore, it will be helpful to observe carefully certain features of a criminal attempt as the doctrine of that offence was developed and established in the common law.

In ancient common law an attempt to commit a crime was not a misdemeanour. Apparently the established maxim was: "For what harm did the attempt cause, since the injury took no effect?" (Hall, op. cit., p. 64, quoting from Bracton.) But the Court of Star Chamber in the 16th century, and, after that Court was abolished in 1641, its successor the Court of King's Bench, treated many acts in the nature of preparation to commit a crime as misdemeanours. Thus, in the Case of Duels (1615), 2 State Tr. 1033, referred to in Hall, op. cit., at p. 80, Sir Francis Bacon, the Attorney General, in a Court which included the Archbishop of Canterbury, Lord Chancellor Ellesmere, Lord Chief Justice Sir Edward Coke, and Lord Chief Justice Hobart, described the prevalent evil of duelling and suggested that the wisest method of prevention was "to nip the practice ... in the head" by punishing "all the acts of preparation". He said at p. 1041:

"For the Capacity of this Court, I take this to be a ground infallible: that wheresoever an offence is capital, or matter of felony, though it be not acted, there the combination or practice tending to that offence is punishable in this Court as a high misdemeanor. So practice to impoison, though it took no effect; waylaying to murder, though it took no effect; and the like; have been adjudged

heinous misdemeanors punishable in this court. Nay, inceptions and preparations in inferior crimes, that are not capital, as suborning and preparing of witnesses that were never deposed, or deposed nothing material, have likewise been censured in this court ..."

In Rex v. Scofield (1784), Cald. Mag. Cas. 197, Lord Mansfield laid down the principle that an attempt to commit a crime is a crime. He said at p. 403: "In the degrees of guilt there is great difference in the eye of the law, but not in the description of the offence. So long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable."

That principle was not fully established until Rex v. Higgins (1801), 2 East 5, 102 E.R. 269.

Criminal intention alone is insufficient to establish a criminal attempt. There must be mens rea and also an actus reus. But it is to be observed that whereas in most crimes it is the actus reus which the law endeavours to prevent, and the mens rea is only a necessary element of the offence, in a criminal attempt the mens rea is of primary importance and the actus reus is the necessary element.

A learned writer, Mr. J.W. Cecil Turner, in an article, "Attempts to Commit Crimes" (1935), 5 Camb. L.J. 230 at 235, says: "It may perhaps be permissible to emphasize this by saying that in most crimes the mens rea is ancillary to the actus reus, but in attempt the actus reus is ancillary to the mens rea."

Likewise, the learned editor of Russell on Crime, 10th ed. 1950, at p. 1784, says: "Since the mischief contained in an attempt depends upon the nature of the crime intended, the criminality lies much more in the intention that in the acts done. Hence the courts sought for proof of only a sufficient physical element to satisfy the maxim that mens rea alone is not a crime."

While it is not difficult to define the mens rea of an attempt, a precise and satisfactory definition of the actus reus is perhaps impossible.

Jervis C.J. said in Regina v. Roberts (1855), referred to in Russell, op. cit., p. 1787, note 22: "It is difficult, and perhaps impossible, to lay down a clear and definite rule to define what is, and what is not, such an act done, in furtherance of a criminal intent, as will constitute an offence."

Kenny's Outlines of Criminal Law, 14th ed. 1933, p. 82, says:
"No abstract test can be given for determining whether an act is insufficiently proximate to be an attempt."

It may, however, be said with authority that: "An actus reus need not be a crime apart from the state of mind. It need not even be a tort, or a moral wrong, or a social mischief." (Glanville Williams, op. cit., s. 150, p. 494.)

The consummation of a crime usually comprises a series of acts which have their genesis in an idea to do a criminal act; the idea develops to a decision to do that act; a plan may be made for putting that decision into effect; the next step may be preparation only for carrying out the intention and plan; but when that preparation is in fact fully completed, the next step in the series of acts doen by the accused for the purpose and with the intention of committing the crime as planned cannot, in my opinion, be regarded as remote in its connection with that crime. The connection is in fact proximate.

In Dugdale v. The Queen (1853), 1 E. & B. 435 at 439, 118 E.R. 499, Lord Campbell C.J. said that the offence of publishing obscene prints is a misdemeanour, and the procuring of such prints is an act done in the commencement of a misdemeanour. Coleridge J. in the same case said: "... procuring with the intent to commit the misdemeanour is the first step towards the committing of the misdemeanour."

After considering the nature of a criminal attempt and the principles as they were developed and established in the common law, together with the cases to which I have referred, and others, I state these propositions in my own words to guide me in the instant case: (1) There must be mens rea and also an actus reus to constitute a criminal attempt, but the criminality of misconduct lies mainly in the intention of the accused. (2) Evidence of similar acts done by the accused before the offence with which he is charged, and also afterwards if such acts are not too remote in time, is admissible to establish a pattern of conduct from which the Court may properly find mens rea. (3) Such evidence may be advanced in the case for the prosecution without waiting for the defence to raise a specific issue. (4) It is not essential that the actus reus be a crime or a tort or even a moral wrong or social mischief. (5) The actus reus must be more than mere preparation to commit a crime. But (6) when the preparation to commit a crime is in fact fully complete and ended, the next step done by the accused for the purpose and with the intention of committing a specific crime constitutes an actus reus sufficient in law to establish a criminal attempt to commit that crime.

I apply those propositions to the evidence in the instant case. The appellant intended to commit the crime of indecent assault. He made a plan in detail to carry out his intention. The plan comprised a series of acts which form a clear-cut pattern of conduct, and the accused followed that pattern of conduct on all occasions. On the occasion in question, and in precise accordance with that pattern of conduct, he chose a time and place where he might procure a victim necessary for the consummation of the crime. He went to that place at the chosen time. Before or after doing so he put on large sun- glasses to disguise his identity. He then waited for the opportunity to pursue his planned conduct to the end. His preparation to commit the intended crime was fully complete. He was ready to embark on the course of committing the intended crime. It was necessary only to lure a victim to a secluded place. He approached Peter C. and, with deliberately planned falsehood and deceit, endeavoured to persuade that young boy to accompany him. If the boy had been successfully lured to a destination chosen by the appellant, can there by any reasonable doubt that the crime of indecent assault would have been committed by the accused? If the conduct of the accused did not amount to an attempt to commit that crime, then I know not what it was. The acts of the appellant from the first moment he approached Peter C. were not preparation. They were not too remote to constitute an attempt to commit the offence of indecent assault, and I so decide as a matter of law pursuant to s. 24(2) of The Criminal Code.

My opinion is the result of the application of the relevant principles of law to the particular facts in this case. Therefore, I do not derive much help from decisions in other cases involving different facts. However, I mention the following cases: Regina v. Ransford (1874), 13 Cox C.C. 9. In that case the evidence disclosed that H. was a boy at school. He had received two letters from the prisoner, which he read. He received a third letter which he did not read, nor was he in any way aware of its contents. It was handed over to the school authorities. It was held that the sending of the letter proved an attempt to incite H. to attempt to commit a specific offence.

Rex v. Cope (1921), 38 T.L.R. 243. The appellant wrote letters to a boy asking the boy to meet him, but containing no indecent invitation or solicitation. It was held that a jury was entitled to look at the circumstances in which the letters were written and to read into them an invitation to repeat a certain offence. The letters never reached the boy, but it was held that this fact did not prevent the writing of them from constituting an attempt.

Rex v. Barker, [1924] N.Z.L.R. 865. The act of the accused in walking with a boy, and with the intention of committing an indecent assault upon him, was held a sufficient act to constitute an attempt to commit that offence.

Rex v. Rump, 1929 CanLII 448 (BC CA), 41 B.C.R. 36, 51 C.C.C. 236, [1929] 1 W.W.R. 649, [1929] 2 D.L.R. 824. The evidence in that case disclosed that the accused made several approaches to a young girl with the obvious intent of assaulting her. He was interrupted, but a conviction for an attempt to carnally know a girl under 14 years of age was not disturbed.

My conclusion is that the conviction for the offence of indecent assault and the sentence imposed by the learned magistrate for that offence should be set aside. In place thereof this Court should find the appellant guilty of an attempt to commit the offence of indecent assault with which he was charged, and this Court should sentence the appellant to a term of imprisonment of five years. I would not interfere with the sentence of preventive detention imposed on the appellant by the learned magistrate.

Judgment accordingly.