27/96

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v CONWAY

Phillips CJ, Southwell and Smith AJJA

2, 30 May 1996

CRIMINAL LAW – ADMINISTERING SUBSTANCE WITHOUT LAWFUL EXCUSE – MEANING OF "WITHOUT LAWFUL EXCUSE" – WHETHER JUSTIFICATIONS PROFFERED AMOUNTED TO LAWFUL EXCUSE: *CRIMES ACT* 1958, S19(1).

C., without the complainant's knowledge, put some Temazepan capsules in cups of coffee in order to give the complainant "a good night's sleep" and "help her sleep during the day". C. was later charged, *inter alia*, with two counts of administering a substance capable of interfering substantially with bodily function *without lawful excuse*. C. was found guilty of these charges. Upon appeal—

HELD: Appeal in respect of the two counts dismissed.
1. The question whether an excuse proffered is capable of constituting a lawful excuse is a question of law. The expression "lawful excuse" means an excuse which the law recognizes as a valid excuse.
***Signorotto v Nicholson* [1982] VicRp 40; [1982] VR 413; (1981) 46 LGRA 141, followed.**

2. In the present case, neither of C.'s justifications proffered constituted evidence of a lawful excuse. C. was in no position of a carer nor was he the complainant's *de facto* husband where he might be able to claim a belief that if the complainant had known of his intention she would have consented to the administration of the drug.

PHILLIPS CJ [Southwell and Smith AJJA agreeing]: *[After setting out the facts, the nature of the charges, the grounds of appeal and part of the directions to the jury, His Honour continued]*...**[9]** The second submission for the Crown, renders it necessary to consider the terms of s19(1) of the *Crimes Act*, pursuant to which the applicant was charged in counts 1 and 3, which are as follows:

> (1) A person who—
> (a) without lawful excuse, administers to or causes to be taken by another person any substance which is capable, and which the first-mentioned person knows is capable, in the circumstances, of interfering substantially with the bodily functions of the other person; and
>
> (b) knows that the other person has not consented to the administration or taking of the substance or is reckless as to whether or not the other person has so consented—
> is guilty of an indictable offence.

(By ss(2) "interference" exists "if the substance is capable of inducing unconsciousness or sleep".) It was submitted that the applicant, at trial, **[10]** advanced no defence in law with respect to counts 1 and 3 and accordingly, the jury, properly directed, must inevitably have convicted the applicant. This was so, the argument went, because the whole of the evidence as to those counts proved that the applicant had acted "without lawful excuse" and his proffered explanations for his conduct did not even put in issue this element in the offences. Aspects of His Honour's directions to the jury (p84) which appeared to leave that issue to them because the applicant's account did not involve "any malign motive" were, it was said, overly favourable to the applicant. Indeed, it was pointed out that an exchange had occurred between the judge and counsel for the applicant wherein His Honour having asked was he correct in thinking that "the defence that you put forward in relation to count 1 and count 3 is whether or not the tablets put her to sleep", counsel had responded "certainly in relation to count 1, Your Honour, I don't think there was too much of a defence advanced in relation to count 3". Later, counsel added that the judge, as to that count, "might have seen me almost concede it". The relevant explanations of the applicant were:

> <u>As to Count 1</u>
> The administration occurred because "I just wanted her to have a good night's sleep" (a.905, a.970).

As to Count 3
The administration occurred "because she was still stressed **[11]** out", (a.955, a.1032)..."just to make - help her sleep during the day",..."...it wasn't a full day anyway" (a.996). The applicant had agreed both administrations occurred without the victim's knowledge.

I should first observe that the question whether his explanation or "excuse" proffered is capable of constituting a lawful excuse is a question of law – *Jenal v Milner* (1994) 11 WAR 264 at p274. In this Court, it was said for the applicant, firstly, that the Crown must negative the presence of "lawful excuse", and secondly, that the applicant had shown a good defence, in that the applicant "administered" the drug for a beneficial purpose, namely "a good night's sleep". Counsel submitted that support for this proposition is to be found in *R v Hill* (1986) 83 Cr App R 386. In that case, the House of Lords considered a direction to the jury following the conviction of a man who by misrepresentation had induced two boys to take a drug; the charge was brought under s24 of the *Offences against the Person Act* 1861, which made it an offence to "unlawfully and maliciously...cause...to be taken by any other person (a drug)...with intent to injure...". However, in that case, it was conceded at trial that the applicant had unlawfully administered a drug - the issue was whether there was proof of an intent to injure.

[12] Support for the applicant is said to be found in the speech of Lord Griffiths (with whom the other members of the House agreed) where it is said (at p390): "If the noxious thing is administered for a purely benevolent purpose such as keeping a pilot of an aircraft awake....", then it would not constitute an intent to injure. That is a quite different circumstance to the claimed desire of the applicant to give the victim "a good night's sleep". In my opinion, that case provides no support for the principal proposition of counsel for the applicant.

I would uphold the Crown's submission upon this aspect. In *Signorotto v Nicholson* [1982] VicRp 40; [1982] VR 413; (1981) 46 LGRA 141, it fell to Fullagar J to construe aspects of s16 of the *Evidence Act* 1958. That section provided that a person who "without lawful excuse" refused or failed to answer any question touching the subject matter of an enquiry by a Board of Enquiry committed an offence. It was held that the expression "lawful excuse" in the section meant a valid excuse supported by law. His Honour said this:

> "In my view, the expression "lawful excuse" in s16(b) of the *Evidence Act* 1958 is used in the sense of excuse "supported by the law", and a person is permitted to refuse to answer (and is thus not compellable to answer) where he produces an excuse which the law recognizes as a valid excuse." (p417)

With that construction, I respectfully agree. Some support for this view may be gleaned from *R v Wuyts* (1969) 2 QB 474, a decision of the Court of **[13]** Appeal. In that case a taxi driver had been convicted of an offence under the *Forgery Act* 1913 of having in his possession "without lawful authority or excuse" two forged bank notes, knowing them to be forged (the *Forgery Act* placed proof of lawful authority or excuse upon the accused person and many of the decided cases relate to similar statutory provisions). The taxi driver had been given the forged notes by a passenger late at night. He discovered that they were forgeries but went to a friend's flat to sleep after finishing work leaving the notes in a book in the car upon returning it to his employers. He did not have any further access to them and they were handed to the police by a company which had hired the car to him. In the course of his evidence at his trial the driver said that it was his intention to surrender the notes to the police. He did not do this although he admitted, in answer to the judge, that he had had an opportunity to do so before giving up the car. His explanation for not doing so was that he did not have the time.

The trial judge directed the jury that there was no evidence on which they could find that the accused had proved a lawful authority or excuse for the possession of the forged notes according to the appropriate standard. The Court of Appeal held that this constituted a misdirection. Widgery, LJ., giving the judgment of the court said this: (at 479)

> "The court does not propose to attempt anything in the nature of the definition of the phrase 'lawful authority **[14]** or excuse'; but the court recognises that the passing of forged banknotes was made a felony by the Act of 1913, and that it is at common law the duty of any citizen to assist the police in the prosecution of a felony. Accordingly, it seems to us that if an accused person in the position of this defendant is able to prove on a balance of probabilities that, although in possession of notes

> which he knew to be forged, he had retained possession of them solely in order to place them before the police authorities so that the previous possessors of the notes might be prosecuted, in our judgment, if that is shown on a balance of probabilities, that amounts to a lawful excuse...*the reason why the excuse to which I have referred is, in our judgment, a lawful excuse, is because it is an excuse which is wholly consistent with the common law: it is wholly consistent with the duty of the citizen to assist in the capture and prosecution of a felon. The excuse is 'lawful' in the strict literal sense of that word."* (Emphasis mine.)

In my opinion, neither of the justifications proffered at the trial by the applicant for his conduct relevant to counts 1 and 3 constituted evidence of a "lawful excuse". It is not in this case necessary to consider the circumstances in which a doctor, nurse, or other carer might show "lawful excuse" for administering a drug without the subject's knowledge or consent. Nor is it necessary to decide whether and in what circumstances a lay person, whether or not spouse or relative, may lawfully so administer a drug.

It is sufficient to say that in the present case, the applicant was in no position of carer; he was not the de facto husband of the victim or otherwise in a position where he might be able to claim a belief that if she had known of his intention, she would have consented to the administration of the drug. Nor, of course, did he rely upon the defence of necessity. In these circumstances it may confidently be stated that **[15]** Parliament could not have had in mind that reasons such as were put forward by the applicant could constitute "lawful excuse". At any rate, when, as in this case, the victim is a sane adult, s19 is designed at least in part, to give that person the right to decide whether he or she will ingest a noxious drug.

Accordingly, I would hold that he did not offer any defence in law to those counts and that his convictions thereon ought to stand despite the likelihood of the jury applying inadequate directions to their consideration of those counts. *[His Honour then dealt with the application for leave to appeal against sentence].*

APPEARANCES: For the Crown: Mr WH Morgan-Payler, counsel. Solicitor: Mr PC Wood, Solicitor for Public Prosecutions. For the Applicant: Mr OP Holdenson, counsel. Solicitors: Efrons.
