REG. v. BONNOR[1]

Criminal Law – Bigamy – Mistake of Fact – Onus of Proof

The appellant had been through the form of marriage with a woman in Victoria in the mistaken belief that a former marriage contracted in England had been dissolved. In fact his former marriage had not been dissolved, and he was convicted by a jury before Lowe J. of an offence against the Crimes Act 1928, s. 61, an appeal against conviction was dismissed by the full bench of the Supreme Court.

The main ground of the appeal was that the trial judge had misdirected the jury when he instructed them that the accused was guilty of bigamy unless they thought that on the balance of probabilities Bonnor himself believed on reasonable grounds that he was free to marry again. As it transpired, however, the Supreme Court was unanimous that the trial judge's direction as to the necessity for reasonable grounds for the accused's mistake was perfectly sound.

However, the court was divided on the further issue as to whether the onus lay on the Crown to satisfy the jury beyond reasonable doubt that the accused did not in fact hold such a belief, or that it was not based on reasonable grounds, or whether the onus lay on the defence to satisfy the jury that on the balance of probabilities he had indeed held such a belief based on reasonable grounds. The majority[2] upheld the latter contention, while the minority[3] placed the onus on the Crown.

The minority judgments were grounded on the view that 'in truth, the plea of not guilty is the plea of the general issue, and it casts upon the prosecution the duty to prove every fact and circumstance constituting the offence charged.'[4]

According to this view the only reason for the accused being required to give any explanation at all as to his mistake is because, as a matter of common sense, a conclusion adverse to him may be drawn if he does not produce evidence putting a different complexion on the evidence adduced by the Crown. Thus on this view, section 61 of the Crimes Act 1928 does not create an offence of absolute prohibition, but on the contrary implies the necessity for a guilty mind to be present to make out the offence, *i.e.* when the accused goes through the form of marriage with a person other than his spouse, he must know that at that time he is not legally entitled to do so by reason of the impediment of his existing marriage, or assumes without reasonable grounds that he is entitled so to do.

[1] [1957] Argus L.R. 187, Supreme Court of Victoria; Herring C.J. Gavan Duffy, O'Bryan, Barry and Sholl JJ.
[2] Herring C.J., Gavan Duffy and O'Bryan JJ.
[3] Barry and Sholl JJ.
[4] [1957] Argus L.R. 187, 214, *per* Barry J.

The minority judgments held further that once the Crown adduces evidence that the accused, being lawfully married, has gone through the form of marriage with another person, then a case for bigamy has been made out, and it rests upon the accused to raise the question as to whether at the time he believed on reasonable grounds that he was free to marry through the annulment of his former marriage, death of his former spouse, or some other fact which would legally allow him to marry again. However, on this view, once this question is raised there is no legal burden on the accused to establish his innocence on the balance of probabilities, and the onus of persuading the jury that on the whole of the evidence that the guilt of the accused has been established beyond reasonable doubt still rests on the Crown.

The majority of the court held that a *prima facie* case of guilt having been made out by the Crown, the onus rested upon the accused to satisfy the jury that he had in fact believed on reasonable grounds that he was legally entitled to marry again. The basis for this conclusion would seem to be that the statutory offence of bigamy implies no *mens rea,* and that therefore a mistake of fact operated purely as a defence, somewhat on the loose analogy of a plea of insanity, which must be proved up to the hilt by the accused.

At first sight the minority judgments would appear to be the more logical, having regard to the general requirement of the criminal law that both an *actus reus* and a *mens rea* are necessary to make out an offence, at least if one leaves aside the confused area relating to 'claims of right' in theft offences. If it is once conceded that there is a *mens rea* in bigamy, then it would seem to follow that the Crown must prove its case conclusively and must prove beyond reasonable doubt the presence of a guilty mind. In the case of provocation or accident as a defence to a murder charge it has been clearly stated that the burden of satisfying the jury still rests squarely on the prosecution.[5] The same applies to self-defence.[6] The particular field of the onus of proof in sexual offences is touched upon in *Prince's* case.[7]

It *is* possible to say that here the majority of the court held that the statutory offence did not entail strict liability, and that there was 'nothing in any of the judgments to encourage the inference that such words as "knowingly" or "wilfully" should be read into the Act,' and that 'the farthest any of the majority judges were prepared to go was that an honest mistaken belief based on reasonable grounds

[5] *R. v. Woolmington* [1935] A.C. 462; *R. v. Mancini* [1942] A.C. 1.
[6] *R. v. Mancini* [1942] A.C. 1. See also allied fields, *R. v. Steane* [1947] K.B. 1004, and *R. v. Meade* [1909] 1 K.B. 895, and Glanville Williams, *Criminal Law. The General Part* (1953), 700-706 and 719.
[7] (1875) L.R. 2 C.C.R. 154, 176.

on facts which if true would make the second marriage non-bigamous was a defence.'[8]

With respect, however, while this may rule out the possibility of negating any *mens rea* by proving the existence of an unreasonable mistake of a fact which if true would make the accused's conduct legal, this is not to say that a *reasonable* belief may not have the effect of of negating *mens rea* nor can *Tolson's* case[9] be read as saying that there is in fact no *mens rea* in bigamy. (Too much emphasis should not be placed on the use of the particular word 'defence' in that case.)

Be this as it may, the effect of *Reg. v. Bonnor* is, it is submitted, to make possible a four-fold classification of criminal offences having regard to the presences or absence and type of their mental elements, and of possible defences involving mistake of fact which will have the effect of negating that mental element, if any:

(1) Common law crimes having a definite element, where the effect of the mistake of fact if operative is to negate any *mens rea*, and where the burden of proof probably still lies on the Crown.

(2) Those crimes created by statutes using the words 'wilfully' or 'knowingly' where the onus of proof is definitely on the Crown,[10] and where perhaps an unreasonable mistake of fact *may* operate as a defence, although of course it would be harder to convince a jury of the genuineness of such a mistake.

(3) Statutory offences construed as importing strict liability, where a mental element is lacking but where a mistake of fact may sometimes operate as a defence which has to be proved by the accused.[11] Such offences are usually of a summary, minor, non-penal nature such as Health or Factory Acts.[12]

(4) Statutory crimes of a serious nature, such as bigamy, entailing a possible sentence of penal servitude and carrying a grave social stigma, which the courts will not construe as exactly importing strict liability but which have nevertheless no mental element in the normal sense, but still allow a mistake of fact to operate as special defence. In these cases the onus of proof lies on the accused to prove both the existence of the mistake and the reasonable nature of that mistake.

In practice, the distinction drawn in *Reg. v. Bonnor* will probably be of little importance except in a very rare case, for the safest course

[8] [1957] Argus L.R. 187, 191, *per* Gavan Duffy J.
[9] (1889) 23 Q.B.D. 168.
[10] J. Ll. J. Edwards, *Malice and Wilfulness in Statutory Offences.* Current Legal Problems (1951), vol. 4, 747.
[11] *Proudman v. Dayman* (1941) 67 C.L.R. 536, 540, *per* Dixon J.
[12] For a detailed study of the factors behind this type of legislation and its interpretation see *Moriessette v. United States*, 342, U.S. 246, 72 Sup. Ct. 240, 96 L. Ed. (1952).

for the defence will still be, where at all possible, to prove conclusively the existence of an operative mistake wherever applicable, whether in strict theory the onus be upon them or not. However, those students of jurisprudence who adhere to the theory of deterrence as the *raison d'être* of the criminal law will view with alarm this further encroachment on the necessity for a guilty mind to make out the complete offence in the field of serious crimes.

J. K. CONNOR

KAYE v. ATTORNEY-GENERAL OF TASMANIA[1]

Crown Servants—Right to Dismiss at Will—Abrogation by Statute—Police Constable

A Board of Enquiry on allegations made against members of the Tasmanian Police Force found that officers of police had been guilty on a particular occasion of using 'unjustifiable force' and that K. a senior constable, even if he had taken no actual part in extending violence, had been fully aware of what was happening. In order that K. should not evade discharge for lack of admissable evidence against him, he was dismissed by order of the Governor-in-Council, a form of dismissal from which there was no appeal available to policemen of less than officer rank. The only course then open to K. was to have this purported dismissal declared ineffective by the Tasmanian Supreme Court. On a special case, the material questions asked of the court were whether he had held office in the force at Her Majesty's pleasure, so as to be subject to dismissal at will by the executive government, and whether he was validly dismissed from the force. The Tasmanian Full Court[2] answered both these questions in the affirmative. The High Court unanimously dismissed an appeal from this decision.

Two judgments were delivered, the first by Dixon C.J., Fullagar, Kitto, and Taylor JJ., and the second by Williams J. It is the former which is hereafter analysed, as Williams J. did little more than concur.[3] The joint judgment first gave a brief summary of the parties' position at common law.[4] Quoting from *Fletcher v. Knott*[5] and the leading case of *Shenton v. Smith*[6] their Honours confirmed

[1] (1956) 94 C.L.R. 193. High Court of Australia; Dixon C.J., Fullagar, Kitto, Taylor and Williams JJ.

[2] Crisp, Green, and Gibson JJ.

[3] It is of note, however, that Williams J. tends to use more sweeping language than the other members of the court in confirming the common law right of the Crown to dismiss any of its servants, 'naval, military, or civil, . . . at any time without notice'.

[4] A useful reference on the common law position of the civil servant will be found in D. W. Logan, 'A Civil Servant and his Pay', (1944) 61 *Law Quarterly Review*, 246.

[5] (1938) 60 C.L.R. 55, 77.

[6] [1895] A.C. 229, 334-335.