56/80

HIGH COURT OF AUSTRALIA

R v O'CONNOR

Barwick CJ, Gibbs, Stephen, Mason, Murphy, Aickin and Wilson JJ

21 June 1979; 20 June 1980

[1980] HCA 17 (1980) 146 CLR 64; 54 ALJR 349; 29 ALR 449; 4 A Crim R 348; noted 54 ALJ 569, 614; 6 QL 153; 4 Crim LJ 264; 5 Crim LJ 270; [1980] NZLJ 532; 100 LQR 639

CRIMINAL LAW – *MENS REA* – INTOXICATION – RELEVANCE TO INTENT AND WILL OF ACCUSED – BASIC INTENT – SPECIFIC INTENT – PURPOSIVE INTENT.

O'Connor was confronted by the owner of property with which he was interfering. The owner was a policeman and identified himself as such. Upon arrest, O'Connor stabbed the policeman with a knife which he had taken from the property. O'Connor was charged with stealing and wounding with intent to resist arrest. At his trial, he testified that he had been taking a particular drug and also drinking alcohol during a large part of the day of the occurrence. He had no recollection of what had occurred immediately before or during his arrest. Expert evidence was given that the drug concerned was hallucinatory and in association with alcohol could have rendered O'Connor incapable of reasoning and of forming an intent to steal or to wound.

On the basis of the decision of the House of Lords in *DPP v Majewski* [1976] UKHL 2; [1977] AC 443; [1976] 2 All ER 142; (1976) 62 Cr App R 262; [1976] 2 WLR 623, the trial judge directed the jury that they could take into account evidence of O'Connor's intoxicated condition when considering the original charges but not when considering the alternative charge of unlawful wounding. That count, the judge instructed, did not require proof of "an intention to cause a particular result ... that is what the law says is a specific intent".

The jury acquitted O'Connor of the original charges but convicted on the alternative charge. On appeal by O'Connor, the Court of Criminal Appeal of Victoria ([1980] VicRp 60; [1980] VR 635; MC 03/80), basing itself largely on statements by Barwick CJ in *Ryan v R* [1967] HCA 2; (1967) 121 CLR 205; [1967] ALR 577; (1967) 40 ALJR 488, and declining to follow the decision in *Majewski's case*, allowed the appeal and entered a verdict of acquittal on the alternative count. The Crown applied to the High Court of Australia for special leave to appeal.

HELD: per Barwick CJ, Gibbs, Stephen, Mason, Aickin and Wilson JJ: Special leave to appeal granted.
Per Barwick CJ, Stephen, Murphy and Aickin JJ: Appeal dismissed.
(i) Per Barwick CJ, Murphy and Aickin JJ (Gibbs, Mason and Wilson JJ dissenting): An intent to do the physical act involved in a crime is indispensable to criminal responsibility. Acts the subject of a criminal charge must be voluntary, that is to say, must be acts done pursuant to an exercise of the will of the accused.

Per Stephen J (Gibbs and Wilson JJ dissenting): There is no sufficient reason for distinguishing between self-induced and other acts of intoxication.

***Ryan v R* [1967] HCA 2; (1967) 121 CLR 205; [1967] ALR 577; (1967) 40 ALJR 488 per Barwick CJ at 214-7, followed.**

***A-G for Northern Ireland v Gallagher* (1963) AC 349; (1961) 3 All ER 299;**

***R v Mary Egan* [1898] VicLawRp 29; (1897) 23 VLR 159;**

***Viro v R* [1978] HCA 9; (1978) 141 CLR 88; (1978) 18 ALR 257; 52 ALJR 418, distinguished.**

***DPP v Majewski* [1976] UKHL 2; (1977) AC 443; (1976) 2 All ER 142; (1976) 62 Cr App R 262; [1976] 2 WLR 623, not followed.**

Per Murphy J: It is not acceptable that *mens rea* should be imputed to a person who is charged with a crime, an element of which is *mens rea*, although it is not provided that he had *mens rea* (indeed, it may be proved or accepted that he did not), provided it is proved that he was intoxicated and that *mens rea* should have been inferred if he were sober. That is the same as saying if *mens rea* is not established but intoxication is, *mens rea* is not regarded as an element of the offence. This would make it an essentially different offence.

(ii) Per Barwick CJ, Stephen and Aickin JJ (Gibbs and Wilson JJ dissenting): The distinction between basic intent and specific intent is inappropriate and misleading.

(a) Per Barwick CJ: The purpose with which a proscribed act must be done in order to be relevantly

criminal is part of the description of the *actus reus*.

***DPP v Beard* [1920] All ER 21; (1920) 14 Cr App R 159; 89 LJKB 437; (1920) AC 479 per Lord Birkenhead at 504, explained and approved (but doubted by Aickin J).**

***R v Kamipeli* (1975) 2 NZLR 610 at 613-4, approved.**

***DPP v Morgan* [1975] UKHL 3, [1976] AC 182; (1976) LC 182 per Lord Simon at 216; [1975] 2 All ER 347; (1975) 61 Cr App R 136;**

***Woolmington v DPP* [1935] UKHL 1; [1935] AC 462; [1935] All ER 1; 25 Cr App R 72; 153 LT 232, referred to.**

Per Barwick CJ: If the evidence of intoxication is sufficient to raise a doubt as to voluntariness or as to the presence of requisite intent, there is no logical ground for determining its admissibility upon a distinction between a crime which specifies only the immediate result of the proscribed act and a crime which in addition requires a further result dependent on purpose.

Per Stephen J: The distinction lacks wholly rational operation and is neither clearly defined nor easily recognizable. The distinction does not clearly reflect or give effect to any coherent attitude either as to the relative wrongfulness of particular conduct or the degree of social mischief which that conduct is thought to involve; it seems an inappropriate response to natural concern lest intoxication be used as a device to escape punishment for crime.

Statement of Dixon J in *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279 at 309; [1938] ALR 37, approved.

***DPP v Morgan* [1975] UKHL 3; [1976] AC 182 per Lord Hailsham at 213; [1975] 2 All ER 347; (1975) 61 Cr App R 136,**

***R v Kamipeli* (1975) 2 NZLR 610 at 614, referred to.**

***DPP v Majewski* [1976] UKHL 2; [1977] AC 443; [1976] 2 All ER 142; (1976) 62 Cr App R 262; [1976] 2 WLR 623, disapproved.**

(iii) Per Barwick CJ and Aickin J: Intent should exist at the time of the doing of the act and, where recklessness stands in the place of actual intent, it too must be contemporaneous with the act itself.

***R v Kamipeli* (1975) 2 NZLR 610, approved.**

***DPP v Majewski supra*, (1977) AC 443; (1976) 2 All ER 142 per Lord Elsyn-Jones LC at 474-5, disapproved.**

Majority decision in *Leary v R* (1977) 74 DLR (3d) 103; 33 Can CC (2d) 473, disapproved; per Dickson J, Can CC at 491-4, approved.

***A-G for Northern Ireland v Gallagher* (1963) AC 349; (1961) 3 All ER 299, distinguished.**

***Parker v R* [1963] HCA 14; (1963) 111 CLR 610; [1963] ALR 524; (1963) 37 ALJR 3, referred to.**

(iv) Per Barwick CJ:
(a) Evidence of the state of the body and mind of an accused tendered to assist in raising a doubt as to the voluntary character of the physical act involved in the crime charged is admissible on the trial of an accused for any offence, whether an offence at common law or by statute.

(b) Such evidence tendered to raise a doubt as to the actual intention with which the physical act involved in the crime charged, if done, was done is admissible on the trial of an accused for any offence, whether at common law or by statute, with the exception of such statutory offences as do not require the existence of an actual intent, the so-called absolute offences.

***DPP v Majewski* [1976] UKHL 2; [1977] AC 443; [1976] 2 All ER 142; (1976) 62 Cr App R 262; [1976] 2 WLR 623, disapproved.**

(v) Per Barwick CJ: In those cases, the jury needs careful and special instruction. If the evidence, if accepted, is not such as to be capable of raising a doubt as to either of the basic elements, voluntariness or actual intent, there being no other material to suggest a lack of voluntariness or actual intent, that evidence can be withdrawn from the jury's consideration. It will have had no more than a tendency to establish that, though the accused acted voluntarily and with the requisite intent, he was influenced in what he did by a state of insobriety. They should be told that if the evidence does not raise in their minds a doubt as to voluntariness or actual intent they may put that evidence out of their minds in considering the accused's guilt or innocence. But if the evidence is capable of raising a doubt either as to voluntariness or the existence of an actual intent, the jury should be told that if that evidence raises in their minds a reasonable doubt as to voluntariness or actual intent it is for the Crown to remove that doubt from their minds and to satisfy them beyond reasonable doubt that the accused voluntarily did the act with which he is charged and that he did so with the actual intent appropriate to the crime charged. They should be instructed as to the meaning and scope of voluntariness and as to the precise intent which the crime charged requires. It would be proper in these cases to tell a jury that the fact that a man does not later remember what he did does not necessarily indicate that his will did not go with what he did do or that he did not have the necessary intent.

Observations by Barwick CJ as to the weight which can be given to evidence of amnesia and as to the lack of universality in the concept of self-induced intoxication.

Observations by Gibbs, Stephen and Mason JJ on the public policy aspects of the decision in *DPP v Majewski* [1976] UKHL 2; [1977] AC 443; [1976] 2 All ER 142; (1976) 62 Cr App R 262; [1976] 2 WLR 623.
