

REX V. BOWERN.

1915, July 2, 15. Court of Appeal, Wellington.
Stout, C.J., Denniston, Sim, Hosking, Stringer, JJ.

*Criminal law—Attempt to procure miscarriage—
Counselling—No crime committed—Amendment
of indictment—Conspiracy—Conviction quashed
—Crimes Act, 1908, sections 90, 91, and 351.*

The prisoner was charged that with intent to procure the miscarriage of a woman with child, he did counsel or procure her unlawfully to permit an instrument or other means to be used upon her. The jury found that he was guilty of counselling the woman. There was no evidence that the crime was committed.

HELD.—That the conviction must be quashed and that an application by the Crown for an amendment of the indictment to one of conspiracy and for a new trial should be refused.

von Haast for the prisoner:

There can be no prosecution in New Zealand for common law crimes: The Crimes Act, 1908, section 5; *R. v. Mabin* (3 G.L.R. 426: 20 N.Z.L.R. 451); *R. v. Eager* (6 G.L.R. 236: 23 N.Z.L.R. 552). Unsuccessfully soliciting or instigating a crime, which is not committed, is in England an offence indictable at common law: *Russell on Crimes* (at page 203); *Reg. v. Gregory* (L.R. 1 C.C.R. 77); *Rex v. Higgins* (2 East 5). Unsuccessfully soliciting or instigating a crime is not in New Zealand a crime except where specially made so by the Crimes Act (*e.g.*, in sections 189 and 192), or some Act not inconsistent therewith. Section 351 of the Crimes Act only applies to inciting a person to commit a crime under some statute not inconsistent with that Act, and not to inciting a person to commit a crime under that Act. The fourth count, therefore, cannot be amended to disclose an offence against this section. A person counselling the commission of a crime is himself liable as a principal, and

therefore some offence must be committed before there can be a conviction for counselling; *R. v. Brown* (15 N.Z.L.R. 18); *R. v. Baker* (11 G.L.R. 575: 28 N.Z.L.R. 536). Hence no person can be convicted under subsection (d) of section 90 of the Act unless (a) the actual offence counselled was committed, or (b) an offence was committed different from that counselled, but one likely to be committed in consequence of such counselling (see section 91), or (c) an attempt was made to commit the offence counselled or a similar one. In this case it is clear that the actual crime counselled was not committed, nor was a different offence committed. Nor did the acts done by the woman constitute an attempt to commit a crime: *Russell on Crimes* (Vol. I., pp. 141-2); *Stephen's Digest of the Criminal Law* (6th ed., p. 39); *Stephen's History of the Criminal Law* (Vol. II., pp. 225-6). All that was done by the woman was to enquire whether another woman would be willing to do something to procure her miscarriage. There is not even sufficient evidence of an attempt to go to a jury. It is an attempt on the part of the woman that has to be proved; an attempt on the part of the prisoner will not make him guilty under the fourth count. The cases of *R. v. Austin* (7 G.L.R. 499: 24 N.Z.L.R. 983) and *R. v. Thompson* (13 G.L.R. 564: 30 N.Z.L.R. 690) must be distinguished from this case. Even if there were an attempt, the count cannot be amended without prejudicing the accused in his defence. The question of whether the evidence showed an attempt was not raised at the trial, nor was it submitted to the jury. Though it is a question of law as to whether any acts constitute an attempt (see section 93), it is for the jury to find the facts. An indictment cannot be amended so as to substitute a different crime from that charged: *R. v. Scully* (6 G.L.R. 248: 23 N.Z.L.R. 380). The case of *R. v. Skellon* (15 G.L.R. 671: 33 N.Z.L.R. 102) is distinguishable from this case, because there the Court had a finding of the jury on the facts. For these reasons the conviction on the fourth count should be quashed.

Solicitor-General (Salmond) for the Crown:

I cannot dispute the argument of counsel for the prisoner as to the effect of section 351. The wording of that section follows the English Bill of 1880. The section (423) of the Draft Code prepared by the Criminal Code Bill Commission of 1879, providing for inciting to commit an offence under the Act, has been omitted from the Crimes Act. Nor can I dispute counsel's argu-

ment that the evidence does not disclose "counselling." *Reg. v. Gregory* (*cit. sup.*) is decisive on that point. That decision was based on 24 & 25 Vict., c. 94, section 2, and I cannot distinguish that section from section 90 of our Act. Section 90 does not provide for "inciting." If it did, section 351 would be unnecessary. The question is whether the indictment can be amended so as to make the count conformable with the proof, and whether such amendment would be justifiable. I must admit that there has been no finding of the jury disclosing another crime that could be substituted. The only charge with regard to which evidence was taken and a verdict given was that of inciting. I agree that *R. v. Skellon* (*cit. sup.*) is distinguishable from this case. If that case marks the limits of the Court's powers in amending an indictment, I do not think the indictment can be amended. The question of whether the acts constitute an attempt is a question of law, and a new trial should not be ordered to determine this. I am inclined to think that the acts done by the woman did not amount to an attempt. This is certainly the case if the recent case of *R. v. Robinson* (11 Crim. App. Cases 124) is rightly decided. The indictment should be amended to disclose a new offence in respect of which a verdict has not been found, and a new trial ordered.

(STOUT, C.J.: Could not the accused at the new trial set up the plea of *autrefois acquit* under section 403?)

That is a point I have not considered. The only possible offence disclosed is that of conspiracy. A man may conspire with another to commit an offence of which he alone cannot be guilty: *Archbold's Criminal Pleading* (24th ed., p. 1411). If such a course would not prejudice the accused, an indictment of conspiracy to commit an offence against section 222 should be preferred against the prisoner and May Williams, and a new trial ordered.

von Haast in reply:

A new trial should not be ordered. This indictment might have been amended, and therefore the accused could set up the plea of *autrefois acquit*. The proper course is to quash the conviction and leave the Crown to bring a fresh charge of conspiracy if it chooses.

Cur. adv. vult.

THE COURT, PER STOUT, C.J.—In this case there were four counts in the indictment against the

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prisoner, but the third count was withdrawn from the consideration of the jury. The jury found the prisoner guilty on the fourth count only. The charge in that count was that in the month of November at Auckland "with intent to procure the miscarriage of one Florence May Williams a woman then with child did counsel or procure her unlawfully to permit a noxious thing to be administered to her or unlawfully permit an instrument or other means to be used upon her against the form of the statute in such case made and provided." The jury were told to disregard the charge of "procuring," and their verdict was only that the prisoner was guilty of counselling the woman Williams. There was no evidence that the crime was committed, that is, no evidence that any noxious thing was administered to her or that an instrument or other means were used upon her to procure miscarriage. The question then was: Is it an offence under our Criminal Code to counsel the commission of a crime that was never committed? Two parts of the Crimes Act were referred to, viz., Part IV., sections 90 and 91, and section 351 of Part IX. Unless these sections disclose that counselling is a crime, though no crime is committed, there is no provision of the Code applicable. Part IV. deals with the "Parties to the Commission of Offences," and section 90 says *inter alia*:

"Every one is a party to and guilty of an offence who—

- "(a) Actually commits the offence; or
- "(b) Does or omits an act for the purpose of aiding any person to commit the offence; or
- "(c) Abets any person in the commission of the offence; or
- "(d) Counsels or procures any person to commit the offence."

Section 91 says:

"(1) Every one who counsels or procures another to be a party to an offence of which that other is afterwards guilty is a party to that offence, although it may be committed in a way different from that which was counselled or suggested.

"(2) Every one who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew or ought to have known to be likely to be committed in consequence of such counselling or procuring."

In our opinion both these sections deal only with those who are parties to the commission of an offence. If no offence has been committed there can be no parties. The language in its plain meaning shows this. In paragraph (d) of section 90 the words used are: "counsels . . . any person to commit the offence." What offence? It must mean the offence mentioned in (a), and it signifies, therefore, that some offence has been committed.

A similar question arose in the case of *Reg. v. Gregory* (L.R. 1 C.C.R. 77). In that case the prisoner was indicted for a misdemeanour at common law, and the point raised was that since the Act 24 & 25 Vict., c. 95, section 2, he could not be so indicted, as soliciting and inciting to commit a felony was a felony under that statute and not a misdemeanour at common law. The words of the statute were:

"Whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished."

The Court held that the statute did not make soliciting and inciting or counselling or procuring an offence if no felony had been committed.

If the prisoner could not have been convicted under section 90, is section 351 applicable? It appears in a subdivision of the Act that deals with "threatening and attempting to commit crimes." There are twelve sections in this subdivision, sections 342 to 353, inclusive. The first four deal with threats, the next three deal with conspiracies, section 349 deals with an attempt to commit a crime, section 350 deals with attempts also, and section 351 deals with attempts and inciting. The other sections deal with accessories after the fact. Section 351 is the only one that can be said to have any reference to the facts in this case. It reads:

"Every one is liable to two years' imprisonment with hard labour who attempts to commit

any crime under any statute not inconsistent with this Act, or incites or attempts to incite any person to commit any such crime."

This section is obviously dealing with attempts to commit or inciting to commit some act that is not a crime under the Crimes Act, and in our opinion, therefore, it cannot be said to justify the fourth count or the finding on it. Our code is similar to the Criminal Code introduced into the British House of Commons in 1880, and similar to the code founded on it brought before the New Zealand House of Representatives in 1883. Through some oversight or because it was not desired to punish such acts as the prisoner has been guilty of, section 365 of the original code prepared by Sir J. F. Stephen was omitted from our code. That section was as follows:—

"Every one who attempts to commit or incites or attempts to incite any person to commit any offence under this Act, not punishable with penal servitude, in any case where no express provision is made by this Act for the punishment of such attempt, shall be guilty of an indictable offence, and shall be liable upon conviction thereof to imprisonment for a term equal to one-half of the longest term to which a person committing the offence attempted to be committed may be sentenced under this Act (with or without hard labour as the case may be)."

We have not, therefore, in our Act the provision that was in the original code, and the prisoner cannot be said to be guilty of any offence under section 351 of our Act.

The next question is whether the indictment can be so amended as to allow the conviction to stand or a new trial to be ordered?

The powers of amendment given by the Act are very wide. They have been considered by this Court in the cases of *Rex v. Scully* (6 G.L.R. 248: 23 N.Z.L.R. 380) and *Rex v. Sweeney* (7 G.L.R. 529). These cases decided that this Court ought not, where the evidence does not establish the commission of the offence charged, but discloses the commission of another crime, to amend the indictment by altering the charge laid to that of a different offence in order to make the indictment conformable to the proof.

It was contended on behalf of the Crown that the evidence proved that an attempt had been made by the woman Williams to procure her own abortion, that the prisoner was by virtue of section 90 a party to such attempt, and therefore that the indictment should be amended so as to conform to the evidence. The evidence, however,

was altogether insufficient to prove any such attempt on the part of the woman, and the most that could be said is that there was some evidence of preparation to make the attempt. It was finally suggested by the Solicitor-General that the evidence disclosed a conspiracy between the prisoner and the woman Williams to procure the miscarriage of the latter, and that the indictment should be amended accordingly and a new trial ordered. This, however, would amount to the substitution for the offence charged in the indictment of a different crime in respect of which no indictment has been preferred against the prisoner, and for which he is still liable to be proceeded against, and would be directly contrary to the decision of this Court in the case of *Rex v. Scully* (6 G.L.R. 248: 23 N.Z.L.R. 380).

In our opinion, no amendment that could properly be made would bring the facts as stated in the evidence within any of the provisions of the Crimes Act, 1908. The conviction must therefore be quashed.

Solicitors: for the Crown: *J. A. Tole*, Auckland; for the prisoner: *R. A. Singer*, Auckland.

PENMAN V. BENNIE.

1915, July 20, 21, 27. Supreme Court (Full Court), Wellington. Edwards, Cooper, Chapman, JJ.

Mining law—Inspecting mines—Failure to inspect—Colliery—Inspecting parts worked out—Daily examination—Coal Mines Act, 1908—Second schedule—Rules—Construction of.

The appellant, a mine manager, was charged with failing to cause an underviewer to examine all parts of a mine daily contrary to the Coal Mines Act, 1908, and the special regulations made thereunder. The charge was founded on Rule 8 of the 2nd Schedule to the Act, which specifies that the underviewer shall examine all parts of the mine daily and also all the air courses of the mine and all stoppings and brattices connected with the same, and cause remedies to be provided immediately for all defects that might be found on such examinations. The question was whether this involved a daily examination of a large area of the colliery which was worked out and in which no work was going on and which examination had not been made. The worked out area had been fenced off as a place not in actual use in terms of Rule 18 but not shut off by means of permanent stoppings from the working mines. The Stipendiary Magistrate convicted the appellant. On appeal,

Held.—Quashing the conviction that having regard to Rules 17, 23, 24 and 41 the words "all parts of the mine" were limited to the actual mine in which the working of the mine was going on.

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