

REX v. WARDLE

It has been repeatedly said that a judge's charge, on the law is not to be regarded as a full exposition of the law relating to the crime charged. Indeed, to charge the jury in regard to aspects of the law which the facts do not raise, so far from being helpful to the jury, is much more likely to confuse them. Moreover, the mention of or the emphasis laid by a judge on *mens rea* or any particular element of the crime must depend on the facts, and the facts, be it noted, as they exist at the end of all the evidence. This last matter is illustrated where it is clear on the evidence of the Crown that someone has done the acts alleged to constitute the crime and the prisoner may be that person, and the prisoner's case is that he did the acts but in circumstances which do not impose criminal liability. To enlarge on evidence of identity in such a case would clearly be unnecessary. So, too, where the defence is an *alibi*, a judge need not deal with other possible defences, nor need he in a case of larceny, where the prisoner swears he took the goods with the owner's consent, take time to explain to the jury that the taking must be with the intent of depriving the owner permanently of the goods. Where the charge is bigamy, the marriage and the subsequent ceremony being supported by evidence, a judge does not direct the jury as to possible mistake unless the evidence raises such a case. Conversely, where the prisoner does not dispute that he did the acts charged, but alleges in his evidence that he was a somnambulist and did them in his sleep or that he did them whilst under the influence of hypnotism, and in either case was not conscious of what he did, or that by reason of drunkenness or the effect of drugs he was incapable of forming an intention—in all these cases it becomes necessary for the judge to explain in his charge the necessity of a *mens rea* in order to constitute the offence. I have said above, "alleged "in his evidence." It is not sufficient for counsel to raise a matter in argument if there is no foundation of fact for the argument. The recent trial of McKenzie for murder was such a case. Counsel for the prisoner in argument raised the defence of insanity and requested the trial Judge to instruct the jury on that matter. The trial Judge thought there was no evidence upon which the jury could properly find insanity, and told the jury so when they attempted to find insanity. Both this Court and the High Court supported his ruling—see also *Mancini v. Director of Public Prosecutions*, [1942] A.C. 1—while in *Holmes v. Director of Public Prosecutions*, [1946] A.C. 588, it was said that it is the duty of the judge where evidence was lacking to direct the jury that the evidence does not support a particular verdict.

Beard's Case, [1920] A.C. 479, and *Hornbuckle's Case*, [1945] V.L.R. 281, [1945] A.L.R. 71, were argued on the assumption that the evidence for the

defence raised the question of the prisoner's incapacity to form the intention to have intercourse against the woman's will, and it was in the light of the argument that the Court in each case addressed itself to the question of *mens rea*. But, as I have already implied, it is one thing to expound the nature of the intention required where the facts call for such an exposition and quite another matter to lay down that it is the judge's duty to explain it in all cases.

In the case under appeal the contention is that the facts proved are all consistent with the prisoner's belief that the woman was consenting, and that therefore it was not proved that he intended to have intercourse with her without her consent. But the prisoner gave evidence on oath and nowhere swore that because of her conduct he believed he had her consent. His case was that he knew he had her consent because both by word and deed she plainly told him so. That case was put to the jury and they disbelieved it. I think, as I thought at the trial, that the trial Judge was not called upon to put for him a case he did not himself swear to and which could only be conceived of if his own evidence were disbelieved. I think it is still the law that the Crown is not bound to negative a possible defence which the prisoner has not raised—see, *per* Latham, C.J., in *Packett v. The King*, (1937) 58 C.L.R. 190 at pp. 196-8—nor is it the judge's duty to charge the jury upon such a possibility.

I think the application should be refused.

FULLAGAR, J.—In my opinion there was not in this case any misdirection or failure to direct adequately or properly, and I agree that the application should be refused.

Leave to appeal refused.

[Solicitors—For the Crown, F. G. Menzies, Crown Solicitor; for the prisoner, C. M. S. Power, Public Solicitor.] F. D. C-S.

FULL COURT — (Lowe, Gavan
Duffy and Martin, JJ.) } May 5, 6.

REX v. WARDLE.

*Criminal law — Crime of buggery — Elements of—
Crimes Act 1928 (No. 3864), secs. 65, 67.*

Upon the trial of a man accused of buggery, evidence was tendered on his behalf to the effect that he was ignorant on matters of sex, and particularly of the sexual functions of his organs.—

Held, that the evidence tendered would afford no defence, and that it was rightly rejected.

APPLICATION for leave to appeal.

The accused was presented for trial at the Criminal Sittings of the Supreme Court at Melbourne, and

charged with the crime of buggery committed with a person under the age of fourteen years. At the trial, evidence was tendered to the effect that, while he had committed the physical acts, he was ignorant of matters of sex, and in particular of the physiological purpose of the penis. Herring, C.J., rejected this evidence and the prisoner was convicted.

He applied for leave to appeal against the conviction.

O'Keeffe for the prisoner.

Sproule, K.C., for the Crown.

LOWE, J., delivered the judgment of the Court:—In this case the prisoner was convicted of the crime of buggery on a person under the age of fourteen years. There was plain evidence for the Crown that the prisoner had inserted his penis into the anus of his victim. Indeed, in giving evidence himself on oath he admitted that the story of the assault told by the victim was true so far as the physical acts were concerned. On the trial, however, Mr. O'Keeffe, appearing for the prisoner, tendered evidence to the learned trial Judge that the prisoner, although committing the physical acts, was ignorant of the physiological purpose of the penis. To put it in his own words, what he said was this—"My submission is that he was ignorant in matters of sex, and in particular, of the sexual functions of his own organs, particularly the penis." A little later he said—"If I may add further, the sexual purpose for which the organ may be used"; and finally the learned Judge put to him—"Very well, you say the ignorance of these matters makes a defence in law, and I propose to direct the jury that it does not." His Honour in that ruling rejected the evidence of the nature tendered by Mr. O'Keeffe, and we are asked here to say that the learned trial Judge wrongly rejected that evidence for the defence.

The crime of buggery is not defined in the Crimes Act, the Legislature being content to say (sec. 65)—"Whosoever commits the abominable crime of buggery," and so on, and then to provide the penalty. It is therefore necessary for us to consider what is involved in the crime of buggery. There was some debate at common law as to whether it involved carnal knowledge and involved the emission of semen from the male. Whatever difficulties may have existed in that regard are got over by the English Act of 9 George IV., c. 31, the provisions of which have been enacted here and have been in force for many years, and are now to be found in sec. 67 of the Crimes Act. There it is plainly laid down that whenever upon the trial for any offence punishable under this Division—the offence of buggery is punishable under this Division—it is necessary to prove carnal knowledge, it shall not be necessary to prove actual emission of seed in order to constitute a carnal knowledge, "but the carnal

"knowledge shall be deemed complete upon proof of penetration only." It is important, too, in that regard to refer to what was said in the Full Court by Cussen, J., as to carnal knowledge. He points out in the case of *R. v. Lambert*, [1919] V.L.R. 205 at p. 212, 25 A.L.R. 101—"Carnal knowledge is merely the physical act of penetration." In that case the question was whether consent had been given. His Honour continued, "though, of course, there cannot be consent even to that without some perception of what is about to take place."

The contention of Mr. O'Keeffe seems to us to involve one or other of two quite separate defences: either that the prisoner was of unsound mind within the meaning of *McNaghten's Case*, (1843) 10 Cl. & F. 200, because he did not know the nature and the quality of his act, or that there was an absence of the *mens rea* that was necessary to constitute the crime. The first alternative Mr. O'Keeffe disclaimed before the trial Judge and has again disclaimed before us. He concedes that the evidence tendered cannot be evidence of insanity. The question of insanity, therefore, being out of the way, the only question for us to consider is whether the evidence tendered really is relevant to the question of *mens rea*. That involves that we should have plainly before our minds what are the elements of the crime of buggery. In our view it is sufficient at the present day to say that the crime of buggery exists when the prisoner, by an intentional (or voluntary) act penetrates the anus of his victim with his penis, and where those elements are proved the crime is established. In this case the evidence tendered could not, in our view, be relevant to the only *mens rea* which is involved in the commission of the crime. We therefore think that the learned Chief Justice rightly rejected the evidence tendered, and that its rejection affords no ground for an application to review the conviction. Under those circumstances the application for leave to appeal against conviction is refused.

My brother Martin reminds me that the question of what constitutes the crime was considered by the Court of Crown Cases Reserved, in the case of *R. v. Reekspear*, (1832) 1 Moo. C.C. 342, and there the whole Court held that since the Act of 9 George IV., c. 31, there is no need to prove emission, and that the crime was complete when there had been penetration by the prisoner of the anus of the victim. I think the same view is involved in the decision of our own Full Court in the case of *R. v. Packer*, [1932] V.L.R. 225. [1932] A.L.R. 212, to which the learned prosecutor for the King referred yesterday.

Application refused.

[Solicitors—For the prisoner, J. R. A. O'Keeffe; for the Crown, F. G. Menzies, Crown Solicitor.]

F. M. B.

GIBNEY v. JACOBS

Before Barry, J.

September 3, 11.

GIBNEY v. JACOBS.

HOARE v. JACOBS.

Licensing—Being in possession of liquor—In vicinity of public hall—During dance—Householder with guest on his own premises—Adjacent to hall—No offence—Licensing Act 1946 (No. 5197), sec. 2 (2).

Where a householder and his guest, having attended a dance in a public hall, have in their possession liquor within the curtilage of the householder's residence, situated about 100 yards from the dance hall and in a different street, the possession was held to be referable to their characters as householder and guest respectively, and not to amount to a contravention of section 2 (2) of the Licensing Act 1946.

ORDER TO REVIEW.

Thomas Gibney and Leo Michael Hoare were convicted in the Court of Petty Sessions at Geelong, on the informations of Stanley Jacobs, licensing inspector. The defendant in each case was charged with "being a person who having attended a dance "in a public hall did in the vicinity of such hall have "in his possession liquor while such dance was being "held contrary to Licensing Act No. 5197, sec. 2 (2)." It appeared that there was a dance at St. Mary's Hall, in Myers Street, Geelong, for which admission was charged, and during the dance the police saw Gibney, the caretaker of the hall, and Hoare leave the hall and go to Gibney's house in Cumberland Street, about 100 yards from the hall. There the police saw the two men standing inside the gate. Gibney had half a bottle of beer in his hand and on the ground was a case of liquor belonging to Hoare, which he had brought there about 6 o'clock.

Each defendant obtained an order to review the conviction, Gibney on the grounds that he did not contravene the Act by having liquor on private premises occupied by him and on which he resided; that the Magistrate was wrong in holding that these premises were in the vicinity of the hall, and that there was no evidence of possession; and Hoare on the latter two grounds, and on the further ground that he was lawfully on private premises at the invitation of or by the permission of the occupier thereof. The orders to review were heard together.

McInerney in support of the orders.—Parliament could not have intended that a person living in the vicinity of a public hall who goes to a dance there while some beer is in his own house commits an

offence. Vicinity should be applied only to places of public resort and public highways in the vicinity. Vehicles, being private property, were therefore included expressly. A penal statute should be construed on the principle set out in *Richardson v. Austin*, (1911) 12 C.L.R. 463 at pp. 477, 478, 17 A.L.R. 324 at pp. 329, 330; *Harriss v. Macpherson*, [1942] V.L.R. 25, [1942] A.L.R. 24; *Ingham v. Hie Lee*, (1912) 15 C.L.R. 267, 18 A.L.R. 453. The argument *ab inconvenienti* was relied on in *Heading v. McCubbin*, [1936] V.L.R. 159, [1936] A.L.R. 309, and *Stelm v. Minogue*, [1940] V.L.R. 320, [1940] A.L.R. 208. The language of the Act must be modified to meet the intention—*Anstee v. Jennings*, [1935] V.L.R. 144, [1935] A.L.R. 216. This house was not in the vicinity—*Mullins v. Norton*, [1938] V.L.R. 292, [1938] A.L.R. 485; *Ex parte Paton*, (1930) 30 S.R. (N.S.W.) 67; *In re Curtin*, (1893) 19 V.L.R. 12; *Lucas v. Mooney*, (1909) 9 C.L.R. 231, 15 A.L.R. 490. The Magistrate's finding was an error of law, for it could not reasonably be inferred from the primary facts—*Bracegirdle v. Oxley*, [1947] 1 K.B. 349; *Chandler v. Stravett*, [1947] 1 All E.R. 164. There was no proper evidence of possession.

Norris, contra.—The Act should be given its full literal meaning. Nothing can be inferred from the mention of vehicles, because persons in a vehicle in a public place are still in that public place. It strengthens the generality of the prohibition. Whether the premises are in the vicinity of the hall is a pure question of fact—*Bracegirdle v. Oxley (supra)*; *Ex parte Paton (supra)*. Possession here means physical possession or the ability to take physical possession.

McInerney.—The section is not ambiguous so much as uncertain. "Vicinity" should not be construed to increase crime and in derogation of common law right. The mischief contemplated in the Act is indecorous behaviour in public.

Cur. adv. vult.

BARRY, J., in a written judgment, after stating the facts and reading sec. 2 of the Licensing Act 1946, continued:—The purpose of this enactment is the preservation of good order and public decorum. It is an exercise of the power of the State, now usually called the "police power"—*R. v. Smithers, Ex parte Benson*, (1913) 16 C.L.R. 99 at p. 110, 19 A.L.R. 209 at p. 212, *per* Barton, J., to enact legislation designed to maintain and preserve the security of the social order within the State, the comfort and convenience of the public, and the enjoyment of private and social life—*cf.* Russell, *The Police Power of the State*, ch. II., pp. 23 *et seq*; *The Slaughter Houses Cases*, (1872) 16 Wallace 36 at p. 62, 21 Law. Ed. 394 at p. 404.

The section is concerned with the use of liquor in and about places of public resort, namely public halls,

* Licensing Act 1946—

Sec. 2 (2). No person who is attending or is proceeding to attend or has attended any dance or other entertainment in a public hall shall in the vicinity of such hall and whether in a vehicle or not consume supply or have in his possession or under his control any liquor while such dance or entertainment is being held.