

R. v. BURLES.

FULL COURT (Lowe, Gavan Duffy and Fullagar JJ.).

MAY 1, 22, 1947.

Criminal law—Rape—Whether force necessary to commit crime—Accused's belief woman a consenting party to intercourse—Necessity for evidence of belief—Direction to jury.

The crime of rape consists in having unlawful carnal knowledge of a woman without her consent. Force in the ordinary sense need not be proved. Where through fear the woman makes no resistance, no more force is necessary to constitute the crime than is sufficient to ensure penetration.

On a charge of rape, in the absence of evidence that the accused believed the woman was a consenting party, it is not necessary to direct the jury to consider whether he had such a belief.

Consideration of the doctrines of *mens rea* and mistake of fact.

APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION.

The prisoner was presented at the Criminal Sittings at Melbourne upon a charge of rape and was convicted. The facts and the grounds of this application appear from the judgments.

Moloney, for the prisoner.

Sproule K.C., for the Crown.

Cur. adv. vult.

GAVAN DUFFY J. read the following judgment: The applicant in this case having been convicted of rape applies for leave to appeal against his conviction on the following grounds:—(1) That the verdict was against the evidence and the weight of evidence. (2) That the learned trial Judge should have withdrawn the case from the jury on the ground that a verdict of "guilty" would have been unsafe on the evidence and the weight of the evidence. (3) That the learned trial Judge was in error in refusing or neglecting to direct the jury that they must be satisfied beyond reasonable doubt that I intended to have carnal knowledge of the woman W. without her consent. (4) That the learned trial Judge failed to direct the jury that if they found that I believed that I was having intercourse with the woman W. with her consent that I was not guilty of the charge of rape. (5) That the learned trial Judge failed to direct the jury that they should be satisfied beyond reasonable doubt that at the time I had intercourse with the woman W. that I did not believe that she was consenting to have intercourse with me.

It appears from the evidence that one Margaret W. had, as a widow, married one R. R. W. in Sydney and later went with her husband to Melbourne for a holiday. Some fourteen days after her marriage she and her husband were in the Royal Mail Hotel with a Mr. Cleland when the accused, who apparently knew Cleland, was introduced to them and joined their party. He asked them to visit a friend of his and late in the

afternoon the four of them arrived at the house of a man called Cordingley at Garfield St., Richmond. Cordingley's wife admitted them and shortly afterwards Cordingley arrived. The six of them then had some drinks, though there is no evidence that anyone was the worse for liquor, and talked. Mrs. Cordingley then left and shortly afterwards the accused asked Mrs. W. to dance. She accepted the invitation and a couple of minutes after the dance was over Cleland departed. Mr. W. then said "We had better go" to which Burles replied "No you don't—not yet". There was then an argument about who was responsible for some spilt wine. The accused said to Mrs. W.: "Come into the room, I want to talk to you". She did not answer and the accused took her by the arm, and according to her "sort of pulled her" through the door opening from the room they were in into the hallway which led to a bedroom. Her husband stood up and went to grab her by the arm, and Cordingley pushed him back into a chair and as she described it "knocked him". The accused who had her by the arm led her into the bedroom. From here on Mrs. W.'s story and that of the accused, who gave evidence on oath, differ most materially. Mrs. W. says accused pushed her on to the bed and said: "Pull your pants down". She was too frightened to say anything and the accused pulled her pants down. She tried to make an excuse to get out saying she wanted to go to the toilet, but he said, "After will do". When he had had intercourse with her she pulled up her pants and he said, "Get up now and come outside", and they went back to the room where the others were, where she found her husband sitting on a chair, dazed, with blood running down his face. She asked Burles to wash her husband's face. She was crying and as soon as accused had washed her husband's face she and her husband left, and as soon as they got on the tram to go back to their hotel at St. Kilda she told her husband what had happened. She swore she did not agree to have intercourse with the accused. Her husband lent some support to her story. He agreed he had said to his wife, "I think we will go", and the accused pushed him back into a chair and said, "No you don't". He then saw the accused taking his wife to a room up the passageway. He added that when he went to go after them he was hit with a bottle, came to after a while, and was hit again. He was then, he said, too dazed to go after his wife and he next saw her coming down the passageway crying terribly and when they got to the tram to go to their hotel she started crying again and said, "That brute pushed me on to the bed and had intercourse with me".

The accused's story is that he requested Mrs. W. to come into the room as he wanted to ask her something: she came to the bedroom and he asked her could he have intercourse with her. She said "What about my husband"? He said "He is pretty drunk". She said he could have intercourse with her on one condition that her husband did not walk into

the room. She sat on the bed and took her right leg out of her scanties and he accepted her offer and had intercourse with her. It was about two or three minutes from the time they left the room where the others were to when they returned there.

It may, I think, be taken that Mrs. W. neither resisted nor cried out for assistance while she and the accused were in the bedroom together.

I may add to this precis of the facts that Cleland having apparently gone to the police when he left Cordingley's house, the hunt for the accused was soon up and he was arrested next morning when about to depart in a plane for Tasmania with a ticket taken out in a name other than his own.

When questioned accused denied that he had been at Cordingley's house the day before, but it is necessary to say that this was in reply to what was in effect a suggestion that he had both raped the wife and robbed the husband, for the latter of which offences accused and Cordingley have since, we were informed, been convicted.

I may deal quite shortly with the first two grounds of objection. There were certainly circumstances in the case to support an argument that the intercourse was not against the woman's will, but terror may be as effective as force, and a woman in a strange house, seeing what she saw when her husband tried to come to her rescue, may well have feared to resist. Whether her story should be believed would depend largely on the impression the woman herself made when she told it (see *R. v. Rudland* (a); *R. v. Woodhurst* (b); *R. v. Jones* (c)).

It is true that there was here no violence used by the accused in the ordinary sense of that term but I think it can now be taken that such violence is not essential. It need hardly be said that in the great majority of cases connection against a woman's will can only be effected by the exercise of violence and a jury might properly hesitate to convict in its absence and this may account for the number of definitions to be found in the books which include violence as a component part of the offence, but I think that, notwithstanding the use of the word "ravish", the language of the statute (13 Edward 1, c. 34) gives full support to the opinion of Hood J. in *R. v. Bourke* (d), that the offence of rape involves no element of force whatever. However that may be, "force" in its common understanding is certainly not necessary, and, at the most nothing more is required than such force as in the particular circumstances is required to effect the purpose of penetration without the woman's consent, so that when she is too feeble of intellect to be able to consent even to the physical act (*R. v. Lambert* (e); *R. v. Fletcher* (f)),

(a) [1865] 4 F. & F. 495.

(b) [1870] 12 Cox C.C. 443.

(c) [1861] 4 L.T. 154.

(d) [1915] V.L.R. 289; 36 A.L.T. 173.

(e) [1919] V.L.R. 205, at p. 212; 40

A.L.T. 170.

(f) [1859] 28 L.J.M.C. 85.

or where by a trick the accused has persuaded the woman to submit to, not consent to, connection (*R. v. Flattery* (g)), and on a like principle where, through fear the woman makes no resistance, no more force would be necessary to constitute the crime than sufficient to ensure the penetration. To adopt the words of Madden C.J. in *R. v. Bourke* (h); "The force necessary to constitute rape may be compared with that required in a case of trespass to a house *vi et armis*. All that is required to be shown is that the trespasser invaded the house. In the same way all that is denoted by the use of the word 'force' in the definition of rape is that the man, not having the consent of the woman, enters her person by the degree of force which is necessary to accomplish that act...without the woman's consent".

The act of connection must be "without the consent" of the woman not "against her will" (*R. v. Fletcher* (i), *coram* Lord Campbell C.J., Martin B., Crowder J., Willes J. and Watson B.), a distinction which emphasizes that force, in any real sense, is not necessary.

Whether there had been rape was essentially a matter for the jury, and the learned trial Judge acted with propriety in leaving it to them.

The other grounds require careful consideration of the effect mistake of fact may have on what otherwise would be a criminal offence.

We must in effect answer the following questions:—(1) Can the accused's belief that the woman is consenting make the connection innocent though in fact she has not consented? (2) If so, in what manner and under what circumstances can the accused take advantage of that belief?

It would simplify matters considerably if "mistake of fact" could be separated from *mens rea*. The fact that it cannot is the cause of the difficulties that we find.

I have had my attention directed by my brother Lowe to an interesting article by J. W. C. Turner in the *Modern Approach to Criminal Law* (Vol. IV. of *English Studies in Criminal Science*) in which the author makes an enquiry into the subject of *mens rea*. He points out that historically any requirement of a mental element only came as an amelioration of the earlier rule that where an act was prohibited the prohibition was absolute, that amelioration came from different sources and in different forms, until, in modern times, as the author contends, the state of the accused's mind must be taken into account for two quite distinct purposes:—(a) In order to ascertain if his conduct was voluntary or involuntary. (b) In order to ascertain if he realised what the consequences of his conduct might be.

(g) [1877] 2 Q.B.D. 410.

A.L.T. 173.

(h) [1915] V.L.R. 289, at p. 293; 36 (i) [1859] 28 L.J.M.C. 85.

The author goes on to say "Now the expression *mens rea* has been used to indicate liability under both (a) and (b) but the difference between the two not having been clearly indicated confusion of thought has been encouraged and complexity of expression has resulted".

It may be remarked that he suggests that mistake of fact may be placed in either category, quoting as an authority for placing it in the first *Sir Mathew Hale*: "But in some cases *ignorantia facti* doth excuse for such ignorance many times makes the act itself morally involuntary".

Whether a failure to keep in mind the dichotomy mentioned by the author must bear the blame for confusion of thought and complexity of expression, they are both to be found in the books, and I propose to examine the language of a number of eminent Judges to discover if an answer can be found to the questions I have propounded and more particularly to the second and difficult one.

In *R. v. Bourke* (j), Madden C.J. said, "In every instance the leading element is the want of consent, and if a man does the act, believing he has the woman's consent, whereas in fact he has not, he does the act at his peril". A'Beckett J. may perhaps be taken to have concurred in this statement of the law since he simply said (k): "I have nothing to add", but whether he did so concur or not, looking at the matters to be decided I think the statement must be taken to be *obiter*.

On the other hand Lowe and Martin JJ. in *R. v. Hornbuckle* (l) stated that an intention to have intercourse without the woman's consent was a necessary element in the offence and must be proved by the prosecution.

In *R. v. Wright* (m) Channel B. directed the jury that rape "required an intention on his [the accused's] part to commit the act by force against her will". *R. v. Stanton* (n) is authority to the same effect.

In *R. v. Lloyd* (o), Patteson J. told the jury, "In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part".

In *R. v. Flattery* (p) Denman J. said: "I think the definition of rape in the statute [13 Edward 1, c. 34]... may be accepted, subject to one qualification. There may be cases where a woman does not consent in fact, but in which her conduct is such that the man reasonably believes she does".

Cussen J. in *R. v. Lambert* (q) dealing with the case of an alleged rape on an idiot girl said, in a judgment with which Irvine C.J. concurred, that two things must be proved to justify a verdict of guilty:

(j) [1915] V.L.R. 289, at p. 293; 36 (n) [1844] 1 Car. & K. 415.

A.L.T. 173.

(o) [1836] 7 C. & P. 318.

(k) [1915] V.L.R. 289, at p. 295; 36 (p) [1877] 2 Q.B.D. 410, at p. 414..

A.L.T. 173.

(q) [1919] V.L.R. 205, at p. 212; 40

(l) [1945] V.L.R. 281, at p. 286.

A.L.T. 170.

(m) [1866] 4 F. & F. 967.

(1) that the girl was incapable of consenting even to the physical act involved in "carnal knowledge". (2) The accused at the time must have known there was at least a possibility of such a want of such a capacity and took the risk notwithstanding.

In the 7th Edition of *Roscoe's Criminal Evidence*, Mr. Stephen (afterwards Stephen J.) dealt with the matter thus:—"It is submitted that the true rule must be that where the man is led from the conduct of the woman to believe that he is not committing a crime known to the law, the act of connection cannot under such circumstances amount to rape. In order to commit rape there must, it would appear, be an intent to have connection with the woman notwithstanding her resistance". This view he reiterated as Stephen J. in *R. v. Prince* (*r*).

The view that there cannot be a rape without such a guilty mind as has been described receives support from the decision of the House of Lords in *Director of Public Prosecutions v. Beard* (*s*). The actual question for consideration there concerned the charge of the trial Judge on what defence could be based on the accused's drunkenness. However the killing occurred owing to the accused trying to smother his victim's cries in the course of raping her. Lord Birkenhead L.C. delivering an opinion in which the other members of the Court concurred, after dealing with authorities that were said to establish that where it was necessary to prove some specific intent to constitute a particular crime the accused's drunkenness might be taken into account by the jury in determining whether such specific intent was present said (*t*):—"I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime, *e.g.*, wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences) a person cannot be convicted of crime unless the *mens* was *rea*. Drunkenness, rendering a person incapable of the intent, would be an answer, as it is for example in a charge of attempted suicide. In *R. v. Moore* (*u*) drunkenness was held to negative the intent in such a case and Jervis C.J. said: 'If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself'? My Lords, 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, which was not in fact, and manifestly, having regard to the evidence, could not be contended". Since the crime is

(*r*) [1875] L.R. 2 C.C.R. 154.

(*s*) [1920] A.C. 479.

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

(*u*) [1852] 3 C. & K. 319.

having connection with a woman "without her consent" not merely having connection with her, this language, I think, supports the view that a lack of the intention to have connection against the woman's will deprives the act of its criminal character.

It seems to me therefore sufficiently clear that our first question must be answered "Yes", The accused's belief that the woman is consenting can make the connection innocent though in fact she has not consented.

It is the more satisfactory to reach this conclusion because otherwise the crime of rape would be an exception to a well settled rule of the criminal law.

The rule that a mistake of fact may make what would otherwise be a guilty act innocent has been sometimes subsumed under the maxim *actus non facit reum nisi mens sit rea*, and the principle said to be that a guilty mind is a necessary constituent of a crime and there is no crime without *mens rea* is sometimes spoken of as being based on a general rule that a mistake of fact is a good defence in law. Sometimes the suggestion is that it is enough if there be an honest belief, sometimes that it must be reasonable also, sometimes that a guilty mind is an integral part of the crime that must be proved by the Crown, sometimes that mistake is a defence that must be proved by the accused. These distinctions, of course, may be important when considering under what circumstances a jury ought to be directed to take such a mistake into its consideration and what form such a direction should take.

In the present case the learned trial Judge did not tell the jury that if they found the intercourse was against the will of Mrs. W. they should go on to consider whether the accused believed that it was against her will, or direct them that they should not convict unless they were satisfied beyond reasonable doubt that he had the intercourse believing it was against the will of Mrs. W. On the contrary he told them in effect that the real issue was whether she consented or not, and as to this particular point said: "Now I am not elaborating, as you will remember, observations on the question which was raised by the last counsel to address you, Mr. Moloney, that if the woman appeared to consent, that the man might reasonably conclude he had her consent. That is sufficient because it does not seem to me to arise really on the facts of the case. On her part she said she did not consent; she was taken by the hand and taken to the room and he had intercourse with her, and on the other hand the man says she did in words say that as long as her husband did not come in then it was all right, so you see you are not dealing with any appearance of consent, gentlemen, it is either a question of her consenting or not consenting and that will depend I should think, in the final analysis, on your views upon what evidence you think is correct and the facts you think are established by the evidence you think is correct".

Whether this was a proper course to take depends, in my opinion, upon whether there must be facts proved either by the prosecution or the accused, from which an inference might reasonably be drawn that the accused believed at least that the woman was consenting, before the jury should consider whether there was a mistake of fact.

In *R. v. Prince* (v) Brett J. who was, it is true, in a minority of one, but was in no way dissented from on this point, and whose reasoning was approved and adopted by Hawkins J. in *R. v. Tolson* (w), after pointing out that a guilty mind was necessary in common law offences said that something more must be proved than merely that the prisoner did the prohibited acts, and added: "They [meaning the words 'feloniously' and 'unlawfully' in an enactment] do not necessarily denote that evidence need, in the first instance, be given of more than that the prisoner did the prohibited acts". Again speaking of the use of the word "knowingly" in a statute: "The presence of the word calls for more evidence on the part of the prosecution. But the absence of the word does not prevent the prisoner from proving to the satisfaction of the jury that the *mens rea*, to be *primâ facie* inferred from his doing the prohibited acts, did not in fact exist". Later in his judgment he says (x): "What reason is there why...a criminal mind, or *mens rea*, must not ultimately be found by the jury in order to justify a conviction, the distinction always being observed, that in some cases the proof of the committal of the acts may *primâ facie*, either by reason of their own nature, or by reason of the form of the statute, import the proof of the *mens rea*? But even in those cases it is open to the prisoner to rebut the *primâ facie* evidence, so that if, in the end, the jury are satisfied that there was no criminal mind, or *mens rea*, there cannot be a conviction in England for that which is by the law considered to be a crime". And finally after considering a number of cases (y): "It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be the facts, would, if true, make his acts no criminal offence at all".

In *R. v. Tolson* (z) Cave J. (speaking of the crime of bigamy) said: "What must the accused prove to bring herself within the general exception? She must prove facts from which the jury may reasonably infer that she honestly and on reasonable grounds believed her first husband to be dead before she married again". Stephen J. in the same case put the matter thus (a): "The principle involved appears to me,

(v) [1875] L.R. 2 C.C.R. 154, at pp. 160, 161-2. (y) [1875] L.R. 2 C.C.R. 154, at p. 169.
 (w) [1889] 23 Q.B.D. 168. (z) [1889] 23 Q.B.D. 168, at p. 183.
 (x) [1875] L.R. 2 C.C.R. 154, at p. 163. (a) [1889] 23 Q.B.D. 168, at p. 187.

when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition". Lord Coleridge C.J. said (b): "If there had been no proviso I confess I should have thought that this statute was to be read like any other statute, and that it was to be shewn, or evidence was to be given, of the felonious intention with which the act in question was performed. That might be an inference to be drawn from the mere fact of the marriage being contracted, but it might also well be an inference that might be rebutted, as it might be in any other case, by the distinct and absolute proof that the intention to violate the statute—I do not mean the intention to do the particular act and the intention to violate any particular statute, but what has been defined, and for all purposes sufficiently defined, as the *mens rea*—existed in the person who was indicted".

In *R. v. Ewart* (c) Edwards J. says that the common law rule was that a guilty mind must either be necessarily inferred from the nature of the act done or must be established by independent evidence and though they do not precisely say so, it would appear that Cooper J. (d) and Chapman J. (e) assented to this.

In *Thorne v. The Motor Trade Association* (f) Lord Atkin said:—"I do not think that doubt should exist upon a well established proposition in criminal law, that, normally, a genuine belief in the existence of facts, as apart from law, which if they existed would constitute a defence, is itself a sufficient defence".

Dixon J. in *Maher v. Musson* (g) said: "In the case alike of an offence at common law and, unless expressly or impliedly excluded by the enactment, of a statutory offence, it is a good defence that the accused held an honest and reasonable belief in the existence of circumstances, which, if true, would make innocent the act for which he is charged".

In *Thomas v. The King* (h) Latham C.J. quoted three statements of the principle from Wills J., Lord Kenyon C.J., and Cave J.: "It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent. "It is a principle of natural justice [and of our law]...that *actus non facit reum, nisi mens sit rea*. The intent and act must both concur to constitute the crime". The guilty intent is not necessarily that of intending the very act or thing done

- (b) [1889] 23 Q.B.D. 168, at p. 202. (f) [1937] 3 All E.R. 157, at p. 161.
 (c) [1905] 25 N.Z.L.R. 709, at p. 731. (g) [1934] 52 C.L.R. 100, at p. 104.
 (d) [1905] 25 N.Z.L.R. 709, at p. 739. (h) [1937] 59 C.L.R. 279, at p. 287.
 (e) [1905] 25 N.Z.L.R. 709, at p. 743.

and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed'. 'At common law an honest and reasonable belief in the existence of circumstances which if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim *actus non facit reum, nisi mens sit rea*. Honest and reasonable mistake stands in fact on the footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy' ". This last sentence deserves special notice in view of what was said about lunacy as a defence by Sankey L.C. in *Woolmington v. Director of Public Prosecutions* (i). Starke J. (j) quoted Stephen J. in *R. v. Tolson* (k):—"It may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence".

In *Hardgrave v. The King* (l) Griffith C.J. expressed the rule thus: "It is ... a general rule that a person who does an act under a reasonable misapprehension of fact is not criminally responsible for it even if the facts which he believed did not exist".

Cussen J. in *R. v. Lambert* (m) said:—"Though a person cannot be convicted unless it is shown that he had a guilty mind, yet if the other facts constituting the offence are proved, the guilty mind may generally be presumed, unless its absence is affirmatively shown".

This Court in the case of *R. v. Adams* (n), a case of bigamy, said:—"If a prisoner have a *bonâ fide* belief, upon reasonable grounds, of a fact which would have rendered her first marriage invalid, that was a permissible subject for the consideration of a jury, and was evidence proper to be submitted to a jury, upon which, if the jury believed in the prisoner's *bonâ fide* belief in the existence of the fact, they would be justified in finding the prisoner not guilty, as there was no *mens rea* in the prisoner".

Finally the rule is expressed in a decision especially binding on us when Sir Richard Couch in *The Bank of N.S.W. v. Piper* (o), (quoted by Dixon J. in *Thomas v. The King* (p)) says:—"It was strongly urged by the respondent's counsel that in order to the constitution of a crime,

(i) [1935] A.C. 462.

(j) [1937] 59 C.L.R. 279, at p. 295.

(k) [1889] 23 Q.B.D. 168, at p. 188.

(l) [1906] 4 C.L.R. 232, at p. 237.

(m) [1919] V.L.R. 205, at p. 212; 40 A.L.T. 170.

(n) [1892] 18 V.L.R. 566, at p. 568.

(o) [1897] A.C. 383, at p. 389.

(p) [1937] 59 C.L.R. 279, at p. 304.

whether common law or statutory, there must be *mens rea* on the part of the accused, and that he may avoid conviction by shewing that such *mens rea* did not exist. That is a proposition that their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations. In cases where the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent''.

From these authoritative statements I think there can be deduced that where a man does something which would otherwise be criminal, mistake will only make his act innocent if he, at least, honestly believed that facts existed which would, if they truly existed, make his act not an offence against the law, or, perhaps not wrong in itself apart from positive law, but that where those conditions do exist, his act will not, in the ordinary course, and apart from certain statutory offences, be a crime.

In what circumstances then is a jury to consider the question of mistake of fact? In the absence of any authority to the contrary the very fact that it is only when there is a *bonâ fide* belief and, as the balance of authority seems to show, one held on reasonable grounds, that the act otherwise criminal becomes innocent, would seem to be conclusive that the jury should only consider the matter when there is some evidence of both these conditions.

On the other hand if a guilty mind is a necessary constituent of the crime, as some of the statements of the rule suggest, it would be in accordance with principle that the Crown should prove it. If this means that the Crown must prove that there could not reasonably be any explanation of the accused's conduct but that he meant to commit the act which constituted the crime charged, or at any rate commit some unlawful act or do something wrong, the practical result would certainly be startling. To take an example from the crime of bigamy; as the law now stands the jury would have to be satisfied beyond reasonable doubt on the Crown's case, that the accused did not honestly and on reasonable grounds, though wrongly, believe that his wife was dead, or that they had been divorced. Since the existence of the relevant facts must be peculiarly in the knowledge of the accused it would be in accordance with general principle that the burden of proving their non-existence should at least be lightened for the Crown—(see *Doe dem. Bridger v. Whitehead* (q); *Elkin v. Janson* (r)), but in addition the universal practice

(q) [1838] 8 A. & E. 571.

(r) [1845] 13 M. & W. 655.

of our Courts points to the initial burden at least being on the accused and common sense would not allow a contrary rule to be imputed to the law without the clearest and most cogent authority for it.

Should the jury then take the matter into their consideration when there are circumstances given in evidence which might reasonably have led the accused to believe that the necessary facts existed but no evidence that could justify a finding that he did so believe? To so hold would I think be to forget what is necessary to make the act innocent. If belief and reasonable grounds are both necessary, and one is missing the position is the same as if neither were proved, and the jury can be concerned with the question only if the proof of absence of mistake is entirely on the prosecution.

Where there is evidence on which a jury could properly find both belief and reasonable grounds for it, it would seem more coherent with general principles that the jury should be told that they are to acquit on the ground of mistake only if they are satisfied on the balance of probabilities that the accused did honestly and on reasonable grounds believe that the necessary innocent state of facts existed. But it has to be remembered that the rules of English Law are not part of a logically arranged and coherent whole, however unceasing the attempts of Courts and text writers in modern times to make them so, as is sufficiently illustrated by the intrusion into the idea of the "guilty mind" of the purely objective test of what a reasonable man would think. They have their roots in history and grew from precedent, and it is more in accord with the spirit of the criminal law, in modern times, as exemplified in decisions of Courts of high authority and more particularly in the decision in *Woolmington's Case* (*s*), that when once there is some evidence of belief and reasonable ground for it, the jury should be told that a guilty mind is a necessary constituent of the crime and that unless they are satisfied beyond reasonable doubt, on a consideration of all the evidence, that that constituent along with the others has been proved, they should acquit. I may refer by way of illustration to a charge by the Recorder of London to this effect in a case where the facts were somewhat unusual—*R. v. Dennis* (*t*). The precedents may or may not allow such a conclusion. Perhaps the technical difficulty may be got over by treating the guilty mind as a constituent part of the offence that must be proved, but holding that the doing of the forbidden act in most at any rate of the common law offences raises a presumption of a guilty mind, though that might propound a second question, whether when, as in this case, there are facts in evidence, which suggest a possibility or a probability of an excusatory mistake any such presumption should

(*s*) [1935] A.C. 462.

(*t*) [1905] 69 J.P. 256.

be made. Some of the language I have quoted indeed suggests such a rule. I need not, however, express any decided opinion on this question since the facts in the present case do not render it necessary.

In my opinion, then, the jury should only consider the possibility of the accused having acted on a wrong belief as to the facts when there is some evidence that he did honestly believe at least that the necessary facts existed. A proper administration of criminal justice requires it and on the whole the statements of the principle to which I have referred confirm it.

It remains however to consider whether such a view of the law is consistent with the decision in *Woolmington v. Director of Public Prosecutions* (u).

It is true that in that case the widest possible language was used as to the necessity of the Crown proving beyond reasonable doubt everything that goes to establish the offence charged, but it must be remembered that the Court was dealing not with a mistake of fact in the accused's mind but with proof of that malice which was as much of the essence of the crime of murder as the intent is in a charge of "loitering with intent to commit a felony" or the lack of consent by the woman in a charge of rape, and despite the statement that the defence of insanity was a special and solitary exception to the rule that the Crown must prove everything that constitutes the crime, I cannot read the judgment as intended, without any further mention of the matter, to introduce such a radical change as that the reasonable possibility of any mistake of fact by the accused must in all cases be negatived by the Crown. It may be observed that, as an illustration of the principle he was laying down, the Lord Chancellor chose to quote the case of *R. v. Davies* (v), the headnote of which, as the Lord Chancellor said, correctly states that "where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental". The charge in that case was shooting with intent to resist lawful apprehension and the intent was as much an ingredient of the crime as the absence of consent is in the crime of rape; this appears to have been the basis of the judgment. The proof of such an intent is analogous to the proof of malice in murder and bears little resemblance to a proof that there was *no* mistake of fact by the accused.

I feel confirmed in this opinion of *Woolmington's Case* (w) by what was said by Latham C.J. in *Packett v. The King* (x): "It is true that Sankey L.C. says that the Crown 'may prove malice either expressly or by implication. For malice may be implied where death occurs as a result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this

(u) [1935] A.C. 462.

(v) [1913] 8 Cr. App. Rep. 211.

(w) [1935] A.C. 462.

(x) [1937] 58 C.L.R. 190, at p. 198.

is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation, or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted the act was unintentional or provoked, the prisoner is entitled to be acquitted'. These words should not be interpreted so as to produce the revolutionary change in the law which is suggested by the argument submitted upon this appeal. The Lord Chancellor states that, when evidence of death and malice (express or implied, as it readily may be implied, from the circumstances) has been given 'the accused is entitled to show' provocation. These words would be quite inapt if the Crown were bound to show absence of provocation before there were a case for the accused to answer''.

In conclusion I may say that in this Court at least, as far as my experience goes, the unvarying practice has been, when no evidence has been given that the accused acted under a mistake of fact, to tell the jury that the two things they must be satisfied of are that there was penetration and that it was without the woman's consent.

If the view I have taken of the law is correct, I think no objection can be taken to the charge of the learned trial Judge in this case. A mistaken belief that a woman is consenting to connection is of course as much a mistake of fact as a mistaken belief by a man that his wife is dead when he goes through the form of marriage with another. The woman swore that the accused had had connection with her without her consent. As part of the Crown case facts were proved which a jury might have considered showed consent, or, if the accused had wrongly believed she consented, reason for such a belief on facts, but no facts from which an inference could properly be drawn that he honestly had any such belief. The accused gave evidence and said that by word and deed she did specifically consent, but he in no way suggested that he thought she was consenting because she did not resist or cry out. It would, therefore, I think have been wrong for the Judge to invite the jury to speculate on whether he might have honestly, though mistakenly, believed she was consenting because she did not resist or cry out. There is of course plain authority, if such were needed, that the Judge's instruction to the jury on the law should be regulated by the facts proved (see *Director of Public Prosecutions v. Mancini* (y)).

I think this application should be refused.

LOWE J. read the following judgment: Inasmuch as I presided at the trial of the prisoner I have asked my brother Gavan Duffy to write the main judgment upon the appeal. I have had an opportunity of reading

what he has written and I agree with his conclusion that the prisoner's application should be refused. The elaborate survey that he has made of the authorities makes it easier to understand that the variation which appears in the statements of various Courts and Judges arises not so much from any difference in view as to the essential nature of the crime of rape as from the necessity or at least the advisability of emphasizing one element or another according to the facts before the Court. I propose only to offer some observations on what at first sight may seem some discrepancy between the accustomed manner of charging juries in cases of rape and what is said in some of the cases cited by Gavan Duffy J., and perhaps most conspicuously in the *Director of Public Prosecutions v. Beard* (z) and *R. v. Hornbuckle* (a).

In the ninth edition of *Russell on Crime*, which was published after *Beard's Case* (b), it is said (at p. 613) that "the definition of the crime of rape depends wholly on the common law as explained by judicial decisions. The crime consists in having unlawful carnal knowledge of a woman without her consent, *i.e.*, her free and conscious permission. It is therefore an aggravated form of assault". *Halsbury's Laws of England* (2nd ed.) vol. IX., p. 475 has a similar definition though it adds "against her will". It is questionable whether this last phrase adds anything to the definition (see *per Palles C.B.* in *R. v. Dee* (c)) and no such allegation is required in the presentment for rape sanctioned by the Appendix to the Seventh Schedule of the *Crimes Act* 1928, see, secs. 398 *et seq.* *Russell's* definition I believe to be the traditional definition which in substance, as the case requires, Judges have constantly adopted in charging juries in this State. In most cases Judges do not refer to the element of unlawfulness. Certainly in what is now a somewhat long experience at the bar, as a trial Judge, and in the Court of Criminal Appeal, I have not known the form of charge to be substantially varied except in cases where the facts raised a question as to the capacity of the prisoner to form the necessary *mens rea*. In most cases probably this practice has been adopted and followed from a recognition of the principle laid down in *R. v. Meade* (d), that "a man is taken to intend the natural consequences of his acts", a presumption which the prisoner may rebut or as to which he may raise a reasonable doubt (see also "*The Modern Approach to Criminal Law*", pp. 211, 256). This statement of the law still remains after the elaborate discussion of *R. v. Meade* (e), in *Beard's Case* (f), and notwithstanding *Woolmington v. Director of Public Prosecutions* (g)

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

(a) [1945] V.L.R. 281, at p. 286.

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

(c) [1884] 14 L.R. Ir. 468, at pp. 481,

(d) [1909] 1 K.B. 895.

(e) [1909] 1 K.B. 895.

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

(g) [1935] A.C. 462.

(see *per* Latham C.J. in *Packett v. The King* (h). Nor is it an unnatural inference in cases of rape that if a man has carnal knowledge of a woman without her consent he intends to have it. The prisoner may rebut the inference if it is unfounded, just as he may rebut the presumption that he intends the natural consequences of his acts. The word “unlawful” in the definition I understand to exclude such a case as a man forcing his wife to intercourse and of course it connotes that the prisoner’s act is intentional. “Carnal Knowledge” simply means, as Cussen J. pointed out in *R. v. Lambert* (i), “the physical act of penetration”. This definition, it is to be observed, is silent on the necessity for the carnal knowledge being with the intention of the prisoner having such carnal knowledge “without the consent of the woman” or “at all events” or “whether she will or not” or “*volens nolens*” all of which expressions may be found in the cases.

How then is the definition to be reconciled with *Beard’s* (j) and *Hornbuckle’s Cases* (k), both of which emphasize that the prisoner must have intended to have carnal knowledge of the woman without her consent? The answer lies in the fact that these cases are really dealing with *mens rea* and the nature of the intention which in the crime of rape must be present. Many instances may be given to show that where the facts do not raise a case that the necessary intention was not present a Judge does not charge the jury on the question of *mens rea* which is an element of most if not all common law crimes. It has been repeatedly said that a Judge’s charge on the law is not to be regarded as a full exposition of the law relating to the crime charged. Indeed to charge the jury in regard to aspects of the law which the facts do not raise, so far from being helpful to the jury, is much more likely to confuse them. Moreover the mention of or the emphasis laid by a Judge on *mens rea* or any particular element of the crime must depend on the facts and the facts, be it noted, as they exist at the end of all the evidence. This last matter is illustrated where it is clear on the evidence of the Crown that someone has done the acts alleged to constitute the crime and the prisoner may be that person, and the prisoner’s case is that he did the acts but in circumstances which do not impose criminal liability. To enlarge on evidence of identity in such a case would clearly be unnecessary. So too where the defence is an alibi a Judge need not deal with other possible defences, nor need he, in a case of larceny, where the prisoner swears he took the goods with the owner’s consent, take time to explain to the jury that the taking must be with the intent of depriving the owner permanently of the goods. Where the charge is bigamy, the marriage and the subsequent ceremony being supported by evidence, a

(h) [1937] 58 C.L.R. 190, at pp. 196-8. (j) [1920] A.C. 479.

(i) [1919] V.L.R. 205, at p. 212; 40 (k) [1945] V.L.R. 281.

A.L.T. 170.

Judge does not direct the jury as to possible mistake unless the evidence raises such a case. Conversely where the prisoner does not dispute that he did the acts charged, but alleges in his evidence that he was a somnambulist and did them in his sleep or that he did them whilst under the influence of hypnotism and in either case was not conscious of what he did, or that by reason of drunkenness or the effect of drugs he was incapable of forming an intention—in all these cases it becomes necessary for the Judge to explain in his charge the necessity of a *mens rea* in order to constitute the offence. I have said above “alleged in his evidence”. It is not sufficient for counsel to raise a matter in argument if there is no foundation of fact for the argument. The recent trial of McKenzie for murder was such a case. Counsel for the prisoner in argument raised the defence of insanity and requested the trial Judge to instruct the jury on that matter. The trial Judge thought there was no evidence upon which the jury could properly find insanity and told the jury so when they attempted to find insanity. Both this Court and the High Court supported his ruling (see also *Director of Public Prosecutions v. Mancini* (l), while in *Holmes v. Director of Public Prosecutions* (m) it was said that it is the duty of the Judge where evidence was lacking to direct the jury that the evidence does not support a particular verdict.

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

In the case under appeal the contention is that the facts proved are all consistent with the prisoner's belief that the woman was consenting and that therefore it was not proved that he intended to have intercourse with her without her consent. But the prisoner gave evidence on oath and nowhere swore that because of her conduct he believed he had her consent. His case was that he knew he had her consent because both by word and deed she plainly told him so. That case was put to the jury and they disbelieved it. I think, as I thought at the trial, that the trial Judge was not called upon to put for him a case he did not himself swear to and which could only be conceived of if his own evidence were disbelieved. I think it is still the law that the Crown is not bound to

(l) [1942] A.C. 1; [1941] 3 All E.R. 272. (n) [1920] A.C. 479.

(o) [1945] V.L.R. 281.

(m) [1946] A.C. 588; 2 All E.R. 124.

negative a possible defence which the prisoner has not raised (see *per* Latham C.J. in *Packett v. The King* (p)), nor is it the Judge's duty to charge the jury upon such a possibility.

I think the application should be refused.

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

Application refused.

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

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

P.E.J.

In re TEULON.

FULLAGAR J.

JUNE 9, 1947.

Administration and probate—Will lost since death of testator—Application for probate—Whether notice to next-of-kin required.

Where application is made for probate of a copy of a will, the original of which has been lost since the death of the testator, it is not necessary to give notice of the application to the testator's next of kin.

In the Will of Mary Smith, [1881] 7 V.L.R. (I.P. & M.) 40, and *In the Estate of Robert Wallace*, [1882] 8 V.L.R. (I.P. & M.) 22 distinguished.

MOTION FOR PROBATE.

The testator, John Seymour Teulon, who died on the 23rd November 1946, left a will dated the 4th March 1946. On the 27th November 1946, a trustee company received this will and, following its usual practice, made a photostatic copy of it. Subsequently the will passed back and forth between the trustee company and a firm of solicitors, and was lost, and, although searches were made in the offices of both the trustee company and the solicitors, the will was not found. The trustee company sought probate of the photostatic copy of the will, and the Registrar referred the application into Court.