

07/90

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v NURI

Young CJ, Crockett and Nathan JJ

13 November, 1 December 1989

[1990] VicRp 55; [1990] VR 641; (1989) 49 A Crim R 253; Noted 14 Crim LJ 365

CRIMINAL LAW – CONDUCT ENDANGERING LIFE – RECKLESSNESS – ELEMENTS CONSTITUTING THE CHARGE – OBJECTIVE/SUBJECTIVE INTENTS: *CRIMES ACT 1958*, S22.Section 22 of the *Crimes Act 1958* provides:

"A person who, without lawful excuse recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence."

HELD: The offence of life endangerment involves a subjective and an objective intent. The subjective intent component requires proof that the accused intended to do what was in fact done (the recklessness being the disregard of the foreseen probable consequences of that conduct). The objective intent component requires proof that a reasonable person in the accused's position doing what the accused did would have realised that another person's life was endangered.

THE COURT: [After setting out the nature of the charges, the facts, the sentences imposed and the grounds of appeal, the Court continued] ... [4] [The] offence was created by the *Crimes (Amendment) Act 1985*. It has no predecessor. It is expressed in these terms:

"A person who, without lawful excuse recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence."

Its enactment was designed to create a general endangerment offence to replace a large number of offences that previously were to be found in the *Crimes Act*. Sections repealed were ss17, 21, 22, 29, 32, 197(2) and 197(5). The problem is that, in an endeavour to subsume all life-endangering behaviour in one offence, the very generality of that offence has given rise to difficulties of construction and interpretation. [5] For example, does the expression "may have placed" mean that the impugned conduct had the potential to endanger life; or does it mean that that conduct was such that it possibly did place another in danger of death? *Hansard's* record of the debate upon the second reading of the Bill suggests it was the former conduct against which the section was designed to strike. Then is the count duplicitous – notwithstanding the presentment rules?

The expression "recklessly" may not give rise to difficulty. It has for long been employed in statutory offences. Presumably conduct is relevantly reckless if there is foresight on the part of an accused of the probable consequences of his actions and he displays indifference as to whether or not those consequences occur. See *R v Crabbe* [1985] HCA 22; (1985) 156 CLR 464; 58 ALR 417; (1985) 59 ALJR 417; 16 A Crim R 19. This is the meaning which the Judge directed the jury they should give the expression. However, his Honour undertook no explanation of what in law was required to be established as the necessary guilty intent. (He thought that that would have to await consideration by the Full Court which has not before had occasion to examine the sections.) Counsel for the Director (who conceded that on any view the direction was inadequate) contended that there should be imported into the section an objective as well as a subjective intent. An analogy with manslaughter by an unlawful and dangerous act was drawn. See *R v Holzer* [1968] VicRp 61; (1968) VR 481.

In that case Smith J, in ruling which has since in this State been regarded as correct, determined that in a case of manslaughter constituted by death caused [6] by an unlawful and dangerous act the Crown was required to establish that the act was a breach of the criminal law.

However, it did not have to prove that the accused knew or believed that his act was dangerous. What must be shown is no more than that a reasonable man in the accused's position, performing the very act which the accused performed, would have realised that he was exposing another or others to an appreciable risk of really serious injury. The *mens rea* necessary to be established is satisfied by proof of an intention to commit the unlawful act.

Doubtless, it is tempting to transpose to the somewhat analogous offence of engaging in conduct which placed or may have placed the victim in danger of death the same combination of objective and subjective intents. The subjective intent constituting the *mens rea* was said to be satisfied if the accused had the intention to engage in the conduct (the recklessness being the disregard of the foreseen probable consequences of that conduct). The objective intent required to be established involved proof that a reasonable man in the accused's position engaging in the very conduct in which the accused engaged would have realised that he had placed or might have placed another in danger of death. We think that the submission to this effect has considerable merit. The analogy between the offence with respect to which Smith J was concerned and that which we have to consider is a striking one. An analysis of the components of the offence of endangerment suggests that it is the intent to engage in the relevant conduct which must be established subjectively.

The logical interpretation of [7] the elements of the offence does, it seems to us, point to an analysis of the conduct to determine its endangerment to life qualities being tested objectively. The adoption of directions to this effect on the question of intent is not only sensible but we think should avoid difficulties which we could envisage arising if the judge were required to instruct the jury on the basis that an objective test as to intent or realisation had no part to play in proof of commission of the offence. This conclusion which commends itself to us is, we think, consistent with modern developments in this area of the criminal law - see e.g. *Nydam v R* (1977) VR 430 at 439-40. As no such direction was given the conviction and sentence on the second count must be set aside...

APPEARANCES: For the applicant: Mr AN Bristow, counsel. G Zindilis, solicitor. For the respondent: Mr GJC Silbert, counsel. JM Buckley, Solicitor to the DPP.
