REGINA v. SORRELL AND BONDETT

Ontario Court of Appeal, Dubin, Martin and Blair, JJ.A. *April 27, 1978.*

D. D. Doherty, for the Crown, appellant.

T. G. O'Hara, for respondent, Michael Thomas Sorrell.

Alan D. Gold, for respondent, Michael Charles Bondett.

BY THE COURT:—The Attorney-General of Ontario appeals against the acquittal of the respondents on a charge of attempted robbery.

The respondents were tried at Kingston before His Honour Judge Campbell, sitting without a jury, on an indictment containing three counts.

Count 1 charged the respondents jointly with, on or about March 3, 1977, attempting to rob Peter Mason of Aunt Lucy's Fried Chicken store at 240 Montreal St. in Kingston. Count 2 charged the respondent Sorrell with carrying, at the time and place aforesaid, a concealed weapon, to wit: a Smith and Wesson revolver. Count 3 charged the respondent Sorrell with having in his possession, at the time and place aforesaid, a Smith and Wesson revolver, knowing the same was obtained by an offence committed in Canada punishable on indictment. The respondent Sorrell, on arraignment, pleaded guilty to the charge of carrying a concealed weapon contained in count 2; his plea of guilty was accepted by the trial Judge after the evidence was completed, and he was sentenced to imprisonment for 18 months. The trial Judge acquitted the respondent Sorrell on count 3, on the ground that the Crown had failed to prove the necessary element of guilty knowledge. The Crown does not appeal the acquittal of Sorrell on count 3, and we are not further concerned with it.

On the evening of Thursday, March 3, 1977, Miss Dawn Arbuckle was the cashier at Aunt Lucy's Fried Chicken store at 240 Montreal St. in Kingston. The store is located at the corner of Montreal and Markland Sts., the customer entrances being on Montreal St. Mr. Peter Mason was the manager of the store. The regular closing time for the store was 11:00 p.m., but, on the evening in question, since almost all the chicken had been sold, the manager decided to close the store earlier, and locked the customer entrances at approximately 10:45 p.m. Around 10 minutes to 11:00 Miss Arbuckle noticed two men, wearing balaclavas, on the Markland St. side of the store; they then came to one of the customer entrances on Montreal St. The area outside the store was illuminated, and the lights normally on in the store, when open, were still on.

One of the men was wearing a blue ski jacket and the other was wearing a brown coat. The balaclavas worn by the two men were pulled down completely over their heads, and one man was also wearing sunglasses. Miss Arbuckle said that the balaclava worn by one man was blue and white in colour, and that worn by the other man was brown and white.

One of the men rapped on the door and on the window. The manager, who had been mopping the floor, turned around and said, "Sorry we are closed", and returned to his mopping. The two men turned toward each other, and made a gesture of surprise. At this time Miss Arbuckle noticed that one

of the men had a silver-coloured gun in his hand. The two men then walked away on Montreal Street in the direction of Princess St.; whereupon Mr. Mason, the manager, telephoned the police. Two officers in a cruiser responded to the call, drove to the area and saw two men, whose clothing corresponded to the description that the officers had been given, walking on Montreal St. The officers drove past the two men, then made a U-turn and drove back towards them.

As the officers passed the two men, before making the U-turn, they saw one of the men throw "an article of material" towards a snow bank on the side of the street. The two men, who proved to be the respondents, were then arrested. The respondent Sorrell had a loaded .357 Magnum revolver concealed in his, waistband. The gun was loaded with six Dominion .38 shells, and another five Dominion .38 shells were removed from the respondent Sorrell's pants' pocket.

An officer conducted a search of the immediate area where the respondents had been arrested, and found a brown balaclava on a snowbank on the side of Montreal St. The point on Montreal St. where the respondents were arrested was some 411 yards from the Aunt Lucy's store, where the attempted robbery is alleged to have occurred. The officer proceeded along Montreal St. in the direction of the Aunt Lucy's store, and found a blue balaclava in the middle of the sidewalk on Montreal St. at the intersection of Raglan St.

Neither of the respondents testified in his defence.

The Crown appeals against the acquittal of the respondents on the charge of attempted robbery on the ground that the trial Judge erred in law in holding that the acts of the respondents did not go beyond mere preparation, and hence did not constitute an attempt.

Section 24 of the Code defines an attempt as follows:

> 24(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an at tempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
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> (2) The question whether an act or omission by a person <u>who has an intent to commit an offence</u> is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is à question of law. (Emphasis supplied.)

In order to establish the commission of the offence of attempted robbery charged, it was necessary for the Crown to prove that the respondents:

(i) Intended to do that which would in law amount to the robbery specified in the indictment (mens rea), and

(ii) (ii) took steps in carrying out that intent which amounted to more than mere preparation (actus reus).

By virtue of s. 24(2) of the Code, the existence of element (i) is a question of fact, but whether the steps taken are sufficient to satisfy element (ii) is a question of law.

In R. v. Cline, (1956), 115 C.C.C. 18 at p. 29, 4 D.L.R. (2d) 480, [1956] O.R. 539, at pp. 550-1, Laidlaw, J.A., in his much-quoted judgment, said:

> (1) There must be mens rea and also an actus reus to constitute a criminal at tempt, but the criminality of misconduct lies mainly in the intention of the ac cused.
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> (5) The actus reus must be more than mere preparation to commit a crime. But
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> (6) when the reparation 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.

Thus, proof of the respondents' intention to commit the robbery particularized in the indictment, which is a question of fact, was the central issue in the case. Mr. Doherty for the Crown contended before us that on the facts found by the trial Judge, he erred in law in failing to draw the legal conclusion of guilt required by the facts accepted by him as proved, and, in particular, erred in law in holding that the acts of the respondents, found by him to have been proved, had not gone beyond mere preparation. Counsel for the respondents, on the other hand, contended that the trial Judge's reasons for judgment, considered in their entirety, show that he ac- quitted the respondents because he entertained a reasonable doubt whether they had the intent to rob the Aunt Lucy's store, the existence of which intent was essential to constitute the attempt charged.

A detailed examination of the trial Judge's reasons for judgment is necessary in order to endeavour to ascertain the basis upon which he acquitted the respondents. The trial Judge said:

> Turning to count 1, that is the count that effects both Sorrel and Bondett, namely, this attempted robbery count. There are many conclusions that I have drawn from the credible evidence, beyond a reasonable doubt, and I say that those conclusions complete substantially the Crown's case subject only — and I say only — to the thorny question as to whether or not the events in question constitute an attempt within the meaning of the Criminal Code.

After referring to certain discrepancies in the evidence of the Crown witnesses, which he did not consider material, the trial Judge continued:

> The Crown's case on count 1 has been proved beyond a reasonable doubt in my finding on the matters of identity of the accused, the date, the place and, subject only to what I am going to be saying on the matter of attempt, as to the allegation that the attempted robbery, if there was an attempted robbery, was committed in respect of Peter Mason of Aunt Lucy's Kentucky Fried Chicken.

He then held that Mr. Mason, as the manager of the store, had the custody of the money in the store, and said:

> It brings me down then to the sole remaining question, did what took place at the time and at the place, as referred to by the witnesses Arbuckle and Mason, constitute an attempt at robbery? I may say that I found the evidence of both of those witnesses to be satisfactory, credible, and my findings are based on that evidence. I as well look to the evidence at the trial as to the manner of departure from the premises — from in front of the premises — by the two accused and the actions that they were performing when seen and practically immediately apprehended by the police. I am finding that between them they rid themselves of the balaclavas which could raise the inference of guilty mind; but that, of course, raises the question: a mind having a sense of guilt of what? They may have thought that what they did at the front of the store was criminal in some way and that they should take some steps to cover up — whether they were right in that belief or not. Was what they had actually done illegal as being an attempt to rob, whether they believed it or not, that still leaves to me the question: was what they did within the ambit of an attempt to rob? The inference is pretty plain, and I think I would be naive to conclude otherwise, that they were up to no good on that occasion, that they may well have had robbery of the store in mind. But, again, I am driven back to the provisions of the Code that differentiate between mere preparation and the actual commencement of steps to commit the robbery.
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> I am obliged to counsel for their references to cases on the point, one of which endeavours to lay down tests for the assistance of the Court, and subsequent cases, but all of which have their own set of facts and circumstances with which the Court then in those cases had to deal. It is an extremely thin line, but whether thin or otherwise, if my finding is that that line had been crossed beyond mere preparation, the finding — if it were to be made — that the line had been crossed would be sufficient to bring me to a conclusion beyond a reasonable doubt. Nevertheless, the fineness of the line is a bother to me. I am conscious of the fact that the accused timed their arrival at the store such that they could expect a fund of money to be in the till, such they could expect there would likely be few if any persons there other than the store personnel, and that they had costumed themselves for the purpose of disguising their features to render subsequent identification difficult, but I am also of the view that it is important for me to consider the fact that apart from rattling the door and perhaps rattling on the window — that would be consistent with an innocent person's endeavour to get in the food store — there was no gesture of threat of violence or threat of force. The case before me is attempted robbery and not attempted break, enter and theft, or break and enter with intent, or conspiracy, or whatever. So that the endeavour to open the door would — were one of those other charges to have been before me, and I am not saying in any way that it should have been before me — what was done by way of attempt

> to open the door could relate more to a charge of attempted breaking rather than the charge of robbery. In brief, in my finding, the accused by virtue of I suppose good luck of not having been able to progress further in doing whatever they were going to do had not yet crossed the line between preparation and attempt. Accordingly, I am finding that count 1 as regards both accused has not been proved on that narrow ground, and I have endorsed the indictment on count 1: both accused not guilty.

It will be observed that while the trial Judge made an express finding that he was satisfied beyond a reasonable doubt that the respondents were the two men who had approached the store, and that one of them had a gun, he made no similar finding with respect to the existence of the necessary intent to rob. Mr. O'Hara, on behalf of the respondent Sorrell particularly emphasized the following passages in the trial Judge's reasons, relative to intent, which Mr. O'Hara characterized as "powerful expressions of doubt", namely: "... they may well have had robbery of the store in mind", and"... what was done by way of attempt to open the door could relate more to a charge of attempted breaking rather than the charge of robbery". In our view, the trial Judge's reasons are more consistent with a finding that the necessary intent to commit robbery was not proved beyond a reasonable doubt, than with a finding that such intent was established by the evidence. In any event, the Crown has not satisfied us that the trial Judge found the existence of an intent to rob.

The Crown's right of appeal under s. 605(1)(a) of the Code is confined to a ground of appeal that involves a question of law alone. The failure of the trial Judge to draw the appropriate inference of intent from the facts found by him, is an error of fact, and does not raise a question of law.

In *Lampard v. The Queen*, [1969] 3 C.C.C. 249, 4 D.L.R. (3d) 98, [1969] S.C.R. 373, the Supreme Court of Canada reversed the judgment of this Court, which had set aside the acquittal of the accused, and registered a conviction, on the ground that the trial Judge erred in failing to infer from the facts found by him, the specific intent which was a constituent element of the offence with which the accused was charged. Cartwright, C.J.C. (with whom Martland and Ritchie, JJ., concurred), said at pp. 256-7 C.C.C., pp. 380-1 S.C.R.:

> Unless the doer of the act has expressed his intention, the finding as to what that intention was will necessarily be founded on an inference drawn from all the relevant circumstances proved in evidence. It has often been pointed out that where a trial Judge makes findings of primary facts and draws an infer ence therefrom an appellate tribunal is in as good a position as was the trial Judge to decide what inference should be drawn, but in drawing the inference the Court is making a finding of fact. In the case of an appeal at large the Court of Appeal has, of course, power to substitute its view, as to what infer ence should be drawn, for that of the trial Judge, but where, as in the case at bar, the jurisdiction of the Court of Appeal is limited to questions of law in the strict sense it has no such power.
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> Nothing would be gained by my expressing an opinion as to what inference as to the intention of the appellant the learned trial Judge should have drawn from the primary facts which he found to have been proved. The Court of Ap peal has said in the passage quoted above that "there is only one reasonable inference", that the conclusion that the guilty intention existed in the mind of the appellant is "an irresistible one", that it is "the only inference that can be drawn from the facts in the record". If I shared fully the view so expressed by the Court of Appeal, I would none the less be satisfied that the error (if such it were) made by the learned trial Judge in failing to draw the suggested infer ence was an error of fact.
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> In my opinion the Court of Appeal has fallen into the error of saying that the question of what inference should be drawn from certain undisputed facts is a question of law. Whether or not it is so must depend on the nature of the question as to which the inference is to be drawn. Here, as I have endeavoured to show above, the inference is as to the intention with which the appellant effected the transactions, that is as to the state of the appellant's mind, which is a question of fact.

Judson, J. (with whom Spence, J., concurred), said at pp. 257 C.C.C., p. 382 S.C.R.:

> The basis of the judgment of the learned trial Judge, who was sitting with out a jury, was that the trading activities of the appellant did not indicate to him beyond a reasonable doubt that they were carried out "with intent to cre ate a false or misleading appearance of active public trading in a security". On the other hand, a unanimous Court of Appeal thought that the inference that there was such intent was irresistible.
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> I agree with this conclusion of the Court of Appeal but we are still left with the question whether the error was one of fact or law. I am compelled by the majority judgment of this Court delivered in R. v. Sunbeam Corp. (Canada) Ltd. to hold that the error — and I am sure that it was error — was one of fact. The appeal therefore succeeds.

If the trial Judge had found that the respondents intended to rob the store, the acts done by them clearly had advanced beyond mere preparation, and were sufficiently proximate to constitute an attempt: see Henderson y. The King (1948), 91 C.C.C. 97, [1949] 2 D.L.R. 121, [1948] S.C.R. 226, per Kerwin, J., at p. 98 C.C.C., p. 228 S.C.R., per Estey, J., at pp. 114-16 C.C.C., pp. 243-6 S.C.R., per Locke, J., at pp. 116-17 C.C.C., p. 246 S.C.R.; R. v. Carey (1957), 118 C.C.C. 241, [1957] S.C.R. 266, 25 C.R. 177, per Kerwin, C.J.C., at pp. 246-7, per Rand, J., at p. 251. If the trial Judge had found that the respondents had the necessary intent his finding that the acts done by the respondents did not go beyond mere preparation and did not constitute attempted robbery, would constitute an error of law that would not only warrant, but require our intervention.

Because of the doubt that he entertained that the respondents had the necessary intent to commit robbery, however, his error in law in holding that the respondents' acts did not go beyond mere preparation, could not have affected the verdict of acquittal, unless, of course, his self-misdirection with respect to what constituted mere preparation, led him into error in entertaining a reasonable doubt whether the requisite intent had been proved. This question is one of considerable difficulty. The following passage (included in those previously quoted), would tend to support the conclusion that the trial Judge was led into error with respect to the existence of the necessary intent by self-misdirection that the respondents' acts had not gone beyond mere preparation:

> It is an extremely thin line, but whether thin or otherwise, if my finding is that that line had been crossed beyond mere preparation, the finding — if it were to be made — that the line had been crossed would be sufficient to bring me to a conclusion beyond a reasonable doubt. Nevertheless, the fineness of the line is a bother to me.

The trial Judge then proceeded, however, to refer to the matters in the passages previously quoted, relating to the issue of intent, which gave him difficulty in finding that the required mental element was present. The issue of intent was basic and, the trial Judge, in our view, could not logically or appropriately make a determination whether the acts of the respondents went beyond mere preparation until he had first found the intent with which those acts were done. The issue whether the acts of the respondents went beyond mere preparation could not be decided in the abstract apart from the existence of the requisite intent.

In the present case, there was no evidence of the intent to rob other than that furnished by the acts relied on as constituting the actus reus. There was no extrinsic evidence in the form of statements of intention, or admissions by the respondents showing what their intention was.

The prosecution in this case was forced to rely exclusively upon the acts of the accused,not only to constitute the actus reus, but to supply the evidence of the necessary mens rea. This Court in R. v. Cline, supra, rejected the so-called "unequivocal act" test for determining when the stage of attempt has been reached. That test excludes resort to evidence aliunde, such as admissions, and holds that the stage of attempt has been reached only when the acts of the accused show unequivocally on their face the criminal intent with which the acts were performed. We are of the view that where the accused's intention is otherwise proved, acts which on their face are equivocal, may none the less, be sufficiently proximate to constitute an attempt. Where, however, there is no extrinsic evidence of the intent with which accused's acts were done, acts of the accused, which on their face are equivocal, may be insufficient to show that the acts were done with the intent to commit the crime that the accused is alleged to have attempted to commit, and hence insufficient to establish the offence of attempt.

Counsel for the respondents while conceding that the trial Judge's reasons are not free of ambiguity, submitted that they are reasonably open to the interpretation that he was searching for evidence that satisfied him beyond a reasonable doubt that the accused intended to rob the store in question, and at the end of his quest was not satisfied beyond a reasonable doubt, that the acts done by the accused supplied the necessary proof of intent.

We think that this submission accurately states the basis upon which the trial Judge acquitted the respondents, and the Crown has not satisfied us that but for the self-misdirection with respect to which complaint is made, that the verdict of the trial Judge would not necessarily have been the same. It is not to the point that, on the evidence, we would have reached a different conclusion with respect to the respondent's intentions.

Because of the view which we have taken, it is unnecessary to consider the difficult question whether, in the circumstances, the conviction of the respondent Sorrell on the charge of carrying a concealed weapon "at the time and place aforesaid" would preclude his conviction on the charge of attempted robbery, by virtue of the principle enunciated in Kienapple v. The Queen (1974), 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, [1975] 1 S.C.R. 729. For the reasons given the appeal must be dismissed.

Appeal dismissed.