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REX *v.* DONOVAN.

C.C.A.
1934.
July 27.

LORD HEWART, C.J.
SWIFT, J.
DU PARC, J.

Criminal Law—Assault—Bodily Harm intended or a Probable Consequence—Consent as Defence—Materiality—Direction to Jury where Consent material.

No person can license another to commit a crime, and therefore a criminal act cannot be rendered lawful by the person to whose detriment it is done consenting to it.

In the case of an assault it is, as a general rule, unlawful to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence or must be inferred to have been intended, and, therefore, when such an act is proved, the fact that the person assaulted consented to the assault is immaterial.

Exceptions to this general rule discussed.

Where consent is in issue the jury must be directed (*a*) that the onus of negativing consent is on the prosecution, and (*b*) 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.

JUDGMENT was delivered, stating their Lordships' reasons for allowing the appeal and quashing the conviction of John George Donovan, an engineer, who had been convicted at Surrey Quarter Sessions of indecently assaulting a girl and had been sentenced to eighteen months' imprisonment with hard labour. On a further charge of common assault he was convicted and sentenced to a concurrent sentence of six months' imprisonment with hard labour.

The appeal was argued on June 25, when the Court quashed Donovan's conviction and intimated that they would give the reasons for their decision later.

Mr. G. B. McClure appeared for Donovan; Mr. C. G. L. Du Cann for the prosecution.

MR. JUSTICE SWIFT read the judgment of the Court, which was as follows: The appellant was convicted at the Surrey Quarter Sessions on an indictment charging him with indecent assault and common assault on Norah Eileen Harrison. He was sentenced to eighteen months' imprisonment with hard labour on the count for indecent assault, and to six months' imprisonment with hard labour on 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.

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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 of seventeen years of age, to go with him to a garage at Morden, and that he there beat her with a cane in circumstances of indecency. The defence was that it lay on 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 appears that the appellant was addicted to a form of sexual perversion, and there is no doubt that during a series of telephone conversations he made suggestions to the girl which, if they were taken seriously, meant that he intended or desired to beat her. According to the appellant's evidence and that 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 "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, 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. There the alleged offence was 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 on 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 letter in 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 had 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, 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 on 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* (29 *The Times* L.R. 24; [1912] 3 K.B. 572) 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."

The Court has no doubt that the facts proved in the present case were such that the jury might reasonably have found consent. It was, indeed, difficult to reconcile some of the admitted facts with absence of consent. It was therefore of importance (if consent were in issue) that there should be no possibility of doubt in the minds of the jury on 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 concerned has been such that,

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viewed as a whole, it shows that she did not consent, then the prisoner is entitled to be acquitted.

It is evident that the Chairman was at pains to sum up an unusually difficult case with impartiality and precision. The Court thinks, nevertheless, that if the summing-up is looked at in the light of the observations which we have made it will be seen to be defective in two respects.

First, the Court 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 on this point, but we think it unnecessary to comment on 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 (supra)*.

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 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 the view of the Court, that direction was 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 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 was 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.

That conclusion would have been enough to dispose of the case, were it not for the fact that counsel for the Crown relied in this Court on the submission 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. Counsel on both sides referred us to passages in the judgment in the case of *Reg.* v. *Coney* (8 Q.B.D. 534). 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 behalf of the Crown on the following passage from the judgment of Mr. Justice Cave, at page 539: " The true view is, I think, that a blow struck " in anger, or which is likely or is 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 on which this view of the 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

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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, Article 290, Sir James Fitzjames Stephen enunciates the proposition that "everyone "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 Article 293 of his Digest the learned author says: "It is uncertain to 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 Cases and East's Pleas of the Crown, much learning on the distinction between lawful and unlawful acts is to be found in the chapters dealing with homicide. At page 259 of the former work (3rd 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 conse-"quence 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 his Crown Cases (3rd edition), page 259, where he refers to the case of persons who in perfect friendship engage by mutual consent in contests such as "cudgels "or 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 tend to "give strength, skill, and activity, and may fit people for "defence, publick 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* (2 Cox 262). In such cases the act is not in itself unlawful, and it becomes unlawful only if the person affected by it is not a consenting party.

In the present case it was not in dispute that the appellant's motive 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 "bodily harm, he had no other intent," and that what he did was *malum in se*. Nothing could be more absurd or more repellant 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 horseplay in the case of *Reg.* v. *Bruce (supra)*.

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

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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, on the footing that the issue of consent was the "vital question in the case." It is not too much to say that in all probability the only question which the jury felt called on 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 Donovan intended to cause and inflicted blows likely to cause bodily harm to the girl, 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 on evidence which they have heard. We may have little doubt that 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 Donovan's act to have been unlawful in itself. Without proof of such facts he could be convicted only if the prosecution negatived consent, and on 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.

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