CRIMINAL LAW: THE MENTAL ELEMENT IN RAPE.

R. v. Burles.[1]

Recent years have seen a tendency to direct more attention than was given in the past to the mental element involved in crimes. A result of this new approach has been to rouse doubts as to the true definition of offences the essential elements of which had hitherto been thought to be well settled. One example of this is found in the felony of rape, and *R. v. Burles*[1] is of interest because it makes some attempt to ascertain the nature of the intent required in that offence.

Burles had been convicted of rape. The evidence given at his trial indicated that the woman concerned had neither resisted nor cried out for assistance, at the time when he committed the acts complained of. In fact the circumstances of the case were such that he might very well have thought, from those circumstances, that she was consenting to his acts.

However, the accused himself gave evidence to the effect that the woman had expressly consented, which she denied; and the trial judge, Lowe J., directed the jury that the question they had to consider was whether there had been consent or not, and that they need not consider the case as being one of appearance of consent.

Burles appealed to the Full Court of the Supreme Court of Victoria against his conviction on the ground that the trial judge should have directed the jury that they must be satisfied beyond reasonable doubt not only that the accused had had intercourse with the complainant without her consent, but also that he realised that his acts were without her consent.

To this question, whether a particular belief by the accused is a necessary element in the offence, the authorities provide no clear answer. On the one hand, Stephen had stated[2] that rape required an intent to have connection with the woman notwithstanding her resistance, and in *Lambert*,[3] a case where the woman was an idiot and incapable of consenting, Cussen J. had said that "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"; and on the other hand, in *Bourke*,[4] Madden C.J. stated that "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."

Many other cases containing dicta are not conclusive since some of them are cases of attempt to commit rape which admittedly requires a specific intent to commit the complete offence, and which therefore necessarily involves a knowledge by the accused that consent is lacking; and others are cases where, for some other reason, a specific intent of the same kind is required.

Furthermore many of the cases are unsatisfactory as authorities on this point since it is not clear that the courts concerned directed their

1. 1947 A.L.R. 460.
2. Roscoe's *Criminal Evidence* 7th Edn. ed. Stephen.
3. (1919) V.L.R. 205 at p. 212.
4. (1915) V.L.R. 289 at p. 293.

minds to it, so that, though some of the statements are apparently sufficiently wide to cover the question, it is by no means certain that they were intended to do so. *Beard's case*[5] appears to be a case of this kind though both Gavan Duffy J. and Lowe J. in the instant case regarded it as supporting the proposition that there must be a specific advertence to absence of consent. The words used in Lord Birkenhead's judgment in that case are quite consistent with the view that the " intention " to which he referred was merely an intention to have intercourse.[6]

Gavan Duffy J. who delivered the leading judgment came to the conclusion that a mistake of fact by the accused as to the existence of consent was relevant; but he proceeded to bolster his conclusion by reference to a long series of well known cases establishing the proposition that a person accused of an offence created by statute, will in general be not guilty of the offence if he can show that he acted on the faith of a belief in facts which, if true, would have rendered his act an innocent one.[7]

It is submitted that the analogy between these statutory offences and the offence of rape is not a true one, since the definition of rape is left to the common law whereas the facts necessary to constitute the statutory offence are detailed in the statute itself. Furthermore the analogy is a dangerous one since it leads to the conclusion that just as the onus of proving mistake of fact is cast on the accused who seeks to escape conviction for the statutory crime, so the onus is on the person charged with rape to show that he did not relaise that the woman was not consenting to his acts. Such a rule would of course be possible; but it is submitted that it is not consistent with the modern current of authority, and in particular with the decision of the House of Lords in *Woolmington*.[8] Furthermore, the reasons which led to the casting of the onus of proof of mistake of fact on the person accused of a statutory crime do not apply to the crime of rape. Where statutes are concerned, a court is not free to determine the elements of the offence created, but is limited to drawing conclusions from the language used in the Act, as to what Parliament must have intended. When construing old statutes, which were very often carelessly drafted, courts frequently assumed that the criminality of conduct was dependent not merely on proof of the existence of the facts set out in the statute, but also on proof of the knowledge of those facts by the accused.[9] As statutes came to be drafted with greater precision, the courts were forced to the conclusion that the absence of some such word as " knowingly " from a particular statute was significant, and meant that knowledge of the facts was no longer an essential element in the crime. It was with respect to these statutes that the onus of proving mistake of fact was cast on the accused, because Parliament

5. 1920 A.C. 479.
6. At p. 504. See also the comment by D. A. Stroud in 37 L.Q.R. at p. 272, " How could a man committing a rape be ' so drunk that he was incapable of forming the intent to commit it '? In such a mental condition, he would be as harmless as a log, and incapable of committing the active crime in question."
e.g. *Prince* (1875) L.R. 2 C.C.R. 154.
Tolson (1889) 23 Q.B.D. 168.
Maher v. Musson (1934) 52 C.L.R. 100.
Thomas (1937) 59 C.L.R. 279.
Bank of N.S.W. v. Piper (1897) A.C. 383.
8. 1935 A.C. 462.
9. e.g *Slee* ? (1861) 8 Cox C.C. 472; *Cohen* (1858) 8 Cox C.C. 41.

had indicated its intention that this should be so. Dixon J. in *Proudman v. Dayman*[10] describes this evolution in the following words:— "There may be no longer any presumption that *mens rea* in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute, but to concede that the weakening of the older understanding of the rule of interpretation has left us with no prima facie prescription that some mental element is implied in the definition of any new statutory offence does not mean that the rule that honest and reasonable mistake is prima facie admissible as an exculpation has lost its application also."

It is submitted that if any analogy is to be drawn between the crime of rape and statutory offences it would be most appropriate to select the earlier statutes of the kind considered in *Sleep*[11] rather than the later ones considered in cases like *Tolson*[12], *Maher v. Musson*[13] etc.

Gavan Duffy J. thought that although he regarded this rule, 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 reasonably believe that the necessary innocent state of facts existed," as being coherent with general principles, "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*,[14] that . . . 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." However the learned judge qualified this statement by saying that the jury should be given such a direction only when there is some evidence that the accused did believe that the necessary facts existed. This view seems, with respect, to be inconsistent with the decision in *Woolmington*.[15] No doubt it is true that where the evidence shows no ground for supposing that the accused has been mistaken as to the absence of consent the judge should not ask the jury to speculate on whether there has been such a mistake or not. But where, as in this case, the evidence is such that the jury might well be in doubt as to whether the accused knew that the woman was not consenting, principle would seem to require that the benefit of that doubt, if not dispelled by the Crown, should be given to the accused.

Lowe J. regarded his direction to the jury at the trial as being satisfactory for reasons other than those expressed by Gavan Duffy J. He accepted the rule that intent to have intercourse without consent was an essential element in the crime of rape, but thought that it was not necessary to give any direction to the jury in this case as to belief in consent since the accused had given evidence on oath, and nowhere swore that because of her conduct he believed he had the woman's consent. "His case was that he knew he had her consent, because both by word and deed

10. (1942) 67 C.L.R. 536 at p. 540.
11. Supra.
12. *Tolson* (1889) 23 Q.B.D. 168.
13. *Maher v. Musson* (1934) 52 C.L.R. 100.
14. 1935 A.C. 462.
15. Supra.

she plainly told him so. That case was put to the jury and they disbelieved it." This view, that the Crown is not bound to negative a possible defence which the prisoner has not raised, is supported by the High Court decision in *Packett v. The King*.[16] It has the curious result that it arbitrarily prevents the jury from determining that they are not satisfied that an essential element in the crime is present. It is by no means certain that the decision of the jury in this case that there had been no consent, also carried with it a decision that they were satisfied that the accused knew there was no consent.

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16. (1937) 58 C.L.R. 190

LANDLORD AND TENANT: SPECIAL CIRCUMSTANCES.

In these days of acute housing shortage a wide section of the general public takes an interest in the law, and in general conversation one may hear some remarkable enunciations of the law relating to landlord and tenant. It is a common thing to hear from laymen, and sometimes even from a person connected with the law, the statement: "Sub-letting is against the law now." This fallacious statement springs from an amendment, by Statutory Rule No. 31 of 1947, to the *National Security (Landlord and Tenant) Regulations*. By regulation 58, a lessor of "prescribed premises" may terminate the tenancy thereof only by a notice to quit given on one of the grounds set out in that regulation. And he may not take ejectment proceedings unless such a notice has previously been given. To the list of grounds for the giving of such a notice, Statutory Rule No. 31 added the following:

> "(*m*) that the lessee has become the lessee of the premises by virtue of an assignment or transfer which the lessor has not consented to or approved, or
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> (*n*) that the lessee has sublet the premises or some part thereof by a sub-lease which has not been consented to or approved by the lessor."

It will be seen that all that Statutory Rule No. 31 has done, has been to create two further grounds for the giving of a notice to quit, and that an assignment or sub-lease, whether with or without the lessor's consent, may still legally be made. However, the practical value of a sub-lease or assignment is obviously diminished when it affords the lessor a ground for giving a notice to quit and taking ejectment proceedings. Even so, the effect of this amendment would not have been particularly drastic if it went no further than that. For, by regulation 63 (1), on the hearing of ejectment proceedings, the Court

> "shall take into consideration, in addition to all other relevant matters—
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> (*a*) any hardship which would be caused to the lessee or any other person by the making of the order;
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> (*b*) any hardship which would be caused to the lessor or any other person by the refusal of the court to make the order; and