

## ARNOL AND OTHERS v. THE QUEEN

1981. Court of Criminal Appeal: Green C.J.,  
Neasey and Cosgrove JJ.

May 26-28, Sept. 2, 1981.

*Jurisprudence — The law — Precedent, supreme over — How known.*

*Precedents — Review by court of own decisions — Court of Criminal Appeal — When it will overrule own previous decision.*

*Criminal Law — Criminal liability and capacity — Intoxication — Effect per se and as negating intent — Criminal Code — Generally — Drunkenness — Criminal Code, ss 12 to 17.*

*Criminal Law — Degrees of criminality — Parties to criminal offences — Principals and persons deemed to be — Aiding commission of crime — Matters to be proved — Knowledge — Intent — Commission of crime — Criminal Code, s. 3(1)(b).\**

*Criminal Law — Particular offences — Offences against the person not resulting in death — Sexual offences — Rape — Aiding the commission of — Matters to be proved — Knowledge — Intent — Commission of crime — Criminal Code, ss 3(1)(b),\* 185.*

*Criminal Law — Particular offences — Offences against the person not resulting in death — Sexual offences — Rape — Intent — Criminal Code, ss 13, 185.*

*Criminal Law — Particular offences — Offences against the person not resulting in death — Rape — Criminal Code — Ingredients*

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\*Criminal Code, s. 3 — (1) Where a crime is committed, each of the following persons is deemed to be a party to, and to be guilty of, the crime, and may be charged with actually committing it:—

- (a) every person who actually commits the crime;
- (b) every person who does an act or makes an omission for the purpose of enabling or aiding another person to commit the crime;
- (c) every person who abets another person in committing the crime;
- (d) every person who instigates another person to commit the crime.

*of offence — Intoxication — Relevance — Criminal Code, ss 13(1), 185.*

The *Criminal Code* provides, by s. 185(1), that "any person who has carnal knowledge of a female not his wife without her consent is guilty of a crime, which is called rape" and, by s. 3(1)(b), that "every person who does any act or makes any omission for the purpose of enabling or aiding another person to commit the crime" is guilty of the same crime.

Six men were convicted of rape and in addition two were convicted of aiding the commission of the crime of rape. The convictions arose out of two connected incidents in which a young girl had been forcibly dragged into a bedroom and repeatedly raped, at times being forcibly held down by persons other than the one who was raping her. There was evidence that each of the accused had consumed intoxicating liquor, and the judge ruled that the authority of *Snow v. The Queen*, [1962] Tas. S.R. 271, was unaffected by *Reg. v. O'Connor* (1980), 146 C.L.R. 64, and directed the jury accordingly.

They appealed against their convictions.

*Held*, that the appeal should be dismissed, because:

- (a) although the Court of Criminal Appeal has the power to overrule its previous decisions it will not do so unless it is established that the decision is plainly or manifestly wrong or that there has been a change in the legislation, case law, or other material circumstances on which the decision was based, no sufficient justification for the court even to embark upon a reconsideration of the law as laid down in *Snow v. The Queen*, [1962] Tas. S.R. 271, had been demonstrated:

*Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia*, (1913) 17 C.L.R. 261, referred to;

- (b) the mental element for the crime of rape in the *Criminal Code*, s. 185, is that the physical act of penetration must have been voluntary and intentional:

*Snow v. The Queen*, [1962] Tas. S.R. 271, applied;

- (c) the reasoning in *Vallance v. The Queen* (1961), 108 C.L.R. 56, as to the need to imply from the words of the section creating the offence a mental element in addition to the *Criminal Code*, s. 13(1), is not applicable to s. 185 because:—

- (i) (per Green C.J. and Neasey J.) in s. 185 the word "rape" is not part of the definition of the ingredients of the crime;

- (ii) (per Cosgrove J.) s. 185 proscribes an act accompanied by circumstances and not an act followed by results or entry; and

- (d) the evidence of intoxication was incapable of raising a doubt as to whether the acts of penetration or the acts of aiding were either voluntary or intentional.

*Reg. v. Arnol*, [1980] Tas. R. 222, affirmed.

#### APPEALS AGAINST CONVICTION.

Derek George Arnol, Mark Anthony Murfett, Paul Anthony Binns, Christopher John Gleeson, Stephen Gary Bennett and Nicky Mark Delphine were on 7th, 10th and 11th November, 1980,

convicted at Launceston Criminal Sittings before Everett J. of rape contrary to the *Criminal Code* 1924, s. 185. Binns and Delphine were also convicted of aiding the commission of the crime of rape.

All six accused appealed against their convictions. The grounds of appeal, as amended, were:

- "1. THAT the learned trial judge was wrong in law in failing to direct the jury that a specific intent to have carnal knowledge of a woman without her consent was an element essential to constitute the crime of rape.
- "2. THAT the learned trial judge was wrong in law in failing to direct the jury in relation to the count of aiding rape that knowledge (by the appellant) of a specific intent in the principal offender to have carnal knowledge of the woman without her consent was an essential element of the crime of aiding rape.
- "3. THAT the learned trial judge was wrong in law in directing the jury 'to completely ignore evidence of the consumption of liquor and of drunkenness' and either of such items of evidence in considering whether it was satisfied beyond reasonable doubt of a voluntary and intentional act of penetration.
- "4. THAT the learned trial judge was wrong in law in directing the jury to 'completely ignore' evidence of the consumption of liquor and of drunkenness and either [of] such items of evidence in considering whether it was satisfied beyond reasonable doubt of the voluntary and intentional doing of an act for the purpose of aiding the commission of the crime of rape contrary to Sections 3 and 185 of the Criminal Code."

*P. J. A. Wright* for the appellants.

*W. J. E. Cox* Q.C., Crown Advocate, *A. R. Jacobs* and *A. G. Melick* for the Crown.

*Wright*. The judge erred in law by failing to direct that the specific intent to have carnal knowledge of a woman without her consent was an essential element of the crime of rape. *D.P.P. v. Morgan*, [1975] 2 All E.R. 347 (*sub nom. Reg. v. Morgan*, [1976] A.C. 182). Section 185 restates the common law and rape is a "law" word or a technical word. *Vallance v. The Queen* (1961), 108 C.L.R. 56, at p. 75. Where the *Code* uses the language of the common law it is permissible to refer to common law cases. *Reg. v. Murray*, [1962] Tas. S.R. 170. The descriptive label "rape" imports the common law meaning unless the *Code* clearly indicates to the contrary and this

Court in *Snow v. The Queen*, [1962] Tas. S.R. 271, has inadequately applied *Vallance's Case* as all judges in *Vallance's Case* incorporated a mental element into the crime of wounding. [Cosgrove J. Section 185 only talks about the external elements, so do you still have to apply a mental element?] I do not go so far but in view of the definition of "consent" in s. 1 of the *Code* s. 185 contains a mental element in that one must intend a non-consented act or be indifferent to it. *Bell v. The Queen*, [1972] Tas. S.R. 127, *Reg. v. Ingram*, [1972] Tas. S.R. 250. I concede that ground 2 fails if ground 1 is not successful.

The exclusion of the relevance of intoxication in *Snow's Case* is mistaken especially in relation to ss. 14 and 17. Section 17 is cumulative to s. 13 and not an exception to it and the effect of s. 17 is to make evidence of intoxication relevant to crimes of specific intent and we say rape is a crime of specific intent. *Reg. v. O'Connor*, (1980), 146 C.L.R. 64, 29 A.L.R. 449.

*Cox Q.C.* The ingredients of the offence of rape are clearly and correctly established by *Snow's Case* (*supra*) and ground 2 of the appeal stands or falls with ground 1. Whilst the conclusion in *D.P.P. v. Morgan* (*supra*) is different and reiterates the common law approach that there must be an intent to penetrate against the complainant's will, Lord Cross pointed out at p. 203 the essential difference between the express words of the relevant laws of the United Kingdom and Tasmania. The proposition enunciated in *Snow's Case* is the basic premise of the proposition laid down by later decisions of this Court that the onus of proving the existence of an honest and reasonable belief lies on the defence. *Reg. v. Martin*, [1963] Tas. S.R. 103, and *Reg. v. Ingram*, [1972] Tas. S.R. 250. The same view as a matter of statutory interpretation has been taken in Western Australia. *Re A.-G.'s Reference No. 1 of 1977*, (1979) W.A.R. 45, at pp 50, 51. There was no need for any specific direction on intoxication as the Crown had to prove that the accused committed particular acts which were voluntary and intentional. *Snow's Case* does not dispute the need to prove voluntary and intentional character of the act nor deny the exculpatory character of accidental acts. It says that s. 17 covers the field and limits the areas into which intoxication may impinge to those involving either insanity or the absence of a specific intention. *O'Connor's Case* (*supra*) is not relevant to Tasmania for crimes not involving a specific intention and there is nothing in it that requires a trial judge to leave to the jury evidence of intoxication that falls well short of causing a doubt in relation to the issues raised by s. 13.

*Jacobs.* There was not sufficient evidence of intoxication approaching anywhere near a reasonable threshold to warrant a direction by the judge in relation to s. 13 or s. 17.

*Cur. adv. vult.*

SEPTEMBER 2.

GREEN C.J.: This is an appeal against the appellants' convictions for rape and an appeal by two of the appellants against their convictions for aiding the commission of the crime of rape. The grounds of appeal and the way in which they were presented to this Court are set out in the reasons for judgment published by Cosgrove J. I shall deal first with the ground which his Honour has numbered 1.

In order to uphold ground 1. this Court would have to overrule its decision in *Snow v. The Queen*, [1962] Tas. S.R. 271. Before considering this ground this Court must therefore decide whether it has the power to overrule its own decisions and, if it has, whether it should do so in this case.

I do not think that it can be doubted that this Court has the power to review its own decisions. If appellate courts do not reserve that power to themselves then as the years go by and more and more permutations of factual and legal situations come before the court in which the law is settled once and for all, the court's capacity to develop, adapt and improve the law will diminish and finally disappear. Further, it seems to me that a decision by a court that it is absolutely bound by its own decisions must be inherently ineffective because before the court on a subsequent occasion could decide whether it should apply that earlier decision, it would have to decide for itself whether it was bound by its own decisions. However, great reliance does not need to be placed upon considerations of policy or logic of that kind as I think that there are more conventional arguments demonstrating the existence of such a power. I would adopt the reasoning used by Isaacs J. in *Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia* (1913), 17 C.L.R. 261, which led him to the conclusion that the High Court was not bound by its own prior decisions. In doing so I am not unmindful of the fact that different considerations apply to intermediate and final appellate tribunals, but the reasoning of Isaacs J. is of general application and, further, in 1913 the High Court was not in all respects a final court of appeal. Further, Isaacs J. referred, it can be inferred with approval, to the fact that the Supreme Courts of New South Wales and Victoria had held that they had the authority to overrule prior decisions of their own. Finally, the *Australian Courts Act* 1828, 9 Geo. 4, c. 83, s. 3, invested the Supreme Court of this State with "jurisdiction in all cases whatsoever, as fully and amply, to all intents and purposes . . . as His Majesty's Courts of King's Bench, Common Pleas and Exchequer, at Westminster, or either of them, lawfully have or hath

in England” and there is no doubt that those courts had at that time the power to overrule their own decisions: see the cases cited in Ram’s *Legal Judgments* (1834), pp. 121ff.

The real question is under what circumstances should the power be exercised? There are two strong and obvious reasons why its exercise should be regarded as exceptional. First, the doctrine of precedent is entrenched as a fundamental characteristic of our legal system. Secondly, the need for certainty and predictability in a legal system is not derived merely from considerations of convenience. The *raison d’être* of any value system, including in particular a legal system, is that it is capable of guiding human conduct. A legal system which contains rules which cannot be ascertained because they are frequently changed, or which is such that rational predictions cannot be made as to the law which a court will apply to a particular situation, loses that capacity and thus destroys its foundations. But nevertheless, although they might be exceptional, there are occasions when other considerations must prevail. Guidance as to some of the general policy considerations which need to be considered when a court is asked to overrule an earlier decision of its own has been provided by a number of authoritative pronouncements.

In *Australian Agricultural Co. v. Federated Engine-Drivers and Firemen’s Association of Australasia* (*supra*, at p. 278) Isaacs J. said in a celebrated passage:

“The oath of a Justice of this Court is ‘to do right to all manner of people *according to law*’. Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.”

Sir Garfield Barwick made this extra-judicial comment about that passage:

“The last sentence, uttered so long ago as 1913, is, I think, symptomatic of much current thinking. We have been through a period when the virtues (and they are no doubt virtues) of stability and predictability in the law have been paramount considerations in the decision of cases, and particularly in the consideration of earlier decisions. Today many are not so enamoured of the perpetuation of error or of inappropriateness to current times of old decisions, and favour their review in proper cases by final courts of appeal. Also the obligation of the judge to the law itself rather than to the decisions upon it is

properly given prominence." *Precedent in the Southern Hemisphere* (1970) 5 Is.L.R., pp. 21, 22.

However, it should be borne in mind that in *Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia* (*supra*) Isaacs J. was primarily directing his mind to the question of the existence of the court's power to overrule its own decisions and he expressly declined to embark upon a consideration of the principles upon which the court should act in particular cases when considering whether it should exercise that power. Further, it should be emphasised that in the passage which I have set out his Honour was referring to the situation when the court found the law to be "plainly in conflict" with what it was previously thought to be and that elsewhere in his judgment he made it clear that he was only referring to earlier decisions which were "clearly" or "manifestly" wrong. In the following year Griffith C.J. emphasised the need for judicial circumspection in the exercise of such a power when he said in *The Tramways Case* (No. 1) (1914), 18 C.L.R. 54, at p. 58:

"In my opinion it is impossible to maintain as an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed, it may in a proper case be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired Statute, or is contrary to a decision of another Court which this Court is bound to follow . . ."

More recently, Gibbs J. said in *Reg v. Cain; Ex parte Evatt* (1975), 133 C.L.R. 37, at p. 43:

"This Court has power to overrule its own decisions, but will do so only 'with great caution and in clear cases': *Perpetual Executors and Trustees Association of Australia Ltd. v. Federal Commissioner of Taxation* (Thomas' Case) (1949), 77 C.L.R. 493."

Although it has no formal authority in this State, the practice statement read by the Lord Chancellor on behalf of himself and the Lords of Appeal in Ordinary reported in [1966] 1 W.L.R. 1234, provides a useful statement of some of the competing considerations:

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

"Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.

They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

"In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

"This announcement is not intended to affect the use of precedent elsewhere than in this House."

I do not propose attempting to exhaustively state the circumstances under which it might be appropriate for this Court to review its own decisions, but I think that the Court would be justified in doing so when the earlier decision is shown to have been arrived at without regard to an applicable statutory provision or binding authority, when the chain of reasoning employed in the earlier decision contains a manifest — as opposed to a merely arguable — contradiction or flaw which vitiates the conclusion reached, or when in the meantime legislation, case law, or other material circumstances have undergone changes which have had the effect of altering the basis upon which the earlier decision was reached. However, it would be wrong for this Court to review an earlier authority merely because it preferred a different view of the law than that which was taken in the earlier case. As Griffith C.J. said in *The Tramways Case No. 1* (*supra*, at p. 58), an earlier decision should not be overruled "upon a mere suggestion that some or all of the members of the later court might arrive at a different conclusion if the matter was *res integra*. Otherwise there would be grave danger of a want of continuity in the interpretation of the law." In *Reg. v. Cain*; *Ex parte Evatt* (*supra*) Gibbs J. said at p. 43:

"It is not enough to overrule an earlier decision that an opposite conclusion is preferred: *Attorney-General (N.S.W.) v. Perpetual Trustee Co. Ltd.* (1952) 85 C.L.R. 237, at p. 244. The decision in *Sutton v. Federal Commissioner of Taxation* (1959) 100 C.L.R. 518 was unanimously given by five members of the court. It is impossible to say that it is manifestly wrong."

Lord Pearson said in *Reg. v. National Insurance Commissioner*, [1972] A.C. 944, at pp. 996, 997:

"If a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal. Finality of decision would be utterly lost."

In my view, the arguments presented on behalf of the appellants in this case fail to satisfy even the most liberal application of the



criteria which need to be satisfied before this Court would be entitled to reconsider its decision in *Snow v. The Queen*. No attempt has been made to show that there have been any material changes in the law since 1962 which have falsified or changed the basis of the decision in *Snow's Case*. It has not been suggested that manifest injustice has followed from the application of *Snow's Case* in particular trials, no internal contradictions in the chain of reasoning employed in *Snow's Case* have been demonstrated and, save for one argument to which I refer below, no submissions were made suggesting that the decision was arrived at *per incuriam*.

However, counsel did argue that the decision in *Snow's Case* was wrong because it did not accord with implications which he submitted necessarily follow from the decision of the High Court in *Vallance v. The Queen* (1961), 108 C.L.R. 56. In essence, counsel submitted that although the *Criminal Code* contains no explicit requirement that a specific mental element is required to be present in order to constitute the crime of rape, nevertheless such an element should be implied. He submitted that in *Vallance's Case* the High Court held that such an element was required to be present in order to constitute the crime of wounding created by the *Criminal Code*, s. 172, notwithstanding that that section does not refer to any specific mental element and that therefore by the same reasoning the crime of rape should be held to include a specific mental element or, at least, an element of recklessness. In accordance with the principles referred to earlier it is sufficient to say that the court in *Snow's Case* did not overlook *Vallance's Case* and that the argument advanced by the appellants is not so compelling that it demonstrates that the decision in *Snow's Case* was manifestly or plainly wrong. Indeed, because the words "unlawfully" and "wounds" used in s. 172 require to be construed by reference to materials or provisions outside that section, whereas the word "rape" in s. 185 is used merely as a label and forms no part of the definition of the crime and therefore does not need to be further construed, it is obvious that different considerations apply to the construction of the two sections and that the appellants' argument is much less than compelling. However, it would be inconsistent with the view I have expressed as to the occasions when it is proper for this Court to review its own decisions for me to express any further views about that submission.

In my view, no sufficient justification for this Court to even embark upon a reconsideration of the law as laid down in *Snow's Case* has been demonstrated. In my view, if this Court were to do so it would run the risk of becoming involved in the sort of never ending process condemned by Lord Pearson in the passage I have cited from *Reg. v. National Insurance Commissioner*, [1972] A.C. 944, at pp. 996, 997 as there would be no bar to the Crown in another appeal next term asking this Court to review its decision in

the present case and to restore the decision in *Snow's Case* and then for the process to be repeated the following term and so on.

Finally, although not strictly necessary for my opinion, I should add that I think that there are good reasons for not overruling the decision in *Snow's Case*. It has been regarded as settled law for nearly twenty years, it has been applied in dozens of trials and although the *Criminal Code* has been amended on a number of occasions since that decision, Parliament has not seen fit to legislate so as to overcome its effect.

I agree with Cosgrove J. that even viewed in its most favourable light from the appellants' point of view, the evidence of intoxication was incapable of raising a doubt as to whether the acts of penetration were either voluntary or intentional.

All the appeals should be dismissed.

NEASEY J.: The relevant facts and the substance of the grounds of appeal are sufficiently set out in the reasons for judgment of Cosgrove J., which I have had the benefit of reading, and I adopt them for the purpose of these reasons. I propose only to discuss ground 1, because I agree with the conclusion reached by Cosgrove J. that there was no evidence in this case of consumption of alcohol remotely sufficient to warrant any view that the relevant acts of penetration were other than voluntary and intentional. I agree also with his Honour's reasons for arriving at that conclusion.

The main ground of appeal challenges the correctness of the law as to rape under the *Criminal Code* in this State, as laid down by the Court of Criminal Appeal in *Snow v. The Queen*, [1962] Tas. S.R. 271. In that case the court held that the ingredients of the crime of rape under s. 185 of the *Code* are "penetration by the accused of a woman not his wife, and the concomitant absence of her consent"; and that the act required by s. 13 of the *Code* to be voluntary and intentional is the act of penetration only. The court so held in an appeal in which the appellant submitted, as here, that it is essential for the Crown to prove in a charge of rape under s. 185 that the accused intended to penetrate without the consent of the woman, or regardless whether she consented or not; which is the mental element required to be proved at common law.

The law as to rape in Tasmania has caused some disquiet in this State over the years since *Snow's Case* was decided, mainly because of this difference from the common law in respect of the mental element required to be proved, but this is the first time a full-scale challenge to the correctness of *Snow's Case* has been made. Having as a result of the arguments in this appeal reconsidered the relevant law, I must say at once that in my view the decision in *Snow's Case* was undoubtedly correct.

The reasoning in *Snow v. The Queen* directly involves and is based upon a most basic tenet as to the proper construction of the

*Criminal Code*; namely the interpretation of the criminal responsibility provisions in s. 13, as laid down by the High Court of Australia in *Vallance v. The Queen* (1961), 108 C.L.R. 56.

The High Court in *Vallance's Case* held that the "act" which s. 13(1) requires to be voluntary and intentional is the physical action of the accused. All three justices comprising the majority so held. Kitto J. at p. 64 said:

"In my opinion, s. 13(1) is framed with a recognition that there is a distinction to be drawn between, on the one hand, a bodily action performed by a person, entailing criminal responsibility either *per se* or in virtue of some quality of the action, some consequence caused by it (cf. s. 153(2)), some accompanying intent or state of mind (cf. s. 12), and, on the other hand, something eventuating in consequence of the action and attracting a criminal responsibility which the action otherwise would not have produced. When s. 13(1) speaks of an act being voluntary and intentional, before turning to the event and speaking of that as not occurring by chance, it seems to me to be addressing itself only to the question whether a person charged acted of his own free will and by decision, before asking whether that which eventuated from his act was a merely chance result."

Taylor J. said, at p. 68:

"... it is one thing to speak of 'voluntary and intentional' acts when defining the general scope of criminal responsibility and another to speak of a specific intent accompanying acts done voluntarily and intentionally. To speak of an act being 'voluntary and intentional' is to speak of the essential character of the act itself and, of course, such an act may or may not be accompanied by an intent to commit some specific crime. Indeed, it is reasonably clear that s. 13 itself recognises this distinction for it conceives that criminal responsibility may attach as the result of either an intentional act (sub-s. (1)) or an intentional omission (sub-s. (2)) and then sub-s. (3) acknowledges that any such act or omission may or may not be accompanied by an intent to commit a specific offence."

Finally, Menzies J. at p. 71 said this:

"These directions" (referring to the directions given by the trial judge in that case) "were obviously based upon the view that the application of s. 13(1) to the circumstances of the case made it necessary that the wounding should be voluntary and intentional i.e. that the 'act' there referred to was the act of wounding and not the act of shooting. The Court of Criminal Appeal took the other view and regarding the 'act' as the shooting i.e. the aiming and firing of the rifle, considered that the first part of s. 13(1) did not require the direction that the accused should not be convicted unless he intended to wound Pauline. I agree with

the Court of Criminal Appeal. It seems to me that when s. 13(1) and (3) are read together the wounding is the 'event' or the 'result' brought about by the 'act' of shooting. This is so as a matter of construction of s. 13 itself. There are moreover other considerations to support such a reading of s. 13(1)."

The minority justices took the contrary view of the meaning of "act" in s. 13(1); namely that all the acts of the accused forming the ingredients of the crime must be voluntary and intentional, including in the factual context of *Vallance's Case*, the composite act of causing a wound — see per Dixon C.J. at p. 60, and per Windeyer J. at p. 79.

The proper interpretation of "act" in s. 13(1) operates within the framework of another basic tenet of the *Code*; namely that, in the words of Crisp J. used in *Vallance's Case*, [1960] Tas. S.R. 51, at p. 86, cited with approval by Burbury C.J. and Cox J., in *Snow v. The Queen*, [1962] Tas. S.R. 271, at p. 278, Ch. IV of the *Code*, comprising ss. 12 to 55 inclusive,

"... is both by design and in expression comprehensive and authoritative so as to exclude competing or supplementary common law doctrine in relation both to the *actus reus* and the *mens rea* of every crime therein provided for."

Burbury C.J. and Cox J. went further in the passage cited, and said, (subject to a qualification not here material):

"We think that ss. 12 to 17 inclusive must be taken to state exhaustively the general principles of criminal responsibility relating to the mental element in crime (including insanity and intoxication)."

With all that I respectfully agree.

But, under the *Code* some crimes are so defined as to include as an ingredient a specific mental element. The *Code* provides for many such offences of specific intent, and ss. 170, 173, 175, 176 and 179 are examples. Usually the element of specific intent refers to an act done with an intention to bring about a particular result. Other acts proscribed under the *Code* entail criminal responsibility *per se*, as for instance to challenge another to fight a duel — s. 81(2). Some crimes are so defined that criminal responsibility is entailed if an act is done in certain circumstances — that is to say, when certain prescribed states of fact external to the act co-exist with the doing of the act, or with an intentional omission to act, where an omission may entail criminal responsibility — see s. 13(2).

In some crimes it is primarily the quality of the act which attracts criminal responsibility — for example ss 78, and 79. Again, there are crimes under the *Code* in which a given consequence must ensue from an act before criminal responsibility is entailed. In such a case, whether the act is done with the intention of bringing about the consequence, or whether the consequence occurs by chance or as a

result of an act done recklessly or negligently are necessarily questions of importance in respect of whether a crime has been committed. The various aspects of homicide are an example.

And further, some crimes are described in the *Code* by use, in no consistent way and according to no set pattern, of their ancient descriptions at common law; and in these, in order to see what the ingredients are of a crime so prescribed, it may be necessary to consider what its components were at common law. As Windeyer J. said in *Vallance's Case* (1961), 108 C.L.R. 56, at pp. 74, 75:

"In some places the Code states common law principles in words that have long been familiar. Other parts of it are a mere assembly of old statute law, re-enacted in its terms. Other parts modify former statute law. Others again deal with matters that were formerly dealt with by the common law, but in words that seem to alter earlier doctrine not simply to declare it. The Code uses many words and phrases that, when it was enacted, had well established meanings. . . . Among the crimes with which the Code deals are ancient wrongs, forms of violent wrongdoing, that were among the earliest pleas of the Crown. The words used to describe them are ordinary English words. Murder, burglary, rape and robbery are ordinary words, and they are law words. They have not dictionary meanings different from their legal meanings. They describe conduct always forbidden by law."

His Honour went on to observe that in some cases the *Code* defines ancient words and in others it does not. For example, it defines "steal" and "rob", but not "maim".

Thus, in order to decide what the ingredients are of any particular crime under the *Code*, a careful exercise in statutory interpretation is always essential; and this is so in regard to rape under s. 185, which may be usefully contrasted, for the purpose of this case, with unlawful wounding under s. 172, which was in issue in *Vallance's Case*.

Under s. 172 the crime simply is, to "unlawfully wound by any means whatever". Thus the crime is described by reference to its ancient appellation, together with the word "unlawfully", but without any definition of either "unlawfully" or "wound". There was no escape, therefore, in *Vallance's Case* from construing those two words. The verb "to wound" is one which needs to be related to its factual context, which in *Vallance's Case* was the infliction of a wound by means of firing a rifle. Obviously that act could be done by the actor with any of several accompanying states of mind, including intention to cause a wound, or recklessness whether a wound was caused. And a wound might be caused by chance. To "wound", in that context, encompasses the physical act or acts necessary to fire the rifle, and a wound inflicted as a consequence. The majority of

the court having decided that s. 13(1) required no more than that the physical "act" of aiming and firing the rifle must be voluntary and intentional as a condition of criminal liability, it was necessary for the court also to define the possible states of mind accompanying that act which would be necessary or sufficient for conviction.

Such was the process of reasoning employed in *Vallance's Case*, and counsel for the appellant in this appeal argued that use of the word "rape" in s. 185 of the *Code* dictated a similar process of reasoning because it too is a "law word", to use the expression of Windeyer J. However, there is no substance in that contention, because s. 185 is drafted in a quite different way from s. 172. Section 185 sets out the ingredients of a crime, and says that crime is to be called "rape". Thus, use of the word "rape" in the section is of no significance to meaning. The ingredients of the crime are as laid down, whatever the crime may be called. It is for a male person to have carnal knowledge of a female, not his wife, without her consent. The only physical or bodily act contained within that definition, and therefore the only act to which s. 13(1) is capable of applying, is to have carnal knowledge. That means, having regard to the definition of "carnal knowledge", to penetrate. No specific intent is required; no consequence is required to ensue. The crime is complete when penetration occurs to any the least degree, provided that two accompanying states of fact co-exist with penetration — that the female be not his wife, and that her consent to penetration be absent. *Snow's Case*, therefore, in my respectful opinion, was quite right in deciding that the only mental element involved in the crime of rape under s. 185 is that the physical act of penetration must have been voluntary and intentional. It need not be stressed that in the nature of things it could scarcely be otherwise in all ordinary circumstances.

Therefore, these appeals should fail.

COSGROVE J.: The six appellants were convicted by a jury of the crime of rape. Binns and Delphine were also convicted of aiding the commission of the crime of rape — by Delphine in the case of Binns and by Murfett in the case of Delphine.

The notices filed by the appellants (all of which I regard, for the purposes of these reasons, as notices of appeal) complain of misdirections by the trial judge. No other ground of appeal is mentioned. The appellants were represented by the one counsel, Mr P. J. A. Wright, so that there is only the one comprehensive argument for the court to consider. The grounds argued are:

- "1. THAT the learned trial judge was wrong in law in failing to direct the jury that a specific intent to have carnal knowledge of a woman without her consent was an element essential to constitute the crime of rape.
- "2. THAT the learned trial judge was wrong in law in failing to

direct the jury in relation to the count of aiding rape that knowledge (by the appellant) of a specific intent in the principal offender to have carnal knowledge of the woman without her consent was an essential element of the crime of aiding rape.

- "3. THAT the learned trial judge was wrong in law in directing the jury "to completely ignore evidence of the consumption of liquor and of drunkenness" and either of such items of evidence in considering whether it was satisfied beyond reasonable doubt of a voluntary and intentional act of penetration.
- "4. THAT the learned trial judge was wrong in law in directing the jury to "completely ignore" evidence of the consumption of liquor and of drunkenness and either (of) such items of evidence in considering whether it was satisfied beyond reasonable doubt of the voluntary and intentional doing of an act for the purpose of aiding the commission of the crime of rape contrary to sections 3 and 185 of the Criminal Code."

It was properly conceded by Mr Wright that the argument based on the ground which I have listed as number 2 could not succeed unless the argument based on ground number 1 was accepted.

#### *Ground 1*

In *Snow v. The Queen*, [1962] Tas. S.R. 271, the Court of Criminal Appeal held that the ingredients of the crime of rape were penetration by the accused of a woman not his wife and the concurrent absence of her consent. At p. 279 Burbury C.J. and Cox J. said:

"... the only mental element that s. 13(1) introduces into the crime of rape is that the accused's physical act of penetration must be voluntary and intentional. An accompanying intent to penetrate the woman against her will is not a positive element of the crime."

On this aspect of the case, Crawford J. concurred with his brethren.

Although it has on occasions been said that this decision might need to be reconsidered on some future occasion, it has been followed by *nisi prius* judges for over eighteen years. It has not been the occasion of any obvious injustice. Indeed this is the first occasion upon which a serious challenge to its validity has been mounted. The courts in Queensland and Western Australia, applying similar provisions in the Codes in force in those States, have reached the same conclusion as to the ingredients of the crime: see, for example, *Reg. v. Thompson*, [1961] Qd.R. 503, at p. 516 per Stable J.; and *Attorney-General's Reference No. 1 of 1977*, [1979] W.A.R. 45, at p. 51.

The courts in each of the Code States have been fully aware of the constituents of the crime of rape at common law. Their decisions

as to its content as provided in the respective Codes have been decisions as to the interpretation of the relevant statute.

Mr Wright's argument was basically this:

1. the absence of any specific reference in s. 185 to intention or belief does not positively exclude the importation into the crime of some element of intention or belief;
2. in *Vallance v. The Queen* (1961), 108 C.L.R. 56, the High Court held that a mental element should be imported into the crime of wounding;
3. the appropriate mental element to be introduced into the crime of rape is an intention to have carnal knowledge of the woman knowing that she was not consenting or reckless or uncaring as to whether she consented or not. The argument is thus based on an application to the crime of rape of the reasoning of the High Court in *Vallance's Case* (*supra*).

It may be noted at once that *Vallance's Case* was decided twenty years ago, and no authority was cited to suggest that any court in the three Code States has been persuaded that it has any application to the crime of rape. It preceded *Snow's Case* and was discussed by the Court of Criminal Appeal in that case.

The decision of the House of Lords in *Reg. v. Morgan*, [1976] A.C. 182, *sub nom. D.P.P. v. Morgan*, [1975] 2 All E.R. 347, is no aid to the interpretation of s. 185 of the *Tasmanian Code*.

What this Court is being asked to do, then, is to overturn *Snow's Case* on the basis that the Court of Criminal Appeal failed in that case properly to apply to s. 185 the reasoning of the High Court in relation to s. 172. An appellant who asks a Court of Appeal to reverse one of its own decisions carries a heavy burden. While no court could countenance a continuing wrong or injustice, public policy demands that the law should be stable and authoritative; firm and not subject to continual challenge and change. The burden which the appellants carry is that of establishing, by reference to more recent authority, or previously unstated arguments, or by other appropriate means, that the decision under attack is plainly, or manifestly, wrong. (See *McKinnon v. Gange*, [1910] V.L.R., at p. 32; *Australian Agricultural Company and Others v. Federated Engine-Drivers and Firemen's Association of Australasia* (1913), 17 C.L.R. 261).

The argument on this ground falls short of attaining that end. It refers to no recent authority; it discloses no new arguments; it makes out no case of injustice. It is simply a *cri de coeur* for the common law. It ought not to be entertained at all.

I have had the benefit of reading, in draft form, the reasons for judgment of the Chief Justice, in which he deals at length with this aspect of the appeal. I agree entirely with the propositions there set out.



But perhaps something should be said about the application of the decision of the High Court in *Vallance's Case* to other sections of the *Code*. The problem in *Vallance's Case* was to determine the mental element in the words "Any person who unlawfully wounds . . . any person is guilty of a crime". After applying s. 13 to s. 172 the justices of the High Court each arrived at the conclusion that there were three elements in the crime—

1. a voluntary and intentional act;
2. some degree of foresight of a wound or harm resulting, the justices differing as to the degree of foresight required;
3. the negative of the proposition that the wound or harm was an event which occurred by chance, that is, neither foreseen nor foreseeable.

The deed proscribed in that section was a physical impact — the wounding, that is, a potentially foreseeable *result* of a physical act — in that case, the discharge of the rifle. The Crown was required to prove not only that the physical act of firing the rifle was voluntary and intentional, but also that the physical impact of the bullet could be, and was to some uncertain degree, foreseen. In that respect it was perhaps akin to the case of *Timbu Kolian v. The Queen* (1968), 119 C.L.R. 47, where *Vallance's Case* was discussed. In both cases it was possible for the physical act to have been deliberate, but the resulting impact on the human body unforeseen. However, in s. 185, it is the physical act of penetrating the human body which is proscribed. That is both an act and an impact, and the two cannot be separated. Once penetration is proved to be voluntary and intentional, there is no result, or resulting event, the foreseeability of which needs to be considered. The problem which exercised the court in *Vallance's Case* does not arise in relation to s. 185. The point may be illustrated by considering a charge of discharging a firearm in the city street. That charge requires no examination of any further event — the deed proscribed is the physical act of discharge. The place of discharge is a concurrent event — not a result of the act. But a charge of wounding by discharging the firearm would require the court to consider the result of the discharge — did it cause a wound? The foreseeability of that result will determine whether the act of firing and the resultant wound constituted a crime.

The act of penetration of a woman's body is an act complete in itself — its character is, and must be, determined without reference to any resulting event and so without reference to foreseeability. The legislature in s. 185 declared that the crime of rape is constituted by the act of penetration accompanied by an extrinsic circumstance — the lack of consent of the woman. That extrinsic circumstance is not part of the "act" mentioned in s. 13(1): see *Kaporonovski v. The Queen* (1973), 133 C.L.R. 209, at p. 231, per Gibbs J.; and cf. *Reg. v. Reynhoudt* (1962), 107 C.L.R. 381. There being no consequence to

the physical act involved in the definition of the crime, there is no room for the debate which occurred in *Vallance's Case*. The argument from *Vallance's Case* is not only not new; it is based on a false application of that case. This ground of appeal must fail. As Mr Wright conceded, ground 2 must fail with it.

### *Ground 3*

There was evidence at the trial that each of the appellants had consumed intoxicating liquor. There was also evidence that some, at least, considered themselves to be adversely affected by such consumption. There was no evidence that they, or anyone else, considered that they were so intoxicated as to be unable to perform the act of sexual intercourse voluntarily and intentionally. There was no evidence that such acts as they did perform were involuntary or unintentional. As I understand Mr Wright, no submission was made to the jury by counsel that any of such acts were involuntary or unintentional. However, the absence of such a submission may well have been due to the ruling of the learned trial judge.

His Honour directed the jury in this way. He directed them as to s. 13, the burden of proof, and the defence of mistake. No complaint is made as to those parts of the summing up. He then said:

"Now, members of the jury, I pass onto another matter. There have been numerous references in the evidence to the question of liquor and intoxication. My direction to you, which I am obliged to give you because of decisions of the Court of Criminal Appeal of this State, which, as you know, bind me as a single judge to follow, and which it is your duty also to follow, is simply this; the questions of intoxicating liquor and drunkenness to the extent, if any, to which drunkenness existed in any accused, must be completely ignored by you in reaching your decision. In the circumstances of this case, there is no room for your decision, in any of the seven cases, to be in any way whatsoever influenced by any consideration of alcohol. You must completely dismiss from your minds alcohol as having anything at all to do with this case. As I have said, it must be ignored."

That may have been an overstatement — as Gibbs J. (as he then was) said in *Reg v. O'Connor* (1980), 146 C.L.R. 64, at p. 95:

"It does not follow from the decision in *D.P.P. v. Majewski* that evidence of the intoxicated condition of the accused must be rejected as irrelevant. That would be absurd; the evidence is admissible as one of the surrounding circumstances, and in some cases it will be relevant to other questions in issue."

But the notice of appeal confines the problem before us to his Honour's dismissal of the evidence of intoxication from the jury's consideration of the issue of the voluntary and intentional qualities

of the act of carnal knowledge. This was pointed out by the learned Crown Advocate (Cox Q.C.) without demur from Mr Wright. So the question for this Court to determine is whether the learned trial judge was wrong insofar as he instructed the jury to ignore that evidence in determining that issue.

His Honour published a ruling on this aspect of the case, *Reg. v. Arnol*, [1980] Tas. R. 222, in which he said that he felt bound to follow *Snow's Case* rather than *O'Connor's Case*. He went on to say, at pp. 227, 228:

"I have considered it necessary to deal at some length in this ruling with the submissions made by counsel. However, despite the conclusion which I have reached, I consider it proper to add that if I had made a contrary decision I would not have allowed the question of intoxication to be considered by the jury. Especially having regard to the nature of the act which the Crown must prove was voluntary and intentional — i.e. penetration — I do not consider there was evidence of self-induced intoxication sufficient to be left for the jury's consideration of the voluntary and intentional character of the acts of any of the accused charged with rape."

The crystallisation of the precise content of the decision in *O'Connor's Case* and the determination of its impact on the *Criminal Code* in this State are difficult questions. It may be, as suggested during argument, that *O'Connor's Case* does no more than apply the gravamen of s. 17(2) to all crimes, whether of so-called "basic" or "specific" intent. That is, to hold that evidence of intoxication tending to show *incapacity* to form the *necessary* intent is always relevant. But it is not necessary to resolve those problems in this appeal. There is nothing in *O'Connor's Case* which requires a trial judge to leave to the jury, on the issues raised by s. 13, evidence which falls short of engendering a doubt as to those issues. As Barwick C.J. said in that case at p. 466:

"If the evidence, if accepted, is not such as to be capable of raising a doubt as to either of the basic elements, voluntariness or actual intent, that evidence can be withdrawn from the jury's consideration."

This passage has been considered and applied in *Reg. v. Murray*, [1980] 2 N.S.W.L.R. 526, and considered in *Reg. v. Kusu*, [1981] Qd.R. 136.

It is quite clear, in my opinion, that, in the case before this Court, the evidence of intoxication fell far short of raising a reasonable doubt as to whether the acts of carnal knowledge were either voluntary or intentional. In my view, there is simply no basis in the evidence for a conclusion or even a suspicion that the acts were anything but voluntary and intentional. It follows that,

whatever may be said as to his Honour's ruling, his charge to the jury was not defective.

For this reason, this ground of appeal fails.

For the same reason, ground 4 fails.

In my opinion, the appeals should be dismissed.

*Appeals dismissed.*

Attorneys for the appellants: *Wright & Wright.*

A.G.M.