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SUPREME COURT OF NEW SOUTH WALES — COMMON LAW DIVISION

JEFFS v GRAHAM

Yeldham J

20 February, 3 April 1987 — (1987) 8 NSWLR 292; 28 A Crim R 211

CRIMINAL LAW – OFFENSIVE LANGUAGE IN A PUBLIC PLACE – *MENS REA* – OFFENDER INTOXICATED – WHETHER PROSECUTION REQUIRED TO PROVE VOLUNTARY CONDUCT: *OFFENCES IN PUBLIC PLACES ACT* 1979 (NSW) S5.

Section 5 of the *Offences in Public Places Act* 1979 (NSW) provides that a "person shall not conduct himself or herself" in a public place in an offensive manner.

HELD: The words "shall not conduct himself or herself" require at least that there should be a voluntary act by the person charged. Accordingly, in a charge of offensive conduct, the prosecution is required to prove beyond reasonable doubt that the person charged had voluntarily engaged in the conduct complained of. Such voluntariness may be negatived by the effects of intoxication.

YELDHAM J: [293] This is an appeal by way of case stated from a decision of a magistrate in convicting the appellant of an offence under the *Offences in Public Places Act* 1979, s5. That section is in the following terms:

> "5. Offensive Conduct. (1) A person shall not conduct himself or herself in, near or within view or hearing from a public place or school in such a manner as would be regarded by reasonable persons as being, in all the circumstances, offensive. Penalty: $200.
>
> (2) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence."

The case is stated with commendable clarity and brevity. It reveals that the appellant was charged with common assault and also with the offence already mentioned. The charges were heard together. The magistrate found that the appellant, by reason of the effects of intoxicating liquor upon her, was not capable of and did not form any intent to assault and hence he dismissed that charge. In this, of course, he was plainly correct: *R v Reynhoudt* [1962] HCA 23; (1962) 107 CLR 381; [1962] ALR 483; 36 ALJR 26; *R v Venna* [1975] EWCA Crim 4; [1976] QB 421; [1975] 3 All ER 788; [1975] 3 WLR 737; 61 Cr App R 310; and *R v Martin* [1984] HCA 23; (1984) 51 ALR 540; (1984) 58 ALJR 217; 16 A Crim R 87 (a case of manslaughter by unlawful and dangerous acts). In relation to the charge under the *Offences in Public Places Act*, s5, the magistrate made the following findings of fact:

> (a) That on 23 February 1985 the defendant had consumed a large amount of intoxicating liquor.
>
> (b) Whilst under the effect of such intoxicating liquor on 23 February 1985 at approximately 7.35pm the defendant assaulted one Kerrie Anne Jenkins.
>
> (c) That the defendant did not intend to assault the said Kerrie Anne Jenkins because she was incapable of forming any intent so to do as a result of being under the influence of the intoxicating liquor the defendant had consumed.
>
> (d) At approximately 7.30pm on 23 February 1985 that the defendant had used offensive language in the presence of one Phyllis Hawkins in a public street whilst under the influence of the liquor referred to in par 3.

"Under the heading "Grounds for Determination" the magistrate said:

"I disregarded the fact that the defendant was incapable of forming an intent to behave offensively

> and found that the conduct of the defendant in a public place was such that it would be regarded by reasonable persons in all the circumstances as offensive and that the offence created **[294]** by s5 of Act No 63 of 1979 known as offensive behaviour does not require the presence in the accused of an intention to commit the act or acts constituting the alleged offensive behaviour."

The appellant contended that the foregoing conclusion was erroneous because the offence created by the relevant section required the presence of an intention to commit the act or acts said to constitute the offensive conduct and that, just as, on the findings made by the magistrate, she was incapable, by reason of the ingestion of liquor, of committing an assault, so also she was incapable of offensive conduct. The question asked in the stated case is whether the magistrate's determination was erroneous in point of law. It would follow from the finding in par (c) above, and from the statement by the learned magistrate that he disregarded "the fact that the defendant was incapable of forming an intent to behave offensively", that the appellant's self-induced intoxication precluded her from consciously using the language which was held to constitute the offence.

It should be said at the outset that no question concerning the onus of proof arises, nor is it relevant to consider the principle which has developed that an honest and reasonable mistake of fact would be a ground of exculpation in cases in which actual knowledge is not required as an element of an offence: see *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523 at 532-533, 572-573, 591; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 and the cases therein referred to. The argument before me and, I apprehend, before the magistrate, turned upon the well-known passage in the judgment of Wright J in *Sherras v De Rutzen* (1895) 1 QB 918 at 921; 11 TLR 369, namely:

> " ... There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

In *He Kaw Teh's case*, Brennan J (at 566) said that such statement has not been doubted. His Honour expressed agreement with what Lord Goddard CJ said in *Brend v Wood* (1946) 62 TLR 462 at 463; (1946) 176 LT 306, that:

> " ... It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

Brennan J said that:

> " ... It is now firmly established that *mens rea* is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter it is excluded expressly or by necessary implication ... Earlier doubts as to the existence of the presumption or as to its strength ... have now been removed."

Sherras v De Rutzen has been considered and applied on many occasions by courts of high authority. The principle is not in doubt, but its application in any particular case frequently raises questions of considerable difficulty. In *R v Turnbull* (1943) 44 SR (NSW) 108; 61 WN (NSW) 70, Jordan CJ emphasised that the rule of the common law that an act is not criminal unless it is the product of a guilty mind is just as applicable to acts which are criminal because prohibited by statute as to those which are offences at **[295]** common law, and it can only be excluded expressly or by necessary implication. His Honour emphasised that *mens rea* has two elements: (1) mind; (2) which is guilty, and the first is always essential. He said (at 109):

> " ... A person is never Regarded as criminally liable for an act which, although physically the act of his body, was done while his mind was in so abnormal a state that it cannot be regarded as his act at all, eg he was sleepwalking or so young, or so insane, as to be incapable of knowing that he was acting or the nature or quality of his act."

His Honour observed that it was also necessary, assuming his mind to be sufficiently normal to be capable of criminal responsibility, that the person charged should be shown to have knowledge that he was doing the criminal act charged against him. Amongst the more important

cases of recent years dealing with the question of statutory offences and the requirement of *mens rea* are *Lim Chin Aik v R* [1962] UKPC 34; (1963) AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42; *Iannella v French* [1968] HCA 14; (1968) 119 CLR 84 where at 93-94, Barwick CJ, speaking of the presumption mentioned by Wright J said [1968] ALR 385; 41 ALJR 389: " ... it is not a presumption lightly to be displaced"; *R v Warner* (1969) 2 AC 256; [1968] 2 All ER 356; (1968) 52 Cr App R 373; [1968] 2 WLR 1303; *Sweet v Parsley* [1969] UKHL 1; (1970) AC 132; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470; *R v Vlahos* (1975) 2 NSWLR 580; *Holt v Cameron* 22 SASR 321; (1980) 27 ALR 311; (1979) 38 FLR 226 (and on appeal *sub nom Cameron v Holt* [1980] HCA 5; (1980) 142 CLR 342; 28 ALR 490; 54 ALJR 202); *Gammon (Hong Kong) Ltd v Yee Chin Tao* (1985) AC 1 at 12-13; [1984] 2 All ER 503; [1984] 3 WLR 437; [1984] Crim LR 479; (1984) 80 Cr App R 194; [1985] LRC (Crim) 439; and *Phipps v State Rail Authority of New South Wales* (1986) 4 NSWLR 444 at 449-451.

Much has been written as to what is meant by the elusive concept of *mens rea*. In *He Kaw Teh's case*, Gibbs CJ described it as "ambiguous and imprecise". The discussion (at 530-531 and 569-570) is instructive: see also *Phipps v State Rail Authority of New South Wales* (at 449-450) and Gillies, *Criminal Law* (1985) Ch 3 at 39 *et seq*. Both counsel in the present appeal sought to place reliance upon the appearance of the word "wilfully" in other sections of the *Offences in Public Places Act* - eg s7, "wilfully prevent", s8 and s9, "wilfully damage", s10, "wilfully mark". But I do not Regard the use of that expression in other sections as being any reliable indicator: see *R v Turnbull* (at 112; 73); *Lim Chin Aik's case* (at 173, 176); *Iannella v French* (at 93); *Sweet v Parsley* (at 149). Nor do I take the terms of subs (2) as being an indicator that no mental element is necessary in the offence for which subs (1) provides. I do not regard the provision of a defence of "reasonable excuse" as being an indication that the Crown need not prove the appropriate mental element, whatever it might be. An onus is placed upon the person charged to prove on a balance of probabilities that he had a reasonable excuse for acting in the manner complained of. Reasonable excuse plainly has a broader scope than a mere absence of intent; see per Dawson J in *He Kaw Teh's case* (at 595).

In my opinion the words "shall not conduct himself or herself" in s5(1) require at least that there should be a voluntary act by the person charged. In the present case the magistrate's attention was directed only to the question of whether the appellant was capable of forming an intention to behave offensively, an issue which he resolved in her favour although holding that it was irrelevant. Such a finding necessarily involves that at the relevant time the appellant did not voluntarily engage in the conduct which was held to constitute the offence. In my opinion the *Offences in Public Places Act*, s5, **[296]** does at least require the Crown to prove beyond reasonable doubt that the person charged had voluntarily engaged in the conduct complained of.

The offence created is truly criminal in nature; and clearly causes a stigma to attach to any person convicted of it. The penalty, whilst not heavy, is not insubstantial, at least to many of the people who would be caught by the section's provisions; and I do not Regard the subject matter of the offence as being really within the matter said, in cases such as *Sweet v Parsley* (at 163), to be one involving "potential danger to public health, safety or morals, in which citizens have a choice whether they participate or not". The fact that the intoxication in the present case was self-induced is not relevant: *R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64; (1980) 29 ALR 449; (1980) 4 A Crim R 348; (1980) 54 ALJR 349. In that case (at 80) Barwick CJ said:

> "In *Ryan's case* ([1967] HCA 2; (1967) 121 CLR 205; [1967] ALR 577; (1967) 40 ALJR 488) I attempted a summary statement of the principle that in all crime, including statutory offences, the act charged must have been done voluntarily, ie accompanied by the will to do it. I find no need to qualify what I then wrote. I stated the principle as without qualification."

See also Brennan J in *He Kaw Teh's case* (at 569-571) and *R v Martin* (at 218; 89). Gillies, *Criminal Law* (at 36), says that "the only mental element in an offence of strict liability is that associated with the voluntary performance of the conduct comprising its *actus reus*". It follows that, because in s5 the expression "shall not conduct himself or herself", involves at least proof that the actions complained of were voluntary, the appellant was entitled to be acquitted upon this charge as she was on the charge of common assault. Thus her appeal must succeed. I answer the question asked in the stated case in the affirmative. Pursuant to the *Justices Act* 1902, s106, I quash the conviction and dismiss the charge of offensive conduct. I order the respondent to pay the costs of the appellant. Question answered in affirmative. Conviction quashed.