

R. v. PAGE.

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1933

Criminal law—Attempt to commit a crime—Change of mind.

August 3, 7.

Where the prisoner has so far prosecuted his criminal purpose as otherwise to be guilty of an attempt, he is not exculpated by the fact that owing to a mere change of mind he desists, of his own free will, from completion of his purpose.

With intent to break and enter a shop, a confederate of the prisoner climbed to a suitable position and inserted a lever under a window. Before he exerted any force on the lever he changed his mind and descended.

Held, the acts were sufficient to constitute an attempt to break and enter the shop.

CASE STATED under sec. 478 of the *Crimes Act* 1928.

His Honour Judge Woinarski, as Chairman of a Court of General Sessions, stated a case for the opinion of the Full Court, in which he said, so far as is material:

“On the 25th May last at the Court of General Sessions, Geelong, Leslie Page was tried before me and convicted by the jury on a charge of attempted shopbreaking. A point of law arose upon the trial in respect of which this case is now reserved.

“The evidence adduced by the Crown showed that a boy, Partridge, with Page had arranged to break into a shop, at Ryrie Street, Geelong, of one Wiggs, and to steal therefrom a quantity of tobacco and cigarettes, which were to be sold and the proceeds divided. In pursuance of the plot Page came from Melbourne to Geelong, met Partridge, and with him went to a motor truck, from which Partridge stole a tyre-lever. Then they went to Wiggs’ shop, entering a lane which led to the back of the shop. Page kept watch. Partridge climbed on to a skillion roof and was then seen to be tampering with the brick wall at the back of the shop and using the tyre-lever. Partridge displaced a brick some 3 or 4 inches out from the alignment of the brick wall, and used the extruded brick as a footing to operate the tyre-lever on the sill of the back window of the shop so as to effect entrance. Unidentified finger prints were afterwards observed on the window-sill. Partridge was seen to be doing something to the window-sill and then to come down to the skillion roof and throw the tyre-lever into the lane. He then dismounted from the skillion roof and was rejoined by Page, and both were walking out of the mouth of the lane when the police

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intercepted them. There was no sign of injury on the window or window-sill, or of any force having been applied to it.

“Partridge made a written statement to the police, in which appeared the following passage:—‘After I went into the yard I climbed up on to the window and then up the chimney on to the roof. When I got on the roof I then put the lever under the window-ledge for the purpose of prising it open. Before I used any force I began to think of my mother and other things, and I decided then that I would not continue on with the job. I then threw the jemmy produced (*i.e.* the tyre-lever) down to my mate, and I got down off the roof and joined him in the lane.’

“Police evidence was that Page admitted the truth of Partridge’s statement, and that he said he would plead guilty to the charge. Page pleaded not guilty, but was not defended by counsel. Partridge had been before the Children’s Court, and there had been dealt with. There was no doubt the two had been acting in concert and that Partridge had taken on the more active part in the enterprise, but as the prisoner was without counsel and as I had a doubt whether on the Crown case there was more than intention to commit the shopbreaking, and preparation to break into the shop by means of the back window being prised open, I allowed the case to go to the jury and told the prisoner that I would reserve a point for a higher Court if the jury did convict him.

“The question I have the honour to submit is: Was I right in leaving the case for the jury to decide? Had Partridge done any overt act immediately connected with the commission of the offence?

“The jury convicted the prisoner. I refrained from sentencing him and made an order for his release on bail pending the consideration and determination of this case.”

The prisoner also appealed against the conviction.

Book, for the Crown.

The prisoner was not represented by counsel.

Cur. adv. vult.

MANN A.C.J. delivered the judgment of the Court (MANN A.C.J., LOWE and GAVAN DUFFY JJ.)—This was a question of law reserved by a Court of General Sessions, raising a question

of some importance with regard to the nature of an attempt to commit a crime. There was also an appeal by the accused, which covers the same point.

The facts are more particularly set out in the case, but shortly the material circumstances were these:—The accused induced a young fellow named Partridge to join him in a shop-breaking enterprize at Geelong. The accused kept watch in a lane, while his companion mounted a wall, having armed himself with a lever. Having reached a position where he could open a window, he put the lever under the window-ledge for the purpose of prising it open, but, before using any force, he decided he would not “continue on with the job.” He dropped the lever to the ground and himself descended, and was arrested with his confederate. The accused admitted the truth of that description of what took place, and the learned trial Judge reserved the case, which asks whether what was done by Partridge amounted to an overt act sufficient to constitute an attempt to break into the shop in question. We are of opinion that that question should be answered in the affirmative.

The act in question was one of a series of acts or omissions which would have constituted an offence if they had not been interrupted and are thus to be distinguished on the authorities from a mere preparation to commit an offence. The learned Prosecutor for the King, the prisoner being undefended, referred us to the words of a definition of an attempt which seemed to offer a further defence on behalf of the prisoner to the charge as laid. In *Russell on Crimes* (8th ed.) p. 148 it is said: “The question in each case is whether the acts relied on constituting the attempt were done with intent to commit the complete offence, and as one or more of a series of acts or omissions directly forming some of the necessary steps towards completing that offence, but falling short of completion by the intervention of causes outside the volition of the accused, or because the offender of his own free will desisted from completion of his criminal purpose for some reason other than mere change of mind.” The concluding words of that definition if they are well founded in law seem to exclude the facts of this case from criminal liability on the part of the accused or his confederate. No authority is cited for that part of the definition, and upon principle it seems difficult to believe that it forms any part of the criminal law. If correct, it would

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seem to involve the necessity, in almost every case of an unsuccessful attempt to commit a crime, of determining whether the accused desisted from sudden alarm, from a sense of wrongdoing, from failure of resolution, or from any other cause. In the great majority of attempts to commit a crime the persons concerned desist because of causes affecting their volition, and the case we are dealing with is a case in point.

The definition of an attempt is well ascertained in English law, and has been laid down by more than one authority. In the 27th edition of *Archbold's Criminal Pleading*, at p. 1407, there is quoted a definition from a Draft Criminal Code—a document of the very highest legal authority, inasmuch as it was prepared by Lord Blackburn and Barry, Lush and Stephen JJ. That definition is as follows:—“An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause.” That definition is in marked contrast with the passage in *Russell on Crimes*. It was cited, and its authority was approved by Pickford J., in *R. v. Laitwood (a)*; and in *Stephen's Digest of the Criminal Law* (7th ed.) at p. 52 the rule is laid down in almost identical terms. After defining attempts the learned author concludes with this clause: “The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself.” The author cites for that proposition the well-known case of *R. v. Taylor (b)*, in which a man struck a match for the purpose of setting fire to a haystack, but desisted and blew out the match on becoming aware that he was watched, and in which Pollock C.B. laid it down that on those facts there was an attempt to commit a crime. The definition in *Russell* was commented on in *R. v. Robinson (c)* as being too wide. The position therefore seems to be that there is no authority to support the latter part of the definition in *Russell on Crimes*, while there is high authority for saying that it is an erroneous statement of the law. The more limited definition is approved by our own Full Court in *R. v. Waugh (d)*.

(a) [1910] 4 Cr. App. R. 248.

(c) [1915] 113 L.T. 379.

(b) [1859] 1 F. & F. 511.

(d) [1909] V.L.R. 379, at p. 383.

The result is that the attempt in this case was, in our opinion, proved, and the fact that the confederate of the accused desisted of his own volition affords no answer to the charge. Each of the two questions asked by the case will be answered in the affirmative. For the same reasons the appeal against the conviction is dismissed.

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Mann A.C.J.*Questions answered accordingly.**Appeal dismissed.*Solicitor for the Crown: *F. G. Menzies*, Crown Solicitor.

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CATMULL *v.* CATMULL.

GAVAN DUFFY J.

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June 30.
*August 1.**Divorce — Practice — Discontinuance of suit without leave — Leave to file answer and counter-petition.*

The respondent in a divorce suit entered an appearance, but failed to file an answer within the time allowed by the Divorce Rules. The petitioner thereupon, without leave of the Court, gave notice of discontinuance of the suit. On an application by the respondent to a Judge in Chambers for leave to file out of time an answer and counter-petition,

Held, the respondent should be given the leave sought, notwithstanding that the petitioner had purported to discontinue the suit.

SUMMONS.

The petition of Edwin Samuel Catmull sought a dissolution of his marriage with the respondent Alicia May Catmull on the ground of desertion. An appearance was entered by the respondent, but no answer having been filed the suit was set down for hearing as undefended. The petitioner's solicitor subsequently consented to the respondent's filing an answer, provided she did so without undue delay. Delay occurred and the petitioner's solicitor served on the respondent's solicitor, without obtaining leave of the court or a Judge, a notice that the petitioner wholly discontinued the suit. The respondent then applied by summons for leave to file an answer and counter-petition.