

REX v. J. A. TURNBULL.

REX v. W. W. TURNBULL.

1943. In Banco : Jordan C.J., Davidson and Street JJ.

Dec. 17, 23, 1943.

*Criminal law—House of ill fame—Girl under 18—Suffering to be on premises—“ Knowingly ”—Mens rea—Misdirection—Evidence—Similar facts—Wrongful admission—New trial—Crimes Act, 1900 No. 40, s. 91D—Crimes (Amendment) Act, 1924, No. 10, s. 8.*

On appeal against a conviction under s. 91D of the Crimes Act, 1900, as amended, of having knowingly suffered to be upon premises then used as a house of ill-fame a certain girl under the age of eighteen years, the trial judge having directed the jury that, if the girl were under that age, it was immaterial whether the accused were aware of this or not, and having admitted certain evidence of allegedly similar facts,

*Held*, (1) that the trial judge was in error in so directing the jury, and (2) that no case had been made for the admission of such evidence ; and, therefore, that the conviction should be set aside and a new trial should be directed.

*Mens rea* in commission of criminal offences, discussed.

#### CRIMINAL APPEAL.

The following statement of facts is taken from the judgment of his Honour the Chief Justice :—

These are appeals against convictions upon a charge laid under s. 91D of the Crimes Act, 1900, as amended. This section is in the following terms :

“ Whosoever employs in, or under any circumstances whatever knowingly suffers to resort to, or be upon, any premises used as a brothel or house of ill-fame any girl under the age of 18 years, shall be liable to penal servitude for five years.”

It was charged against the appellants that they had knowingly suffered to be upon premises then used as a house of ill-fame a certain girl under the age of eighteen years. Nine grounds of appeal have been taken, but only two have been argued : (1) that the learned trial judge was wrong in directing the jury that if the girl were in fact under the age of eighteen years it was immaterial whether the accused were aware of this or not ; and (2) that certain evidence of allegedly similar facts was wrongly admitted.

*Clancy K.C.* and *Bagot*, for the appellants.

*Weigall K.C.*, Solicitor-General, for the Crown.

*Cur. adv. vult.*

Dec. 23.

JORDAN C.J. [after stating the above facts, continued :] The grounds make it necessary to consider to what extent at the present day *mens rea* is an

essential ingredient in crime. The general rule as to *mens rea* is clear and plain. It is a well established rule of the common law that an act is not criminal unless it is the product of a guilty mind. Thus, *mens rea* has two elements—(1) a mind ; (2) which is guilty. The first is always essential. A person is never regarded as criminally liable for an act which, although physically the act of his body, was done while his mind was in so abnormal a state that it cannot be regarded as his act at all, e.g., if he was sleep-walking, or so young, or so insane, as to be incapable of knowing that he was acting or the nature or quality of his act. But, assuming his mind to be sufficiently normal for him to be capable of criminal responsibility, it is also necessary at common law for the prosecution to prove that he knew that he was doing the criminal act which is charged against him, that is, that he knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing. If this be established, it is no defence that he did not know that the act which he was consciously doing was forbidden by law. Ignorance of the law is no excuse. But it is a good defence if he displaces the evidence relied upon as establishing his knowledge of the presence of some essential factual ingredient of the crime charged.

In principle, the rule of the common law is just as applicable to acts which are criminal because prohibited by statute, as to those which are offences at common law ; and it was said by *Cave J.*, in *R. v. Tolson* (1) that it is so applicable unless excluded expressly or by necessary implication. There appears to be no case in which it has ever been suggested that an implication could be found in a statute of an intention to exclude the necessity for establishing the first element of *mens rea*, namely a mind : *R. v. Tolson* (2) ; *Hardgrave v. The King*.(3) It is seldom, however, that any difficulty arises on this point, because there is a presumption of fact, which prevails unless there is something to suggest the contrary, that everyone possesses a sufficient degree of reason to be responsible for his acts, so that in practice the burden of proof in this respect is transferred to the accused : *Woolmington v. Director of Public Prosecutions*.(4)

As regards the second element of *mens rea*—the necessity for establishing of the accused that he knew that he was in fact doing the criminal act with which he was charged—it was said by *Cave J.*, in *R. v. Tolson* (5) (a case of felony) that to eliminate this requirement in the case of a statutory offence “seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act.” If courts had adhered to this principle, this branch of the law would be free from difficulty. If it had been steadily insisted upon, persons sponsoring a bill by which it was sought to penalise a man for doing something, notwithstanding that he did not and could not know that he was doing it, would very soon have learned that it was necessary to disclose this on the face of the bill either in express terms or by words conveying so necessary an implication of intention in that behalf as to leave no room for doubt about their purpose. If the Legislature were prepared to allow such a provision, it would pass it ; if it disapproved of it, it would strike it out. In either

(1) (1889) 23 Q.B.D. 168 at 181.

(2) (1889) 23 Q.B.D. 168 at 187, 189.

(3) (1906) 4 C.L.R. 232 at 237 ; 5 Austn Digest 131.

(4) [1935] A.C. 462 at 475-6.

(5) (1889) 23 Q.B.D. 168 at 182.

case, the result would be perfectly clear; the Legislature would know exactly what it was doing, and people would know exactly how they stood. Unfortunately, this course was not followed. It has been stated by high authority that "the Legislature is not, by the use of other than the clearest words, to be taken to have subverted in any statute fundamental principles whether of law or of equity. It is a matter of judicial obligation to the Legislature itself, that the Court, in construing a statute, shall make that presumption": *In re Jordison*.<sup>(1)</sup> But in the present connection the courts have manifested an increasing readiness to assume the role of legislators, and to fill imagined *lacunae* in penal statutes by the conjectural emendations of judges. The result has been lamentable. Penal statutes have acquired appendages of judge-made law based upon the conjectures of judges as to what the Legislature would have provided if it had addressed its mind to a matter, where there is nothing to suggest that the Legislature ever thought about it at all or that the appendage would have survived if it had been included as part of the bill. A fertile field of litigation has been created; multitudes of reported cases have come into existence, many of them irreconcilable, in which the common law rule has been treated as excluded or not excluded upon judge-made indicia derived from cases in which there has often been a difference of opinion as to so-called necessary implications; and no one can now be reasonably sure of the effect of a penal statute until it has been tested by prosecutions. Indeed, so far have courts gone in this direction that in *Hobbs v. Winchester Corporation* <sup>(2)</sup>, *Kennedy L.J.*, expressed the opinion that there is "a clear balance of authority that in construing a modern statute this presumption as to *mens rea* does not exist." It has been sought to base this upon a view that a penal statute must be read according to its literal words and that if those say nothing about intention or knowledge there is no room for any implication from the common law: *Mallinson v. Carr*.<sup>(3)</sup> This standpoint, however, found no favour with *Dixon J.*, in *Thomas v. The King* <sup>(4)</sup>, where his Honour described it as the Mikado principle, and said that a contrary principle, that of the common law, is applicable alike to offences created by statute and to crimes existing at common law. It is small wonder that in *In re Mahmoud v. Ispahani* <sup>(5)</sup>, *Atkin L.J.*, said:

"I myself view with some trepidation any tendency to diminish the importance of the rule as to *mens rea* which has prevailed in respect of criminal charges. There are cases no doubt where a statute makes it plain that an offence is created without a criminal intention on the part of the person who is charged, but those cases, where the court is dealing with a question of crime, are to my mind in themselves anomalous."

However, it is too late for this Court now to restore elementary and fundamental principles of justice in this field of law. It is necessary now to take the cases as it finds them, and endeavour to solve the question upon a general consideration of the section, aided by certain guiding rules which have been sought to be evolved inductively by judges who in the past have endeavoured to reduce chaos to order in this field. In the leading case of *Sherras v.*

(1) [1922] 1 Ch. 440 at 465.

(3) [1891] 1 Q.B. 48.

(2) [1910] 2 K.B. 471 at 483.

(4) (1937) 59 C.L.R. 279 at 302-304.

(5) [1921] 2 K.B. 716 at 731-2.

*De Rutzen* (1), it was stated by *Wright J.*, that :

“ there is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence ; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.”

His Lordship, guarding himself by saying that there were other isolated and extreme cases, said that the principal classes of exceptions to the rule that *mens rea* must be established in statutory as well as common law offences might perhaps be reduced to three: (1) where the acts were not criminal in any real sense, but were acts which in the public interest are prohibited under a penalty, e.g., statutes treated as prohibiting even the innocent possession of adulterated food or tobacco; (2) acts constituting public nuisances; and (3) where the proceeding, though criminal in form, is really only a summary mode of enforcing a civil right; but that except in such cases as these there must in general be guilty knowledge on the part of the defendant or of someone whom he has put in his place to act for him generally or in the particular matter in order to constitute an offence. In *R. v. Tolson* (2), it was said that, in default of language dealing with the matter, the question whether the exclusion of the necessity for *mens rea* should be implied depended upon the subject matter of the statute. The same language used to create an offence would produce one result in relation to one subject matter and an opposite result in relation to another. By-laws regulating by the sanction of penalties the width of streets, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health or convenience were instanced as creating offences of which *mens rea* was not an ingredient. All the circumstances must be taken into consideration, including the history of the legislation. The fact that the offence entails a severe and degrading punishment would point to the retention of *mens rea* as an ingredient. It will be observed that the rule which it has been attempted to extract from the authorities leaves plenty of room for doubt and conjecture; and it is not uncommon to find some of the judges in a case discovering a necessary implication against *mens rea* whilst the rest find no implication at all. There is an additional source of confusion. Some judges have contrived to discover from the general atmosphere of a statute, without any assistance from its language, an intention on the part of the Legislature, not that *mens rea* should not be an ingredient of a statutory offence, but that proof of absence of *mens rea* should be a good defence: *R. v. Ewart* (3), which seems to be an unnecessarily complicated way of saying that *mens rea* remains an ingredient of the offence but that the Legislature must have meant to shift the onus of proof, putting it upon the accused to establish its absence. This idea would appear to have gained currency in part from the fact that under certain statutes the offence is of such a kind that in all or many cases proof of the doing of the thing supplies, as a matter of commonsense, *prima facie* evidence of *mens rea*, e.g., proof of a furtive theft: *R. v. Tolson* (4); cf. *R. v. Hutton* (5); and in part from the fact that in other statutes there is language which may be thought really to point in that direction. Thus,

(1) [1895] 1 Q.B. 918 at 921.

(3) (1905) 25 N.Z.L.R. 709 at 731.

(2) (1889) 23 Q.B.D. 168.

(4) (1889) 23 Q.B.D. 168 at 175, 194.

(5) (1936) 36 S.R. 534 at 541.

where in a statute some provisions creating offences include the word "knowingly" and others do not, *mens rea* may be regarded as included in both cases, but the onus of proof may be treated as transferred to the accused where the word is omitted: *Sherras v. De Rutzen* (1). *Maher v. Musson* (2) appears to be a case of this type. It is conceived that authorities such as these indicate a disposition to return to the principle that clear words are necessary to exclude *mens rea*. Even where "knowingly" occurs in some sections, its omission in others is not sufficient to show clearly an intention to exclude it in these; and so, to give some meaning to the omission, it is treated as doing no more than shifting the onus. But in order so to hold in the absence of any such indication, it would have to be assumed that the Legislature meant the Court to infer from nothing at all more than Mr. Puff expected of his audience from a shake of Lord *Burleigh's* head.

In the present unhappy state of the authorities, I think that we should adhere to principle except where compelled by some binding authority to depart from it, and that the departures from principle which have been introduced by judicial legislation should not be extended to new types of case. In the present case, we are concerned only with part of a section in which the Legislature has deliberately inserted the word "knowingly." I think that this of itself indicates a recognition by Parliament of the risk of an attempt on the part of courts to eliminate the common law element of *mens rea* from the new statutory offence which it was creating, and an intention to thwart any such attempt in advance. I think that the word is used for the evident purpose of ensuring that, in this part of the section at any rate, *mens rea* shall be retained not only as an essential ingredient of the crime but with the full onus of proving it thrown upon the prosecutor. In these circumstances, it would be wrong to seek to defeat the expressed intention of the Legislature by giving as little effect as possible to the word "knowingly." The word which follows it is "suffers." It was pointed out in *Somerset v. Hart* (3) that this word in itself connotes "knowingly." Hence, to treat "knowingly" as intended to be confined to "suffers" would make its insertion otiose. It was then argued, in an attempt to support his Honour's direction, that if one is forced to take "knowingly" past "suffers," one should stop at the first possible halting place and refuse to hudge a step further. Hence it should be regarded as qualifying "brothel or house of ill-fame" but not "girl under the age of 18 years." I see no reason for halting before the full stop: cf. *Somerset v. Wade* (4). For these reasons, I am of opinion that his Honour was in error in directing the jury that it was immaterial whether the accused knew that the girl was under the age of 18 years.

The remaining question is whether certain evidence was wrongly admitted. This was evidence that some little time before the date of the offences charged, the accused were keeping a house of ill-fame at a different address. The principles upon which evidence of similar facts may be admitted were discussed at some length by this Court in *R. v. Hutton* (5), and I do not think that any useful purpose would be served by traversing

(1) [1895] 1 Q.B. 918 at 920-1.

(4) [1894] 1 Q.B. 574.

(2) (1934) 52 C.L.R. 100; Austn Digest (1934-1939) 549.

(5) (1936) 36 S.R. 534; Austn Digest (1934-1939) 578.

(3) (1884) 12 Q.B.D. 360 at 362.

this ground again. Applying these principles, I am clearly of opinion that no case had been made for the admission of the evidence in question.

For the reasons which I have stated, I am of opinion that the appeal should be allowed, that the conviction should be set aside, and that a new trial should be directed.

DAVIDSON and STREET JJ., concurred.

Solicitor for the appellant : *A. G. Brindley.*

Solicitor for the respondent : *J. E. Clark* (Crown Solicitor).

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DAVIDSON v. MOULD.

1943. In Banco : Jordan C.J., Halse Rogers J. and Nicholas C.J. in Eq.

June 22 ; July 2, 1943.

*Workers' Compensation—Injury arising in the course of employment—Accident in workroom during luncheon—Evidence—Decision based on Industrial Award—Award not properly before Commission—Workers' Compensation Act, 1926 No. 15, s. 6.*

If the terms of a contract of employment provide that a worker, during the course of the stipulated working day, may cease work for one or more short periods for the purpose of resting or refreshing himself, and he (the employer not objecting) on such an occasion occupies the period between the cessation of one period of work and the commencement of another by remaining in his workroom, it is possible to regard him as being in the course of his employment during the whole of the period that he so remains.

Nearly all the employees of a manufacturer ate their midday meal in the workroom, and it was the practice for a boy to go around about midday taking orders from anyone who wanted anything brought in for his luncheon. The applicant, while opening in the lunch hour a bottle of cordial brought in for him by the boy, caused the tin top to fly up and strike his eye, so that he lost the sight of it. He applied for and was awarded compensation in respect of the injury by the Commission, the decision in his favour being based on its interpretation of a certain industrial award not tendered in evidence or referred to during the hearing. Upon appeal,

*Held*, (by Jordan C.J. and Nicholas C.J. in Eq., Halse Rogers J. dissenting) that it was quite competent to the Commission to hold that the worker was in the course of his employment when he sustained his injury, if it thought that this was the proper conclusion of fact upon the evidence ; but (by the Court) the decision being based on material not properly before the Commission, that the matter should be remitted to the Commission for further consideration.

*Whittingham v. Commissioner of Railways (W.A.)* (1931) 46 C.L.R. 22 ; 22 Austn Digest 1076, and *Henderson v. Commissioner for Railways (W.A.)* (1937) 58 C.L.R. 281 ; Austn Digest (1934-1939) 2558, considered.