

R. v. BROUGHTON.

FULL COURT (Lowe A.-C.J., Gavan Duffy and Barry JJ.).

AUGUST 5, 6, 18, 1953.

Criminal law—Bigamy—Exemption from criminal liability—Absence of spouse from accused for seven years—Onus of proof—Honest and reasonable belief by accused that spouse absent for seven years—Whether a defence—Knowledge by accused that spouse living—Meaning of knowledge—Crimes Act 1928 (No. 3664), sec. 61.

Section 61 of the *Crimes Act* 1928, in enacting the crime of bigamy, provides that: "Nothing in this section contained shall extend to any person going through the form or ceremony of marriage... whose husband or wife has been continually absent from such person for the space of seven years then last past and has not been known by such person to be living within that time."

Held, Gavan Duffy J. dissenting, the onus of proving absence for seven years lies on the Crown and not on the accused. Consideration of the meaning of "knowledge" in the above provision.

APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION.

Arthur Laurence Broughton was presented at the Criminal Sittings at Melbourne before Dean J. on a charge that on the 30th June 1951, being then married to Marjorie Eleanor Broughton, he went through the form of marriage with Sarah Victoria Winnifred Humphrey. The accused was convicted and now applied for leave to appeal against conviction. The grounds of the application sufficiently appear from the judgment.

The learned trial Judge directed the jury, on the question of the knowledge of the accused that his wife was living at the time of the second ceremony of marriage, as follows:—

It is a practical question. He cannot know with absolute certainty, but I venture to suggest that is not what the section means. The section means that having regard to the circumstances should he be taken as knowing a fact. Suppose, for example, somebody had come to him within the seven years—this is not suggested to have happened, but I am using it for the purpose of illustration—and said, "I saw your wife yesterday in Melbourne", somebody he had no reason to doubt at all, would not that be taken as knowledge, assuming him to be a man he believed to be truthful, knowledge that his wife had been alive the day before and knowledge, I presume, that she was still alive? Belief is another thing. Belief is not knowledge, but when your belief is of such a character that it is the kind of belief that you accept as proof in the ordinary everyday affairs, then I suggest to you that that is knowledge, otherwise the only kind of knowledge that would be of any use would be that you saw the person herself actually alive and walking, walking about, for example. Even the receipt of a letter would not be knowledge, if the other view is correct, because it might have been forged in her handwriting. I venture to suggest it is a practical question, what is knowledge; whether you think that the circumstances were such that any reasonable person would from those circumstances treat the fact as established, and not say "I believe it, but I do not know it".

Brian Thompson, for the applicant.

Nelson Q.C., for the Crown.

[The authorities cited by counsel are referred to in the judgment.]

Cur. adv. vult.

LOWE A.-C.J. read the judgment of himself and BARRY J.: The applicant in this case was convicted of the crime of bigamy. He applies to this Court for leave to appeal against that conviction on four grounds

which in the result amount to an attack on the learned Judge's direction to the jury, particularly in regard to the onus of proof. The question raised on this application involves both a matter of substantive criminal law and of the practical administration of criminal justice in a trial for bigamy. We have heard a full argument for the applicant and for the Crown and we think all relevant decisions have been brought to our attention. Most of these decisions throw little light upon the problems with which we have to deal, but there are two exceptions to this statement and at a later stage we shall refer to the decisions which fall outside this general statement. In our opinion, when attention is paid to two decisions of authority, *R. v. Spark* (1885), 11 V.L.R. 405, and *Woolmington's Case*, [1935] A.C. 462, and to the well-established distinction between the onus of proof in the sense of the obligation to adduce evidence at a particular stage of the case and the ultimate obligation of establishing guilt when all the evidence has been adduced (a matter on which reference may be made to *Nelson v. Campbell*, [1928] V.L.R. 364, at pp. 369-370), the answer to the questions raised in this case can be readily given.

The crime of bigamy is a statutory crime. By sec. 61 of the *Crimes Act* 1928 it is provided that

whosoever being married goes through the form or ceremony of marriage with any other person during the life of her or his husband or wife shall be guilty of felony.

Then follow three categories introduced by a declaration that nothing in the section contained shall extend to any person who comes within them.

We think the Crown sufficiently launches its case against the accused in a charge of bigamy by leading evidence that the accused, being lawfully married, has gone through the ceremony of marriage with another person, the other party to his marriage being then alive.

If these facts are established to the satisfaction of the jury, and no exculpatory facts appear, a verdict of guilty is proper. The jury are not concerned to determine whether a prisoner comes within any of the three exemptions from criminal liability for which the section provides until there is before them some evidence which shows that it is a genuine and not a purely speculative question that he does. If it appears (whether in the Crown case or from evidence introduced by the accused) that there is a genuine question whether the prisoner comes within the first exemption, we think the decision of the Full Court in *R. v. Spark* (1885), 11 V.L.R. 405, establishes it to be the law in this State that the obligation rests upon the Crown to prove to the satisfaction of the jury beyond reasonable doubt that the prisoner is not, on the facts, entitled to have the protection which the exemption furnishes. In that case it was held, following *R. v. Curgerwen* (1865), L.R. 1 C.C.R. 1 (which itself followed *R. v. Heaton* (1863), 3 F. & F. 819), in regard to the first exemption that, there being evidence that the accused and his wife had lived apart for seven years preceding the second marriage, it was incumbent on the prosecution to show that during that time the prisoner was aware of his wife's existence. We can see no reason for thinking that that exemption stands on any different footing in regard to the onus of proof from either of the other exemptions, and we think that the decision of the Full Court shows that when facts are in evidence putting in issue the existence of any one of the exemptions, the ultimate onus of establishing their non-existence lies on the Crown, and that the obligation does not rest upon the accused as a matter of law to establish that they do exist. We may add that in relation to all three exemptions we think that the decision of the High Court in *Thomas v. The*

King (1937), 59 C.L.R. 279, applies and that where it appears that the accused *bonâ fide* believed on reasonable grounds in a set of facts which if true would exculpate him from liability, such a belief will furnish a defence. Having reached this point, we go now to the other case of authority to which we have made reference, namely, *Woolmington v. The Director of Public Prosecutions*, [1935] A.C. 462, from which it appears at p. 481,

No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

(*Cf. Mancini v. Director of Public Prosecutions*, [1942] A.C. 1, at p. 11.) It seems to us to follow that, when all the evidence is adduced, whether introduced by the Crown or the prisoner, this over-riding onus in law comes into play, and the Crown must satisfy the jury on all this evidence beyond reasonable doubt that the prisoner is guilty. If the jury are left in such doubt, then the prosecution fails. It must be constantly borne in mind that rules for fixing the obligation of adducing evidence at any particular stage of the case have no relevance in determining the value of conflicting evidence when all the proof has been completed (*cf. Folkestone Corporation v. Brockman*, [1914] A.C. 338, at p. 355).

The ultimate onus of establishing guilt has been held by the Court of Criminal Appeal to lie upon the Crown even in a case in which by statute the words occurred "without lawful excuse the proof of which shall lie upon such person"; see *R. v. Ward*, [1915] 3 K.B. 696, at p. 698. Whether this is universally so (see *Dowling v. Bowie* (1952), 86 C.L.R. 136; *Proudman v. Dayman* (1941), 67 C.L.R. 536, at p. 541) in case of an exemption provided for by statute we need not now discuss. It is certainly so in cases of common law offences, as may be seen from the invariable practice in cases where there is a charge of larceny based on recent possession and the accused offers an explanation of his possession (*R. v. Schama & Abramovitch* (1914), 11 Cr. App. R. 45, at p. 49; *R. v. Grinberg* (1917), 12 Cr. App. R. 259, at p. 260; *R. v. Garth*, [1949] 1 All E.R. 773); in murder cases where the accused relies on provocation to reduce the crime to manslaughter or where he offers a plea of self defence (*Woolmington's Case* (*supra*); *Mancini's Case* (*supra*), at p. 11; *Holmes v. Director of Public Prosecutions*, [1946] A.C. 588); and in false pretences where the accused offers an explanation consistent with his innocence (*R. v. Stoddart* (1909), 25 T.L.R. 612, at p. 616). These instances which involve different applications of the same proposition (*cf. Mancini's Case* (*supra*), at p. 11) show that the rule adopted by the Full Court in *Spark's Case* is not an exceptional rule, and that it accords with what Dixon J. spoke of, in *Thomas's Case* (*supra*), as

the much more reasonable doctrine that when a statute introduced into our criminal code a new offence it should be understood *primâ facie* to take its place in a coherent general system and to be governed by the established principles of criminal liability (p. 304).

We turn now to the charge of the learned Judge in the present case. In regard to the exemption relied upon by the prisoner, the learned Judge directed the jury that the onus of proving absence for seven years lay on the accused and that he was bound to establish this on the balance of probabilities. This, we think, was wrong. The exemption is one which gives rise to a single defence which contains two co-existing elements: absence of the other spouse for seven years then last past,

and absence of knowledge on the part of the accused that the other spouse was living within that time. Despite *dicta* in *Tolson's Case* (1889), 23 Q.B.D. 168, at p. 183, it does not seem to us to be possible to separate these two elements, and to say that the ultimate onus as to the first is on the prisoner and on the Crown as to the second, and such a view seems to us contrary to what was said expressly in *Heaton's Case* and clearly by implication in *Spark's Case*. It was not contended that if the learned Judge was wrong in this direction it had not led to a substantial miscarriage of justice.

The next ground taken by the applicant was an exception to the learned Judge's charge that an honest and reasonable belief by the accused that his wife had been absent for seven years would be no defence. The learned Judge did so direct the jury and it seems to us such a direction cannot stand consistently with the decision in *Thomas v. The King* (*supra*). The third objection taken by the applicant is to the Judge's direction that actual knowledge by the accused that his wife was living was not necessary. The learned Judge discussed with the jury what was meant by knowledge in the exception, and we find no reason to dissent from his direction on that point (*cf.* the discussion by O'Bryan J. of the meaning of "know" in *A.N.A. Pty. Ltd. v. Vines*, [1950] V.L.R. 510, at pp. 513-4; and *National Bank of Australia v. Morris* (1892), 61 L.J.P.C. 32, at p. 33). The final ground taken was that the learned trial Judge misdirected the jury that while it was a defence to a charge of bigamy that the accused had an honest and reasonable belief based on reasonable grounds in a state of facts which, if it existed, would mean that he was not guilty, the onus of establishing such a defence lay upon the accused. We think that this direction of the learned trial Judge misdirected the jury that while it was a defence to a fusion of the different senses in which the word "onus" is used to refer to the burden of adducing further evidence and to the burden of ultimate persuasion. What we have said earlier indicates sufficiently the view we take and we need say no more about the matter.

From all this it follows that the learned Judge did misdirect the jury and that a substantial miscarriage of justice has followed from his misdirection. The application therefore should be granted; the appeal should be allowed; the conviction should be quashed and the matter should be remitted for a re-trial.

GAVAN DUFFY J. read the following judgment: I agree with the conclusion to which the other members of the Bench have come and with the order they propose should be made. However, in their reasons for judgment they have expressed some views on the question of burden of proof with which I find myself unable to agree. I appreciate that an examination of the reports does not encourage the holding of decided views on the subject, but the question of burden of proof is so important in the administration of the criminal law that I think it proper to give my opinion on the matter.

To do so I turn to the first ground in the accused's notice.

Section 61 of the *Crimes Act* 1928 reads

whosoever being married goes through the form or ceremony of marriage with any other person during the life of her or his husband or wife, shall be guilty of felony, and shall be liable to imprisonment for a term of not more than five years. Nothing in this section contained shall extend to any person going through the form or ceremony of marriage as aforesaid whose husband or wife has been continually absent from such person for the space of seven years then last past and has not been known by such person to be living within that time; or shall extend to any person

who at the time of her or his going through such form or ceremony of marriage has been divorced from the bond of marriage; or to any person whose marriage at such time has been declared void by the sentence of any Court of competent jurisdiction.

Ground 1 of the notice of appeal raises the question whether the onus of proof that the spouse of the accused has been continually absent from the accused for the space of seven years being last past is upon the accused or the Crown.

I propose to consider first what is the proper rule of construction applicable; then what light can be obtained from reported cases directly relevant to the statutory offence of bigamy; then, if the burden of proof can properly be said to be upon the accused, what are the exact limits thereof; and finally how the matter is affected by the decision of the House of Lords in *Woolmington's Case*, [1935] A.C. 462.

I feel no need to search the authorities to discover the rule of construction applicable since the High Court has so recently dealt with the matter. In *Dowling v. Bowie* (1952), 86 C.L.R. 136, Dixon C.J. said, at p. 139:

The argument treats the case as governed by the common law doctrine that where a statute having defined the grounds of some liability it imposes proceeds to introduce by some distinct provision a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it. The common law rule distinguished between such a statutory provision and one where the definition of the grounds of liability contains within itself the statement of the exception or qualification, and in the latter case the law places upon the party asserting that the liability has been incurred the burden of negating the existence of facts bringing the case within the exception or qualification—See *Barritt v. Baker*, [1948] V.L.R. 491, at p. 495. The distinction has been criticized as unreal and illusory and as, at best, depending on nothing but the form in which legislation may be cast and not upon its substantial meaning or effect. The question, however, where in such cases the burden of proof lies may be determined in accordance with common law principle upon consideration of substance and not of form. A qualification or exception to a general principle of liability may express an exculpation, excuse or justification or ground of defeasance which assumes the existence of the facts upon which the general rule of liability is based and depends on additional facts of a special kind. If that is the effect of the statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it.

The other two members of the Court, Williams and Taylor JJ., quoted with approval what was said by Jordan C.J. in *Ex parte Ferguson; Re Alexander* (1944), 45 S.R. (N.S.W.) 64, at p. 66:

In these cases a special rule of construction became established at common law. If the offence were defined as consisting of a single concatenation of factors, all were regarded as necessary ingredients of the offence, whether they were positive or negative in their nature; but, if the definition were twofold, in the sense that after a definition of the offence there was a distinct and separate provision exempting from liability in a certain event, only the first part was regarded as defining the ingredients of the offence, and the second was regarded as matter of confession and avoidance available by way of defence.

In the light of these principles of construction I should have no hesitation in determining that the burden of proof here in question was on the accused and would agree with what Bigham J. said in *R. v. Audley*, [1907] 1 K.B. 383, at p. 387,

the gist of the offence of bigamy is the second marriage during the first wife's lifetime, and when the fact has been established by the prosecution the case is complete. The fact that the accused is not a British subject and the other matters specified in the proviso to sec. 57 are all matters of confession and avoidance, and they must be alleged and proved by the defence.

It is not, however, open to us to hold that the burden is on the accused of proving that, during the necessary seven years' absence of the spouse of the accused, the accused has not known that he or she was living. In *R. v. Heaton* (1863), 3 F. & F. 819, Wightman J. at *nisi prius* held that such burden was on the Crown, saying "How is it possible for any man to prove a negative? The prisoner cannot do that"; and in *R. v. Curgerwen* (1865), L.R. 1 C.C.R. 1, the Court of Crown Cases Reserved came to the same conclusion. In 1921, in *R. v. Lund* (1921), 16 Cr. App. R. 31, the Court of Criminal Appeal applied the same principle, and in 1885 our own Full Court in *R. v. Spark* (1885), 11 V.L.R. 405, followed *R. v. Curgerwen* on this point. A similar conclusion was arrived at in the case of *R. v. Peake* (1922), 17 Cr. App. R. 22.

No case, however, was brought to our attention which established that the burden of proving the absence for seven years is on the Crown, although the language in which the Court expressed its reasons in *R. v. Jones* (1883), 11 Q.B.D. 118, might perhaps suggest that it was. There are *dicta* in the reports to the contrary.

In *R. v. Tolson* (1889), 23 Q.B.D. 168, five Judges, some of them being of the majority and some of the minority, were responsible for such *dicta*.

Cave J. (p. 183) said, speaking of a section substantially the same as sec. 61 of the *Crimes Act* 1928,

What must she prove to bring herself within the proviso? Simply that her husband has been continually absent for seven years; and, if she can do that, it will be no answer to prove that she had no reasonable grounds for believing him to be dead or that she did not honestly believe it. Unless the prosecution can prove that she knew her husband to be living within the seven years she must be acquitted.

Day and A. L. Smith JJ. concurred.

Denman J. said that the statute

was intended to provide, and does provide, that any person who marries another (his or her wife or husband as the case may be being at the time alive) does so at his or her peril; and can only make good a defence to a prosecution for bigamy by proving a continuous absence for seven years: and that even such an absence will not be a defence if the prosecution can prove knowledge on the part of the accused within seven years of the second marriage that the first wife or husband, as the case may be, was still alive.

In this Field J. concurred.

I may remark that as regards another of the exceptions contained in a section similar to sec. 61 of the *Crimes Act* 1928, *Russell on Crimes* (10th ed.), p. 883, states:

If the first husband or wife is proved to have been alive at the date of the second marriage it is for the defence to prove the dissolution or nullification of the marriage and not for the prosecution to negative it.

Indeed, a close examination of the judgments in *R. v. Spark* (1885), 11 V.L.R. 405, suggests that the members of the Court were of opinion that it was for the accused to prove that seven years' absence; Higinbotham J. said, at p. 407, speaking of the case of *R. v. Curgerwen* which the Court was following,

There the Court settled previous difficulties by determining that where the married parties were shown to have been absent from one another for the period of seven years preceding the second marriage, the burden of proof was thereby laid upon the prosecution to show that the husband or wife of the accused person was, in the words of the statute, known by the accused to be living within that time,

and Holroyd J. said, at p. 409,

The reasonable interpretation then of the section, so far as affects this case, I take to be this: If the prisoner shows that his wife has been away from him for seven continuous years, it becomes necessary for the prosecution to prove his knowledge of her existence at some time during that period.

Cope J. concurred in both these judgments.

Even if to prove absence for seven years can be said to be to prove a negative, I can find no reason in the rule of construction approved by the High Court in *Dowling v. Bowie* (1952), 86 C.L.R. 136, for therefore concluding that the burden is on the Crown. On the contrary, applying such rule I am clearly of opinion that it is on the accused, and I would not be prepared to extend the doctrine of *R. v. Curgerwen* (1865), L.R. 1 C.C.R. 1, for the mere sake of uniformity. I am of opinion, therefore, that the burden of proving absence for seven years should be on the accused.

The necessity of inquiring what is meant by saying that the burden of proof of seven years' absence—what are the limits of such burden—arises because, as the Acting-Chief Justice has said, the expression "burden of proof" is ambiguous. It may mean, and that is its primary meaning, that the person who has that burden fails unless, when all the evidence, by whomsoever called, is considered, the relevant fact is established, or it may mean that the course of the evidence has been such that one of the parties is in the position that he must fail unless he calls evidence to change the inference or conclusion that must arise against him from the evidence already called, in which case it may in a sense be said that he now has the burden of proof. It would be idle to consider this distinction if it were a question of a mere logomachy, but in fact the distinction may have important consequences, especially since the extent of proof required of the Crown and of the accused is different.

The question where the burden of proof lies is, of course, a different one from that which had to be answered in *R. v. Burles*, [1947] V.L.R. 392. There the Court was asked to say that the learned trial Judge should have directed the jury that even if the accused had had connexion with the woman without her consent, they should acquit him unless they were satisfied that he did not believe that she was consenting, and they ruled that, in view of the evidence, and more particularly of the evidence of the accused himself, the issue on this point need not have been left to the jury and that no such direction was required.

A belief by the accused in the existence or absence of facts which, if true, would have made his acts innocent may be relevant in either of two ways. An intention which is irreconcilable with such belief may be an ingredient of the offence charged, or his belief may be a defence in the nature of a plea of confession and avoidance.

I speak of a belief merely, disregarding whether it need rest on reasonable ground, since that question is irrelevant to the present inquiry, though I may suggest that if some objective test has crept into the definition of a mental state constituting *mens rea*, it shows an alien face there (see *Wilson v. Inyang*, [1951] 2 All E.R. 237).

Unfortunately, the language used in the reported cases makes it difficult to draw a rational conclusion as to the exact situation in the criminal law of "honest belief" or "honest and reasonable belief", but I am of opinion that on principle where a belief is an ingredient of a crime, the burden of proving its non-existence, except in the case of a defence of insanity or where there is a statutory provision requiring otherwise, is and remains on the Crown, to be satisfied by evidence or presumption, but that where it is not so part of the *mens rea* but is a defence, by way, as has been said, of confession and avoidance, the full burden of proof in its primary sense is on the accused.

Applying these principles, in my judgment the burden of proving his wife's absence for seven years should in the full sense be on the accused.

Mr. Thompson, in support of the proposition that the "onus of proof" on the accused was something less than "onus of proof" in its primary meaning, relied on some authorities quoted at p. 38 of *Phipson on Evidence* (9th ed.). An examination of them, however, shows that they are no authority for such a proposition.

In *R. v. Stoddart* (1909), 25 T.L.R. 612, the Court of Criminal Appeal had to consider the charge to the jury in a case of obtaining money by false pretences. The prosecution gave evidence that well might have been taken as establishing a *primâ facie* case. The accused gave evidence to put another colour on the facts proved. The Recorder directed the jury in effect that, as a result of the evidence led by the Crown, the burden of proof was shifted to the accused. The Court of Criminal Appeal held that this direction was wrong.

In *R. v. Schama & Abramovitch* (1914), 84 L.J. K.B. 396, the Court of Criminal Appeal was concerned with a question of recent possession of stolen goods. The jury had been told,

It is the duty of the prosecution to prove the case against the prisoners... The burden of proof is on them up to a point, that is to say, they have to prove that the goods were stolen, and the stolen goods were in the hands of these people but then the prisoners have to give an account of how the goods came into their possession.

The Court merely laid down that the possession of stolen goods and any explanation offered were merely evidence and that the onus of proof was on the prosecution to prove the offence charged beyond reasonable doubt and such onus never shifted.

In *R. v. Ward*, [1915] 3 K.B. 696, the prosecution was under sec. 58 of the English *Larceny Act* 1861 which made it an offence for a person to be found by night in possession of an implement of housebreaking "without lawful excuse (the proof of which shall be on such person)".

Ward was a bricklayer and proved that the implements, with the possession of which he was charged, were bricklayer's tools. The trial Judge directed the jury that, although that were so, the onus was still on the accused to prove that he had no intention of using the tools for the purpose of housebreaking. The Court of Criminal Appeal held that this direction was wrong; that by his evidence the accused had established *primâ facie* that he had a lawful excuse and the onus was shifted on to the prosecution to prove, if they could, from the other circumstances of the case, that the appellant was not in possession of the tools for an innocent purpose but for the purpose of housebreaking.

It is obvious that the Court were of opinion that the accused, having *primâ facie* satisfied the onus placed on him by the statute, had, if the evidence stopped there, made out a good defence, unless other evidence was called that would throw a different light on his possession. I should

think, therefore, the Court in saying that the onus was shifted on to the prosecution, was using the term "onus" as meaning the necessity of producing further evidence if the *primâ facie* case made by the accused was not to be held sufficient to satisfy his statutory obligation to prove that his possession was innocent.

The Court of Criminal Appeal in *R. v. Carr-Briant*, [1943] 1 K.B. 607, apparently took this view of the judgment in *R. v. Ward*.

In *Dowling v. Bowie* (1952), 86 C.L.R. 136, Williams and Taylor JJ., having laid it down (at p. 150) that

the mere circumstance that guilty knowledge is not an ingredient of a particular offence does not necessarily mean that the defence of honest mistake on reasonable grounds is not open

held that such a defence was open on the case before them. They then examined the evidence in some detail and said:

In these circumstances we are of opinion that there is sufficient evidence that the belief which the appellant was held both by the magistrate and the learned Judge on appeal to have entertained was based on reasonable grounds.

Their examination of the evidence and the manner of stating their conclusion appear to me to make it sufficiently clear that they were enquiring whether on the whole of the evidence the proper conclusion was that the belief the accused had was based on reasonable grounds. There is nothing in the language of any of the three Judges to suggest that the burden on the defendant of establishing his defence was other than the burden he would have had if he had pleaded it by way of confession and avoidance in a civil action, and this encourages me in my view that where a criminal statute puts the burden of proving an exception on the accused, the burden is of a like nature.

Finally, in my opinion, the burden of proof of the fact here in question is not affected by *Woolmington's Case*, [1935] A.C. 462. That judgment of the House of Lords establishes no more than that the Crown must establish every constituent of the offence charged (see remarks of Latham C.J. in *Packett v. The King* (1937), 58 C.L.R. 190, at p. 198). If an intention is part of the crime the Crown must prove it though there may be occasions when the issue concerning it need not be left to the jury (*R. v. Burles*, [1947] V.L.R. 392). Where mistake of fact, however, is strictly a defence by way of confession and avoidance, I do not consider *Woolmington's Case* governs it. If it does, I cannot understand why the accused should be called upon to make a *primâ facie* case or, indeed, to give any evidence except to rebut evidence or presumption relied on by the Crown and consequently how he can be said, until such an occasion actually arises, to have the burden of proof in any sense at all. Even if I am taking too narrow a view of the effect of *Woolmington's Case*, I should be of opinion that the proof of the fact relevant here is excluded by the Lord Chancellor's words "subject also to any statutory exception", for where, according to the recognized method of interpretation, a section imposes the burden of proof on the accused, there is, in my judgment, a statutory exception.

Application allowed.

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

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