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SUPREME COURT OF VICTORIA — FULL COURT

R v ROACH and HEATH

Crockett, King and Tadgell JJ

16, 19-20 October 1987 — [1988] VicRp 66; [1988] VR 665; (1987) 31 A Crim R 302

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – "WITHOUT LAWFUL EXCUSE" – WHETHER ONUS OF PROOF REVERSED – WHETHER ANY NEXUS BETWEEN SS18 AND 410 OF *CRIMES ACT* 1958 – EXTENT OF APPLICATION OF S410 – EVIDENCE – RAPE – NEED FOR DISTINCTION TO BE MADE BETWEEN EVIDENCE OF DISTRESS AND OF COMPLAINT.

Section 18 of the *Crimes Act* 1958 ('Act') provides:

"A person who, without lawful excuse, intentionally ... causes injury ... is guilty of an indictable offence."

Section 410 of the Act provides:

"Wherever by this Act doing any act matter or thing or having a specified article or thing in possession without lawful authority or excuse is made, or expressed to be an offence, the proof of such authority shall lie on the accused."

R. pleaded not guilty to several charges one of which alleged an offence against s18 of the Act. The trial judge directed the jury that in view of the provisions of s410 and s18 of the Act, the onus of proof in relation to the defence of consent was reversed. R. was convicted. By notice of application for leave to appeal—

HELD: Application granted. Appeal allowed. New trial ordered.
1. The burden of negativing such defences as consent and self-defence has traditionally rested on the prosecution and legislation specific in its terms will be required before the burden of proof with regard to such defences is reversed.

2. In view of its legislative history, s410 of the Act relates only to certain currency, coinage and related offences, and not to offences against the person. Unless the whole phrase "without lawful authority or excuse" (as used in s410) appears in a section of the Act, the provisions of s410 do not apply so as to reverse the onus of proof.

3. Per Tadgell J, *obiter*: Furthermore, no reversal of onus has been effected in other sections of the Act dealing with offences against the person namely, ss16, 17, 19 to 23 and 31, and offences involving criminal damage to property, namely, ss197-199.

4. Per the Court: A distinction must be drawn in rape cases between evidence of distress and evidence of recent complaint. Evidence of distress after the event is capable of corroborating a prosecutrix's assertion of lack of consent, but except in special circumstances, is of little weight. On the other hand, evidence of recent complaint cannot be corroborative of the prosecutrix's evidence, but can serve to buttress the prosecutrix's credit as a witness by demonstrating consistency.
***R v Flannery* [1969] VicRp 72; (1969) VR 586; and**
***R v Freeman* [1980] VicRp 1; (1980) VR 1, applied.**

KING J: *[After setting out the nature of the charges, and the verdicts, His Honour continued]*: ... **[2]** One of the defences raised by the accused at the trial was that the prosecutrix had consented to all that was done to her by the applicants on 16th November 1986, the date when it was alleged that all the charged offences took place. In his charge to the jury, the learned trial Judge pointed out that usually in the criminal law the prosecution has to prove every element of a crime charged beyond reasonable doubt, and that this would normally mean that in such a case as this the prosecution would have to prove lack of consent on the part of the prosecutrix beyond reasonable doubt. He went on to say that the offence charged in Count 1 was exceptional in that it involved a crime where Parliament has seen fit to interfere with the ordinary rules by placing on an accused person the burden of proof on the balance of probabilities that the prosecutrix consented to the causing of injury to her by the accused.

[3] It was explained to us that his Honour had in mind s410 of the *Crimes Act* 1958, which provides as follows:

> "Wherever by this Act doing any act matter or thing or having a specified article of thing in possession without lawful authority or excuse is made, or expressed to be an offence, the proof of such authority or excuse shall lie on the accused."

It seems clear that his Honour has regarded consent by the prosecutrix as embraced by the words "lawful excuse" within the meaning both of s18 and s410 and, as a result, has taken the view that the applicant Roach was required to establish on the balance of probabilities that consent was given. Mr Barnett has submitted that this was a misapprehension on the part of his Honour and that in the present case, in respect of Count 1, the prosecution retained the burden of proving beyond reasonable doubt lack of consent on the part of the prosecutrix.

Section 410 was introduced into the *Crimes Act* 1915 as s441, a new section, in precisely its present form. In the *Crimes Act* 1890 there were to be found a number of provisions dealing with coinage, currency and related offences, which began with the words "whosoever without lawful authority or excuse" and then the words "(proof whereof shall lie on the party accused)". An example was s238, which provided as follows:

> "Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall purchase or receive from any other person, or have in his custody or possession, any forged bank note bank bill of exchange or bank post bill or blank bank note or blank bank bill of exchange or blank bank post bill knowing the same to be forged, shall be guilty of felony".

[4] Other such sections were ss239, 241, 242, 243, and 244. In the *Crimes Act* 1915 is to be found a number of corresponding, although substantially re-drafted, substituted sections in which the words in brackets to which I have referred are deleted.

It seems that until the passing of Act No. 10233 of 1985, such words as "without lawful authority or excuse" were not to be found in any part of the successive *Crimes Acts* in any category or provisions other than those to which I have referred, and that the draftsman of the 1915 Act, as part of the re-drafting which he undertook, took the opportunity to make it unnecessary to repeat the words in brackets in every section in which it was intended to throw the burden of proving lawful authority or excuse on accused persons. The form of words relating to acts causing bodily harm in the successive *Crimes Acts* has been phrased so as not to exclude an accused person's right to raise the various common law defences such as consent and self-defence, although such defences have not been expressly referred to, and to require the prosecution to negative them beyond reasonable doubt. Mr Barnett maintains that this is the case with s18 and that the words "without lawful excuse" in that section should not be construed as related to the words "without lawful authority or excuse" in s410.

I think that Parliament intended in 1915 that the then equivalent of s410 would relate only to certain currency, coinage and related offences This would not prevent the legislature in 1985 adding to the categories of offences in respect of which the burden of proof is to be reversed. However, accused persons should not be deprived of their common law rights unless Parliament clearly intends **[5]** this result: *R v Bishop of Salisbury* (1901) 1 QB 573 at p577, per Wills J, cited by Fullagar J in *Signorotto v Nicholson* [1982] VicRp 40; (1982) VR 413 at p417; (1981) 46 LGRA 141.

I think that Parliament has, in s410, nominated the words "without lawful authority or excuse" as those which must appear in a section of the *Crimes Act* before the burden of proof is reversed. I think that in the absence of the whole of this group of words in a section of the Act, s410 does not apply to it so as to reverse the burden of proof on an accused person. Section 18 does not include the whole of this group of words, so that his Honour was mistaken in telling the jury that it was for the applicant Roach to prove that the prosecutrix consented to the conduct attributed to him in Count 1, if the jury found that he had engaged in this conduct.

The effect of this finding is that in my opinion the applicant Roach's conviction on Count 1 should be quashed. Mr Walmsley, who appeared before this Court for the Director of Public Prosecutions, did not dispute this outcome, although he was non-committal as to the reasoning

by which it is to be reached. Another argument put to this Court by Mr Barnett was that the learned trial Judge's directions to the jury in respect of the evidence of the prosecutrix's boyfriend, Andrew Jonathon Asprey, were so confusing as to render all the convictions of both accused men unsafe and unsatisfactory.

The offences charged were said to have taken place around about 8 pm. on 16th November 1986. At about 9pm the prosecutrix contacted the Rape Crisis Centre at R Victoria Hospital by telephone and was not long afterwards **[6]** rung by a social worker, to whom she spoke. At about 11.30pm her girlfriend arrived home and persuaded her to visit the Rape Crisis Centre where the same social worker saw her at about 12pm. She was medically examined and then taken to the police complex at St. Kilda where she rang Mr Asprey. Both the girlfriend and social worker gave evidence of her distress and of complaints made by her which were said on behalf of the prosecution to be consistent with her not having consented to the acts charged. Evidence was also led from the examining doctor of her statements to him, and his Honour referred in his charge to its relevance as showing recent complaint. Counsel for the prosecution elicited from Mr Asprey that the prosecutrix, in her phone conversation to him, was "very distraught", but when he sought to elicit evidence of their conversation for the express purpose of showing that she was complaining of the alleged sexual assault upon her, his Honour stopped him, on objection by Counsel for the accused, on the basis that too long a time had elapsed since occurrence of the events concerned.

Evidence of distress after the event is capable of corroborating a prosecutrix's assertion of lack of consent, but except in special circumstances is of little weight: *R v Flannery* [1969] VicRp 72; [1969] VR 586; *R v Freeman* [1980] VicRp 1; [1980] VR 1. On the other hand, evidence of recent complaint cannot be corroborative of the prosecutrix's evidence as the complaint emanates from the prosecutrix herself. The object of leading it is to buttress the prosecutrix's credit as a witness by demonstrating consistency: *R v Freeman* (*supra*).

[7] In view of the witnesses who testified in respect both of distress and recent complaint, it was necessary for his Honour in his charge to make clear the distinction between them and their distinct significances. However, when referring to the evidence of Mr Asprey, whose evidence, as I have said, related only to distress, his Honour made the following remarks (at p569 of the transcript):

> "The evidence that the complainant, Miss Zumpe, appeared distressed when she telephoned her boyfriend – you heard she said she rang her boyfriend – that might not be given any weight by you because there is a lapse of time after making the event. She sobbed and I think he said she did not seem herself and he made some comments that indicated quite apart from what she said she said that she was distressed in some way. The lapse of time after that event, the fact of a person making such a complaint at that time, that person you might expect to display distress is part of making the complaint and that might deprive the evidence of distress of any probative value separate from the consistency said to be demonstrated about the complaint itself. In other words, given the circumstances of ringing the boyfriend, you would expect her to demonstrate distress whether it was genuine or otherwise."

As consent was a defence to all the charges and the burden was on the prosecution to negative it beyond reasonable doubt, any substantial possibility of confusion in the minds of the jury as to the effects of evidence of recent complaint and of distress must be seriously considered. It is relevant to this point that in respect of many of the offences charged the jury were not satisfied beyond reasonable doubt that the charges were made out. In view of the admissions made by the accused in their evidence as to what they did on 16th November 1986, the jury must, in respect of at least some of those charges, have given effect **[8]** to doubts in their minds on the issue of consent. The existence of this doubt makes it all the more important that the jury should have been clear as to the bearing of the evidence on the matter of consent. My conclusion is that there is a real possibility that they were led into confusion on this subject and that on this ground the verdicts on all the counts on which the applicants were found guilty, that is, the grounds remaining after the quashing of the verdict on Count 1, are unsafe and unsatisfactory and should be quashed.

Mr Barnett put other arguments, but it is unnecessary to pursue them. It is important that Mr Walmsley has conceded, without being specific, that there is much to be said for the contention that all verdicts of guilty against the applicants are unsafe and unsatisfactory.

CROCKETT J: Tadgell J will deliver the next judgment.

TADGELL J: I agree with the conclusion that has been proposed by King J. I should like, however, to add some remarks of my own about the first count on the presentment charged against the applicant Roach and the approach of the learned trial Judge to his instruction to the jury upon it.

Count 1 was laid under s18 of the *Crimes Act* 1958, which provides that a person who, without lawful excuse, intentionally or recklessly causes injury to another person is guilty of an indictable offence. Roach was charged with having behaved intentionally. His Honour instructed the jury that, once the Crown had proved that Roach had intentionally injured the victim, he, Roach, bore the burden of proving on the balance of probabilities that he had a lawful excuse for doing what he did. His Honour evidently gave that **[9]** instruction in the light of s410 of the *Crimes Act*, the terms of which have been already set out by King J. His Honour saw that some of the words in s410, namely "without lawful excuse" are reproduced in s18 of the Act, and concluded that the latter was therefore qualified by the former. In so concluding, I think His Honour fell into error. One can sympathise with him, however, because he no doubt noted that s18 is one of a number of newly-inserted provisions evidently designed to simplify the statute law relating to indictable offences against the person. He no doubt reasoned that he was entitled and obliged to interpret it as it stood, clothed in its plain, clear English words, to which s410 on its face had direct application.

Official publicity has recently been demanded for the notion that law-makers and practising lawyers should now strive to speak in so-called "Plain English". The ideal of unmistakably clear verbal expression is admirable but surely not new. To vaunt it as though previous generations had overlooked and neglected it is to risk the mistake of substituting conceit for zeal. It is another mistake to suppose that clarity of expression can be an end in itself. Plain English alone achieves nothing. To be useful it must run in tandem with clear thought. After all, English speech – in the law at least – is a vehicle for the conveyance of ideas. A feeble or wandering idea will not become strong and precise merely because it is dressed in plain, homely language: it will remain simply a poor idea, and perhaps more obviously and emphatically so because it is plainly expressed.

A bright idea, on the other hand, is **[10]** likely to find its own expression and thereby to make itself understood. Statutes, if I may say so, do not commonly contain many naturally bright ideas that speak for themselves, especially those parts of them that seek to create indictable offences. They need to work hard in order to make themselves clearly understood, if only because there are persons whose interests are served by trying to misunderstand them.

The attempted simplification of long-standing, long-understood legislation and ideas contained in it carries its own special difficulties. Thought, ideas and language all feed on their context. The use of "Plain English" to amend an existing statute of ancient lineage cannot absolve the draftsman from a careful study of context, both philological and historical. Of course, the older the subject statute, the more ample is the relevant context that needs consideration. This case illustrates that point very well. *[His Honour then discussed the legislative history of s410 of the Act and continued]* ... **[13]** The relevant law thus began in the same terms in England and Victoria until, as King J has mentioned, the passing of the *Crimes Act* 1915 which enacted as s441 the earliest forebear of s410 of the *Crimes Act* 1958.

Section 441 of the 1915 Act was evidently designed as a drafting device. It was apt to pick up the express terms reversing the onus that were repeated in all the individual sections prescribing the relevant forgery offences and coinage offences in which proof of lawful authority or excuse was cast upon the person accused. King J has referred to the terms in which onus was thus reversed. Section 441 was not, in my view, necessarily apt to cover those offences that did not in terms prescribe as an ingredient that the accused acted "without lawful authority or excuse".

In particular, having regard to the history of the legislation, which I have attempted briefly to sketch, I should be unwilling to conclude, in the absence of necessity, that s441 was ever intended to apply to any offence which prescribes as an ingredient simply that the accused acted "without lawful excuse". I take that view because the legislature should not be presumed, without saying so in express terms, to cut what has been described as the golden thread which runs throughout

the web of the English criminal law. I refer, of course, to the onus which ordinarily in a criminal case rests upon the Crown.

For these reasons, I cannot conclude, as the **[14]** learned trial Judge evidently did – and, I Regret to observe, without much argument either by the Crown or by those appearing on behalf of the accused – that s18 effected any such reversal of onus. The same, of course, applies in the case of ss16 and 17 and 19 to 23 and s31. In my opinion, it also applies in the case of ss197 to 199.

CROCKETT J: I agree that the verdict and conviction on count 1 on the presentment against the applicant Roach should be quashed, and I so agree for the reasons which have been given by the other members of the Court. The Judge's determination that the onus on the Crown of proving the applicant Roach's guilt on count 1 was reversed with respect to a defence of lawful excuse was, if I may say so, plainly wrong. Whatever the area of application of the provisions of s410 of the *Crimes Act* 1958 might be, its amplitude is certainly not such as to reverse the onus of proof in relation to such defences as consent and self-defence, the burden of negativing which has traditionally rested on the prosecution. Legislation more specific in its terms that that in which the provisions of the Act are expressed would be required before the burden of proof with regard to long-standing common law defences could be held to have been reversed.

I agree also for the reasons given by King J that the Judge's attempts at classifying various pieces of evidence as evidence of a complaint, or on the other hand evidence of distress, then ruling upon the admissibility of that evidence, were unsatisfactory. Inevitably this led to confusion in what the Judge told the jury about these matters in the course of his charge.

[His Honour then granted the applications for leave to appeal.]
