R

v.

DAVIDSON

Victorian Supreme Court

[1969] VicRp 85

Menhennitt, J.: The accused is charged on four counts of unlawfully using an instrument or other means with intent to procure the miscarriage of a woman and one court of conspiring unlawfully to procure the miscarriage of a woman. The trial is in its eighth day. The Crown is about to call medical witnesses to give expert evidence. In order to determine questions of admissibility of evidence which may well arise, it is necessary that an aspect of the relevant law relating to the charges be stated. Accordingly, I invited counsel to make submissions so that I could then make appropriate rulings. The particular matter as to which I have heard submissions and on which I make this rulings is as to the element of unlawfulness in the charges.

The relevant portion of s65 of the Crimes Act 1958, under which the first four counts are laid and which is the basis of the conspiracy charge in the fifth count, is as follows: "Whosoever...with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of a felony, and shall be liable to imprisonment for a term of not more than fifteen years."

The use of the word "unlawfully" in the section implies that in certain circumstances the use of an instrument or other means to procure a miscarriage may be lawful. The word "unlawfully" is nowhere statutorily defined. S65 of the Victorian Crimes Act is, apart from the penalty, in substance in the same form as s58 of the English Offences Against the Person Act 1861 (24 and 25 Vict. c. 100) which continued to be the law in England until it was qualified by the English Abortion Act 1967, a statute which has not been enacted in Victoria. In England the 1861 provision was preceded by an Act of 1837 (7 Will. 4 and 1 Vict. c. 85), s6 of which was in substantially the same terms as the relevant portion of the 1861 provision except that it did not include the words "whether she be or be not with child" in the 1861 section. The predecessor of the 1837 Act was s13 of a statute of 1828 (9 Geo. 4 c.31) which in turn was preceded by the original statutory provision in England, a statute of 1803 (43 Geo. 3 c.58). S1 of that Act made it a felony wilfully, maliciously, and unlawfully to administer any deadly poison or other noxious and destructive substance or thing with intent to procure a miscarriage and s2 made it a felony wilfully and maliciously to administer any substance or thing or employ any instrument or other means with intent to procure a miscarriage of any woman not proved to be quick with child. Thus s2 did not make it an offence to employ an instrument on a woman quick with child. The statute of 1828 remedied this omission and also used the word "unlawfully" in the provision. In all of these statutory provisions the word "unlawfully" appeared as an ingredient of the offence save in s2 of the original Act of 1803. (The footnote in Russell on "Crime" (11th ed.), p. 663, that the word "unlawfully" was not in 9 Geo. 4 c.31, s13, is incorrect.)

The word "unlawfully" also appears in the precedent of an indictment for common law offences (that is before the 1803 statute) of unlawfully administering a drug and using an instrument to procure a miscarriage whereby the mother and child suffered in health or the child was born dead, set out in Chitty's "Criminal Law" (1826), vol. 3, pp. 798-800.

The only decision of which I am aware in which the meaning of the word "unlawfully" in s65 of the Crimes Act 1958, or its equivalent elsewhere, has been deliberately construed is R v Bourne, [1939] 1 KB 687; [1938] 3 All ER 615. In R v Carlos, [1946] VLR 15; [1946] ALR 94, one aspect of unlawfulness is stated by Gavan Duffy, J, at (VLR) p. 19. In R v Trim, [1943] VicLawRp 22; [1943] VLR 109; [1943] ALR 236, no deliberate definition was given, although the majority decision dealt with the case on the assumption that it involved a particular meaning to which I shall subsequently refer. In R v Ross and McCarthy, [1955] St R Qd 48, and R v Anderson, [1951] NZLR 439, the meaning given in R v Bourne was in effect accepted. Morris, J, in R v Bergmann and Ferguson (referred to in The Sanctity of Life and the Criminal Law by Glanville Williams, at pp. 154 and 165, and in Abortion and the Law by Bernard M Dickens, at p. 50) and Ashworth, J, in R v Newton and Stungo, [1958] Crim LR 469 and 600, in charges to juries possibly made some extensions to the principles stated in R v Bourne, but did not otherwise deal deliberately with the interpretation of the word "unlawfully".

R v Bourne, [1939] 1 KB 687; [1938] 3 All ER 615, was a trial of an eminent surgeon who openly in a public hospital operated to terminate the pregnancy of a 14 year old girl who had become pregnant in consequence of a violent rape. Macnaghten, J, the trial judge, in the course of his charge to the jury said (at KB pp. 690-1): "Nine years ago Parliament passed an Act called the Infant Life (Preservation) Act, 1929 (19 and 20 Geo. 5 c.34). S1, subs-s1 of that Act provides that 'any person who, with the intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life: Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.' It is true, as Mr. Oliver has said, that this enactment provides for the case where a child is killed by a wilful act at the time when it is being delivered in the ordinary course of nature; but in my view the proviso that it is necessary for the Crown to prove that the act was not done in good faith for the purpose only of preserving the life of the mother is in accordance with what has always been the common law of England with regard to the killing of an unborn child. No such proviso is in fact set out in s58 of the Offences Against the Person Act, 1861; but the words of that section are that any person who 'unlawfully' uses an instrument with intent to procure a miscarriage shall be guilty of felony. In my opinion the word 'unlawfully' is not, in that section, a meaningless word. I think it imports the meaning expressed by the proviso in s1, subs1, of the Infant Life (Preservation) Act, 1929, and that s58 of the Offences Against the Person Act, 1861, must be read as if the words making it an offence to use an instrument with intent to procure a miscarriage were qualified by a similar proviso."

Later (at pp. 693-4) he said:--"It permits the termination of pregnancy for the purpose of preserving the life of the mother.

"As I have said, I think those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable

consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother."

It is to be noted that s2 of the English Infant Life (Preservation) Act 1929 provided that on a trial for, inter alia, an offence under s58 of the 1861 Act (unlawfully using an instrument to procure a miscarriage) a jury could convict under s1 of the 1929 Act and that on a trial under s1 of that Act a jury could convict, inter alia, of an offence under s58 of the 1861 Act and it might be argued that what was to be negated by the Crown by reason of the proviso to s1 in relation to child destruction should also have to be negated, by reason of the word "unlawfully", in the less grave crime (although with the same penalty of life imprisonment) of unlawful abortion.

Mr. JV Barry (as he then was, now Barry, J), in an address delivered on 26 November 1938, entitled "The Law of Therapeutic Abortion" (recorded in The Proceedings of the Medico-Legal Society of Victoria, vol. 3, pp. 211-33), which, if I may say so with respect, includes, inter alia, a most comprehensive survey of the law relating to abortion going back to Roman law, at pp. 228-9, criticizes the fact that Macnaghten, J, should have founded himself so narrowly on a much later Act in considering the Act of 1861. At pp. 220-3 and 228-9 of that paper, the learned author said that his view was that the proper approach to the problem is to be found in the application of the principle of necessity and he cited Stephen's statement of that principle in Art. 43 of ch.3 of his Digest of the Criminal Law.

The position in this State is that in the Victorian equivalent of the English Infant Life (Preservation) Act 1929, namely, s5 of the Crimes Act 1949, now s10 of the Crimes Act 1958, there is the significant difference that the proviso to s1 of the English Act does not appear but the word "unlawfully", which does not appear in the English Act, does appear. Accordingly, in so far as the decision in R v Bourne is founded upon the proviso to s1 of the 1929 English statute, that basis for the decision is absent from Victorian law. Accordingly, what is lawful and what is unlawful must be determined by other legal principles.

In addition to the view of Mr. Barry, as he then was, to which I have referred, Glanville Williams, in The Sanctity of Life and the Criminal Law (1958), says of R v Bourne, at p. 152: "The judge's direction to the jury, which resulted in Mr. Bourne's acquittal, is a striking vindication of the legal view that the defence of necessity applies not only to common law but even to statutory crimes. It is true that the direction proceeded in some slight degree on the analogy of the child destruction statute, which contains an express exemption for the preservation of the life of the mother; but the exception in the one statute was not in itself a ground for reading a similar exception into the other. The only legal principle on which the exception could be based was the defence of necessity. It is true, also, that Mr. Justice Macnaghten proceeded in part on the ground that the abortion statute contained the word 'unlawfully', which he regarded as implying that some abortions are lawful. The word does not, however, specify which abortions are lawful, and again the only principle indicating the extent of legality is the defence of necessity." (See also Russell on Crime (11th ed.) p. 664.)

The principle of necessity is stated by Stephen in his Digest of the Criminal Law (1st., ed., ch. 3, art. 43; 9th ed., ch. 2, art. 11) in the following terms: "An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had

followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided. The extent of this principle is unascertained."

Whilst necessity is not a justification for every act which would otherwise be criminal (Halsbury, 3rd. ed., vol. 10, p. 291, para. 540; Archbold, 36th ed., para. 2498), none the less the concept of necessity finds its place in various branches of the criminal law. Examples are the prevention of a felony and the apprehension of a felon: R v Mackay, [1957] VicRp 79; [1957] VR 560, at pp. 562-3 (per Lowe, J), and at pp. 571-3 (per Smith, J); [1957] VicRp 79; [1957] ALR 648. See also Kenny's Outlines of the Criminal Law, 19th ed., pp. 141-2, paras94-6, and the element of necessity in self- defence: R v Tikos (No 1), [1963] VicRp 44; [1963] VR 285, at pp. 290 (per Sholl, J), at p. 298 (per Smith, J) and at p. 302 (per Monahan, J).

Having regard to the deliberate and repeated use of the word "unlawfully" in s65 of the Crimes Act 1958 and the nature of the offence created and the history thereof and in the light of the authorities and views of learned authors to which I have referred, it appears to me that necessity is the appropriate principle to apply to determine whether a therapeutic abortion is lawful or unlawful within the meaning of s65.

The principle of necessity as stated by Stephen contains within it the two elements of necessity and proportion. In R v MacKay, [1957] VicRp 79; [1957] VR 560; [1957] ALR 648, Lowe, J, stated these two elements in his propositions numbered 3 and 6 set out at (VR) pp. 562-3; (ALR) p. 649. Smith, J, decided, at (VR) pp. 571-3; (ALR) pp. 654-6, that for killing in the prevention of the completion of a felony or in the arrest of a felon to be justifiable, the act done must have been necessary and not out of proportion to the mischief. His Honour stated the law at (VR) p. 573; (ALR) p. 657, in the following terms:--"For these reasons I accept the submission of the Crown that in cases such as the present the test laid down by the law today for determining whether the homicide is justifiable or not is a two-fold test which may be stated in this form: (1) Did the accused honestly believe on reasonable grounds that it was necessary to do what he did in order to prevent the completion of the felony or the escape of the felon? and (2) Would a reasonable man in his position have considered that what he did was not out of proportion to the mischief to be prevented?" (See also R v Howe [1958] HCA 38; (1958) 100 CLR 448; [1958] ALR 753.)

In R v Tikos (No 1), [1963] VicRp 44; [1963] VR 285, Smith, J, decided at p. 298 that two of the necessary elements involved in self-defence are:--

"(c) that the accused should have honestly believed upon reasonable grounds that what he did was necessary to prevent the mischief that threatened him, or in other words that it could not have been avoided by less violent means; and
(d) that a reasonable man in his situation would have considered that what he did was not disproportionate to the mischief to be prevented."

The principle of necessity imported by the use of the word "unlawfully" in s65 of the Crimes Act 1958, in my view imports, the two elements of necessity and proportion.

One aspect of the element of necessity in relation to prevention of a felony or arrest of a felon or self-defence is that the accused should honestly believe on reasonable grounds that what he

did was necessary. In principle, it appears to me that the same concepts should apply to the element of necessity in relation to unlawfulness in s65 of the Crimes Act 1958. In R v Bourne Macnaghten, J, in the second passage I have cited above, in stating the relevant test, used the expressions "if the doctor is of opinion on reasonable grounds and with adequate knowledge" and "in that honest belief". In R v Bergmann and Ferguson, supra, which concerned in one count advice by a doctor, Morris, J, said the issue was not whether the doctor did or did not make a mistake but whether she "gave a dishonest opinion, did not act in good faith": Glanville Williams, op. cit., p. 165.

In the next place, for therapeutic abortion to be lawful I think that the accused must have honestly believed on reasonable grounds that the act done by him was necessary to preserve the woman from some serious danger. As to this element of danger, it appears to me in principle that it should not be confined to danger to life but should apply equally to danger to physical or mental health provided it is a serious danger not being merely the normal dangers of pregnancy and childbirth. In R v Bourne Macnaghten, J, extends the principle to cover the case where the woman would be a physical or mental wreck. In R v Trim, [1943] VicLawRp 22; [1943] VLR 109; [1943] ALR 236, Martin and O'Bryan, JJ, held at (VLR) pp. 116-7 that the facts did not raise any question of the act being lawful because done in good faith for the purpose only of preserving the life or health of the deceased. In R v Newton and Stungo, [1958] Crim LR 469 and 600, Ashworth, J, said that the use of an instrument to procure a miscarriage "is unlawful unless the use is made in good faith for the purpose of preserving the life or health of the woman". See also The Sanctity of Life and the Criminal Law Glanville Williams, pp. 153-63.

As to the element of proportion, it seems to me in principle that this should apply to the element of unlawfulness in s65 of the Crimes Act as it does to the element of necessity in prevention of felony, arrest of a felon and self-defence. Proportion is an aspect of the principle of necessity as stated by Stephen. The concept of proportion underlay what Macnaghten, J, said in R v Bourne, [1939] 1 KB 687, at pp. 694-5; [1938] 3 All ER 615.

The two elements of necessity and proportion involve, I think, subjective tests, subject to the beliefs being held on reasonable grounds.

In the present case, no issue as to lawfulness on grounds other than therapeutic grounds has emerged.

On the basis of all the foregoing, I accordingly decide that the relevant law in relation to unlawfulness is as follows:--

For the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.

Accordingly, to establish that the use of an instrument with intent to procure a miscarriage was unlawful, the Crown must establish either (a) that the accused did not honestly believe on reasonable grounds that the act done by him was necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal

dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; or (b) that the accused did not honestly believe on reasonable grounds that the act done by him was in the circumstances proportionate to the need to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail.