

mode of prosecution and although the determination whether the offence is to be tried summarily or on indictment is made not by a Court, but by an officer of the Crown. I am glad to find that this conclusion is the same as that reached by the Full Court of South Australia in *Wachtel v. Messent* (r) and by the Full Court of New South Wales in *Ex parte Nomarhas* (s).

The order *nisi* will be made absolute and the case remitted to the magistrate.

Solicitor for the informant: *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

Solicitor for the defendant: *P. Fraser*, Geelong.

P. E. J.

R. v. HORNBUCKLE.

FULL COURT (Macfarlan, Lowe and Martin JJ.).

MAY 3, 4, 14, 1945.

Criminal law—Drunkenness—Rape—Intent—Direction to jury.

On a charge of rape, drunkenness rendering the accused incapable of forming the specific intent to commit rape is a defence. Such defence is not one of insanity.

Director of Public Prosecutions v. Beard, [1920] A.C. 479, followed.

APPLICATION FOR LEAVE TO APPEAL.

Charles Hornbuckle was presented at the Criminal Sittings at Melbourne upon a charge of rape and was found guilty of attempted rape. He gave notice of application for leave to appeal against conviction on the grounds: 1. That the learned trial Judge was in error in holding that the defence raised by the accused was insanity and not drunkenness or a certain condition similar to drunkenness caused by drugs or a combination of alcohol and drugs. 2. That the learned trial Judge was in error in holding that there was no evidence that the accused believed that the prosecutrix consented to intercourse. 3. That the learned trial Judge failed to direct the jury as to the accused's defence as set out above in paragraph 1. 4. That the learned trial Judge misdirected the jury by stating that the defence raised by the accused was insanity and not

(r) [1943] S.A.S.R. 47.

(s) [1944] S.R. (N.S.W.) 187.

drunkenness as set out above in paragraph 1. He also applied for leave to appeal against sentence. The facts are set out in the judgments.

Bourke, for the applicant.

L. P. Little, for the Crown.

Cur. adv. vult.

MACFARLAN J. This was an application for leave to appeal against conviction and sentence. The applicant was presented on a charge of rape and found "not guilty of rape", but "guilty of attempted rape". In addition to oral admissions and a written confession by the accused, there was a mass of evidence, including the evidence of an independent witness and medical evidence as to the girl's condition, all showing that the prisoner attempted to have carnal knowledge of her without her consent. This evidence was, in effect, uncontradicted even by the prisoner, who gave evidence on oath. But he also swore that he had taken a considerable quantity of drink. There was also other evidence from which it was contended the jury might infer that he had taken, accidentally or otherwise, some narcotic shortly before the acts relied on as constituting the offence.

The prisoner's counsel appears to me to have led evidence in support of a defence of temporary insanity arising from the involuntary taking of a narcotic by the accused or from the combined effect of drink and the narcotic. His Honour was asked by counsel for the defence in dealing with the charge of actual rape to direct the jury in effect—(i) that the intention to commit rape was an essential ingredient to the crime of rape and was "a specific intention" within the meaning of the rule laid down in *Director of Public Prosecutions v. Beard (a)*; (ii) that short of temporary insanity there was evidence from which the jury might infer that the accused by reason of the alcohol and drug he had taken was incapable of forming the specific intention to commit rape; (iii) that the jury should be directed that they should consider the evidence as to his condition, with the rest of the evidence, in order to decide whether he had that specific intention.

His Honour, in effect, as I understand the record, held that the specific intention to commit rape was not a specific intention essential to the crime of rape within the rule as to drunkenness laid down by the House of Lords in *Beard's Case (b)*, and held that the defence disclosed by the evidence was really a defence of temporary insanity, and declined to direct the jury on the lines suggested.

The first, third and fourth grounds of the application to this Court are (1) That the learned trial Judge was in error in holding that the defence raised by the accused was insanity and not drunkenness or a certain con-

(a) [1920] A.C. 479, at p. 501.

(b) [1920] A.C. 479.

dition similar to drunkenness caused by drugs or a combination of alcohol and drugs. (3) That the learned trial Judge failed to direct the jury as to the accused's defence as set out in paragraph (1). (4.) That the learned trial Judge misdirected the jury by stating that the defence raised by the accused was insanity and not drunkenness as set out in paragraph (1.). These grounds appear to be directed to His Honour's ruling to which I have just referred. In my opinion, the question raised by those grounds does not, strictly speaking, arise for determination by this Court, or perhaps it would be more correct to say, that it is unnecessary finally to determine it in this case. As I have said, the ruling complained of at the trial and in this Court was given in relation to the substantive crime of rape, and the jury has found the prisoner not guilty of rape. But they have found him guilty of an attempt to rape. The learned Judge, after defining rape (in effect) as the penetration by a man with his male organ into the genital organ of a woman without her consent, and after explaining the onus of proof and the possible verdicts of rape, or rape with mitigating circumstances, says: "There is another verdict which you may bring in this case. You might say, 'We are quite satisfied that this man intended to rape this woman and that he had gone on his way so far that he had got her to the ground, that he had started on one of the series of acts which, if uninterrupted, would have resulted in rape, but for some reason he did not penetrate', and you may then find him guilty of an attempt to rape. An attempt to commit a crime is the doing of an act with the intention to commit the crime, the act being one of a series which, if continued, would lead to the commission of the crime itself. In other words, in this case, I think it comes to this, that if you thought he threw this woman to the ground, was on top of her, pulled down her pants, and was trying to have connection with her, but you are not satisfied that he did get his penis inside her private part, so that you are not satisfied he had carnal knowledge of her, then you would find him not guilty of rape, but guilty of an attempt to rape". That definition of an attempt to commit a crime follows the traditional definition. (See *Archbold's Criminal Pleading, Evidence and Practice* (31st ed.), p. 1425, and the definition in the English draft Criminal Code there cited.) Assuming, as I do, that definition to be correct in law, a specific intention to commit the crime of rape is, in my opinion, an essential element or ingredient of the crime of attempting to commit rape within the meaning of the judgment of the House of Lords in *Beard's Case* (c). It seems to me to follow, *primâ facie* at least, that if there were evidence of drunkenness at the material time which rendered the prisoner incapable of forming that intention essential to the crime charged (here an attempt to commit rape), the jury should have been directed to take that evidence into consideration with the other evidence in order to determine whether

or not the prisoner had that intent. If the omission to do so is not, on their strict construction, covered by the grounds of appeal, I should, having regard to His Honour's actual direction, treat it as covered by them, and if I thought there was any risk of a miscarriage of justice by reason of it, I should feel bound to set aside the verdict.

Was there any evidence that by reason of drunkenness (voluntary or involuntary) the prisoner was incapable of forming the intention to rape? [His Honour then examined the evidence and continued:] Once the view that, at the material time, the prisoner was unconscious is eliminated, I doubt if there is any evidence at all that he had at that time drunk or consumed any narcotic. It is not necessary to pronounce a final view as to that. In the discussion at the trial (after the prisoner had given evidence on oath) on the bearing of drunkenness on the question of intent, O'Bryan J. said: "But your client's defence here is that his state of mind was that he did not know what he was doing at all—that is what he has sworn to—that is the only state of mind of which he has given evidence." I agree with that view.

In my opinion the real defence raised by the evidence at that stage was that the prisoner was, by reason of a narcotic taken by him, after having taken a considerable quantity of beer, in effect, unconscious at the time of the acts and conduct relied on as constituting the crime, and so could not know what he was doing. That was really a defence of temporary insanity. The direction as to the law relating to insanity as a defence, is not challenged. An attempt was then made to shroud the evidence as it then stood by calling medical evidence directed to show that there was a possibility that prisoner's mind might (by reason of taking a narcotic on top of the beer he had drunk) be, at the relevant time, in a state of unconsciousness which rendered him incapable of forming the intention to rape. I have examined that evidence in conjunction with the evidence in support of the assumptions on which it is based, and I have no doubt that it leaves the position in law as it was, viz., that there was no evidence that the mind of the prisoner was in fact in such a state. It is, of course, true that if he was unconscious he would be incapable of forming the intention to rape (cf. *per* Jarvis C.J. in *R. v. Moore (d)*) (cited by Birkenhead L.C. in *Beard's Case (e)*). In my opinion, the only evidence of prisoner's incapability to form the intention to rape was that he was unconscious at the material time. But the position on this point is not precisely the same as it was when O'Bryan J. summed up at the trial. The jury must by their verdict be taken to have accepted in substance the evidence of the Crown witnesses as to the physical acts and conduct of the accused—short of actual penetration—relied on as constituting the attempt to rape. They must also by their verdict, read in the light of the summing up as to temporary

(d) [1852] 3 C. & K. 319.

(e) [1920] A.C. 479, at p. 504.

insanity, be taken to have rejected the view that he was unconscious at the relevant time. As there was no evidence of incapacity at the material time—other than that arising from unconsciousness—to form the intention to rape, it appears to me inconceivable that the jury would or could have arrived at a different verdict if the direction sought had been given.

For these reasons I am satisfied that there has been no miscarriage of justice and that the application for leave to appeal should be refused.

The judgment of LOWE and MARTIN JJ. was read by LOWE J.: The prisoner was presented on a charge of rape and was found guilty by the jury of attempted rape. He now applies for leave to appeal against this conviction. It is not disputed by his counsel that there was ample evidence to sustain this verdict if the jury were properly directed. The grounds of appeal therefore attacked the direction to the jury of the trial Judge, O'Bryan J. On the trial it appeared that the offence was alleged to have been committed during an interval of a dance at which the prisoner and the prosecutrix had danced together. Evidence was given by the prisoner that prior to the dance he had consumed a large quantity of liquor and was dull and heavy of foot when he met the prosecutrix. Other evidence was given of the finding subsequent to the alleged offence of a glass, which might reasonably be supposed to be the glass out of which both the prosecutrix and the prisoner had drunk, and which then contained partially undissolved tablets of morphine-hydrochlorine, a narcotic poison. How long subsequent to the alleged offence the finding occurred was not fixed precisely by the evidence, but the interval was substantial and may have been upwards of an hour. There was evidence that about five hours after the commission of the alleged offence the prisoner appeared to be suffering from the effect of narcotic poisoning.

Counsel for the prisoner at the trial raised two defences as arising out of the facts which I have just summarised. He contended in the first place that, the prisoner being charged with rape, it was incumbent on the Crown to prove that he had the intention to have intercourse with the prosecutrix without her consent, and that the evidence did not establish or at least raised a reasonable doubt as to the existence in the prisoner of such intention, and secondly that the prisoner did not know what he was doing and was temporarily insane at the critical time. The learned Judge directed the jury, in regard to the second contention, and no exception is taken to this direction. The learned Judge, however, refused to accede to counsel's first contention. He held at the end of discussion with counsel that, if the prisoner knew he was having intercourse with the prosecutrix against her will or consent, it was rape, that it was unnecessary to show any special intent and that the nature and quality of the act of the prisoner under such circumstances manifested the only intent which the crime involved. Holding this view His Honour did not charge the jury

on the question whether or not the prisoner was capable, by reason of his condition, of forming the intention to have intercourse without the consent of the prosecutrix.

The ground of appeal substantially argued before us was directed to this view of and action by His Honour. It is said that His Honour was in error in so holding and his charge was defective by non-direction as to this point and by misdirection in telling the jury that the defence raised by the prisoner was insanity and not drunkenness. The point raised is undoubtedly important, not only because of the different facts necessary to establish the defences, but because of the difference in the incidence of the onus of proof involved. The only other ground taken, viz., that the learned trial Judge was in error in holding "that there was no evidence that the accused believed that prosecutrix consented to intercourse" was disposed of on the hearing of this application and we do not refer further to it. We deal then with the substantial ground which remains.

We do not think that His Honour's view is reconcilable with authority to which we should pay the greatest respect. In *Director of Public Prosecutions v. Beard* (f) the House of Lords discussed elaborately the defence of drunkenness in relation to death resulting from suffocation caused in the commission of rape. The Lord Chancellor emphasised the historical distinction which still exists between the defences of drunkenness and insanity and in at least two passages indicates unmistakably that he regards the intention necessary to be shown in order to constitute rape as an intention which a man through drunkenness may be incapable of forming. He says (g): "Drunkenness in this case could be no defence, unless it could be established that Beard, at the time of committing the rape, was so drunk that he was incapable of forming the intention to commit it". And again he says (h): "There was certainly no evidence that he was too drunk to form the intent of committing rape." It would be sufficient to leave the matter there, but it may be helpful to say a little more. The learned Judge's view would at least result in an anomaly. On a charge of rape a jury may return a verdict—not guilty of rape but guilty of an assault with intent to commit rape (*Crimes Act* 1928, sec. 456). We find it difficult to understand how the intent in this alternative case can be said not to be a special intent to which a defence of drunkenness may be established and if it may be (as we think it may be) one would, on the trial Judge's view, deny the defence to an attempt which succeeds, while it would be available where the crime remained in the attempt. There is indeed a suggested anomaly.

It was always open at common law for the jury to find a prisoner not guilty of the offence charged but guilty of a lesser offence which was involved in the indictment (see *Archbold's Criminal Pleading, Evidence &*

(f) [1920] A.C. 479.

(h) [1920] A.C. 479, at p. 507.

(g) [1920] A.C. 479, at pp. 504-5.

Practice (31st ed.), pp. 187-8, 1497: *R. v. Taylor* (i)). There were limitations of course. The offences must not be of an entirely different character, e.g., felonies and misdemeanours (though there is now some statutory modification of this restriction). Analysis of the crime of rape involves at least these elements, (a) an indecent assault, (b) an intent to have intercourse with the female without her consent, and (c) the intended assault completed by the having of intercourse. To hold that knowledge that the act of intercourse was occurring sufficiently establishes the intent, because the man who knows he is committing the act must intend it, even if *prima facie* warranted, seems to us to fail to distinguish "intent to have intercourse" from "intent to have intercourse without the consent of the female." Once it is appreciated that the above elements are involved, the alternative verdict of assault with intent (now specifically authorised by the Crimes Act) follows naturally and any basis for the suggested anomaly disappears.

It follows from what we have said that we think the learned trial Judge was in error. But we have still to consider whether this error vitiates the trial. Of drunkenness *simpliciter* incapacitating the prisoner from forming the necessary intention, we think there is no evidence proper to be submitted to the jury: nor indeed can we find in the transcript any indication that the prisoner's counsel ever submitted such a case to the Judge or desired it to be submitted to the jury. His submission to the Court and his questions to witnesses suggest a case of incapacity to form the necessary intention by reason of the combined effect of drink and a narcotic drug. We will assume in favour of the prisoner that there is evidence that he had taken some of the drug at the time he attempted to rape the prosecutrix (though we shall later give reasons for doubting if there was any such evidence), and we will also assume that an incapacity to form an intention because of the combined action of drug and drink stands on the same legal footing as drunkenness. Counsel suggested to witnesses two possible effects on the prisoner—temporary insanity and inability to form the necessary intention. It is the latter only with which we are concerned. In order to see whether there is any real evidence proper to be submitted to the jury we go at once to the transcript. Prisoner's account is as follows: "Tell the jury what took place from then on?"—"She drank the first glass of beer; I drank the second. When she was drinking the first glass I was waiting for the glass. She said 'I can't drink fast'. We stood there talking for a while. She drank the first. I drank the second. I filled up the third. She said 'I don't want any more'. I said 'Have some; you'll drink this off'. She drank half of it. We stood there talking and I drank the remainder of the glass, and after some considerable time we were standing there, and I drank

(i) [1869] L.R. 1 C.C.R. 194.

it. I had my arm around her. I said 'Give us a kiss'." "What space of time elapsed?"—"I should say anywhere from 20 minutes to half an hour." "That is from the time you got out there until you finished the drinking?"—"Yes, from the time we got there until we finished the drinking." "Then what happened?"—"I had my arm around her. I said 'Give us a kiss'. She said 'I don't kiss strange men'. I said 'Don't be hard'. With that she went to turn around. She turned to pull away, she fell over; she overbalanced and fell over. I don't know whether she kissed me or whether she did not. My head hit the ground. I don't know whether she kissed me or she did not." His Honour: "What?"—"My head hit the ground. I don't know whether she gave me a kiss or not. The next thing I know I woke up. I was half sitting and lying on the steps outside the hut. I had a half-consumed saveloy in my hand." "Outside what hut?"—"An empty hut two huts away from my own." Mr. Bourke: "Do you recollect anything between those times?"—"No." "Do you recollect struggling with the girl or trying to have intercourse with her?"—"No."

In so far as this account asserts that the prisoner did not know what he was doing, the jury's verdict on a direction unchallenged and unchallengeable in this regard has negatived it. And apart from this the prisoner nowhere himself asserted he did not or could not have the intention to have intercourse against her will with the prosecutrix. The case made by his counsel rests on evidence of the possible effect on the prisoner of drug and drink. In evidence Dr. Renou said in his opinion a man having taken the quantity of alcohol and drug suggested could form an intention to do a particular act, *e.g.*, to rape a woman, but that he would not be confident in his opinion. Then counsel put to him questions, and answers were given, as follows: "I want you to assume the fact that the man does in fact have sexual intercourse with a woman, but I am putting to you that his mental state is such that he is unable to form that intention?"—"You mean, do it without knowing he is doing it?" "Yes, without consciously forming the intention?"—"I should doubt it." "Would you be confident in that view?"—"No, but I would be more confident in that than the previous statement. I cannot see that a man could do anything, not knowing anything about it, from a dose of drug which would not knock him out." Another witness, Dr. Dale, was asked, "I put it that the combination of the two things, the approximate quantity of liquor and that approximate quantity of drug might render a man incapable of forming the intention of doing any particular act which in fact he does, would you agree with that?" And he answered, "Yes". Then he was asked whether such a man would be able to do a series of acts of which evidence had been given (and which ultimately was not challenged) which the prisoner had done and he answered, "No". A third medical witness was asked whether the condition suggested might have

“resulted in the patient being unable to form the intention of having connection with a woman against her will”, and he said, answering in a generality, “I can only say it is possible”. In answer to further questions he said that a man so affected would know in a dull sort of way that he was struggling with a woman. But in cross-examination there was read to him from the prisoner’s statement then in evidence his account of what he had done when the offence was alleged to have been committed and he was asked, “Having read that, do you think the man who made that statement knew what he was doing at the time he was with the girl?” And he answered, “On that statement, yes.” “Realised perfectly what he was doing?”—“Yes.”

It seems to us that the effect of this evidence is that while in the abstract one may say that it is possible for a person affected by drug and drink to the degree suggested to be incapable of forming the intention to rape, yet in relation to the facts of the case we are dealing with the witnesses did not think him incapable. To invite the jury on such evidence to acquit him on the ground that he was incapable would be to invite them to guess in the face of the evidence or to disregard their oaths. This then is a case in which there is no evidence proper to be submitted to the jury on the point challenged and consequently failure of the learned Judge to put it cannot have resulted in any miscarriage and therefore the application should be refused (*Crimes Act 1928, sec. 594 (1)*). It is pointed out by the House of Lords that it is not the duty of the Judge to invite the jury to speculate on matters on which there is no evidence and which cannot reasonably be inferred from the evidence—*Mancini v. Director of Public Prosecutions (j)*. The passage referred to by counsel from the judgment of the House of Lords in *Maxwell v. Director of Public Prosecutions (k)*, which he suggested gave him a right to have the conviction quashed, must be read with what is said by Lord Simon in *Stirland v. Director of Public Prosecutions (l)*. We have assumed that the evidence that when the glass was found it contained the narcotic tablets and that the prisoner at 2 a.m. the following morning showed symptoms of narcotic poisoning is evidence that the narcotic tablets were in the glass at the time when he and the prosecutrix drank from it, but we have grave doubts whether this assumption is correct. This evidence seems to us equally consistent with the tablets having been put in the glass after the attempted rape. The account of the prosecutrix is that the assault upon her started immediately after the last drink and that she and the prisoner went to the ground. And the prisoner’s account is to the same effect. If it is said that the prisoner’s evidence that after he struck the ground he knew nothing more was sufficient to render the evidence more consistent with his assertion, that evidence was not

(j) [1942] A.C. 1, at p. 12.

(l) [1944] A.C. 315, at p. 321.

(k) [1935] A.C. 309, at p. 323.

accepted by the jury and now, after the verdict, cannot help him. Judges often out of mercy to the accused allow evidence, as to which they are doubtful, to go to the jury, but such a practice is of no assistance when, after verdict, a Court of appeal is examining the matter on strict principles.

There is also an application for leave to appeal against sentence but no argument was addressed to us in support of it, nor do we think on the facts of this case any such argument could succeed.

In our opinion both applications should be refused.

Solicitor for the applicant: *C. M. S. Power*, Public Solicitor.

Solicitor for the Crown: *F. G. Menzies*, Crown Solicitor.

P. E. J.

CITY OF CAMBERWELL v. WALDMANN.

LOWE J.

JUNE 8, 20, 1945.

Local Government—Street construction—Road on Crown land—Whether road formed means of back access to or drainage from premises abutting thereon—Liability to contribute—Local Government Act 1928 (No. 3720), sec. 574 (1).

A municipality, purporting to act under sec. 574 (1) (b) of the *Local Government Act 1928*, went through the statutory procedure and constructed a road set out on land of the Crown. The defendant's premises adjoined or abutted on the road, but the road did not form means of back access to any premises adjoining or abutting upon it, nor did it form means of drainage from the defendant's premises. The municipality sought to recover from the defendant a proportion of the cost of constructing the road.

Held, that the defendant was not liable.

TRIAL OF ACTION.

The Mayor, councillors and citizens of the City of Camberwell brought an action against Franz Waldmann claiming that the defendant was indebted to the plaintiff in the sum of 834*l.* 11*s.* 11*d.* for the cost of constructing a road situated within the plaintiff municipality, viz., Greythorn Road. The defendant was the owner of certain allotments, all of which abutted on Greythorn Road, and the plaintiff alleged that the defendant by himself or his tenants had the right to use or commonly did use the said road. The plaintiff, prior to constructing the road, had, pursuant to the provisions of Part XIX, Division 10 of the *Local Government Act*