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A2 GCE LAW

G154/01/RM Criminal Law Special Study

PRE-RELEASE SPECIAL STUDY MATERIAL

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G154 CRIMINAL LAW

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

Extract adapted from the judgment of Russell L.J. in *R v Wilson* [1996] 2 Cr.App.R. 241 (Court of Appeal, Criminal Division).

We are abundantly satisfied that there is no factual comparison to be made between the instant case and the facts of either *Donovan* or *Brown*: Mrs Wilson not only consented to that which the appellant did, she instigated it. There was no aggressive intent on the part of the appellant. On the contrary, far from wishing to cause injury to his wife, the appellant's desire was to assist her in what she regarded as the acquisition of a desirable piece of personal adornment, perhaps in this day and age no less understandable than the piercing of nostrils or even tongues for the purposes of inserting decorative jewellery.

In our judgment *Brown* is not authority for the proposition that consent is no defence to a charge under section 47 of the Act of 1861, in all circumstances where actual bodily harm is deliberately inflicted. It is to be observed that the question certified for their Lordships in *Brown* related only to a "sado-masochistic encounter." However, their Lordships recognised in the course of their speeches, that it is necessary that there must be exceptions to what is no more than a general proposition. The speeches of [several of their Lordships] … all refer to tattooing as being an activity which, if carried out with the consent of an adult, does not involve an offence under section 47, albeit that actual bodily harm is deliberately inflicted.

For our part, we cannot detect any logical difference between what the appellant did and what he might have done in the way of tattooing. The latter activity apparently requires no state authorisation, and the appellant was as free to engage in it as anyone else. We do not think that we are entitled to assume that the method adopted by the appellant and his wife was any more dangerous or painful than tattooing …

… we are firmly of the opinion that it is not in the public interest that activities such as the appellant's in this appeal should amount to criminal behaviour. Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, normally a proper matter for criminal investigation, let alone criminal prosecution …

In this field, in our judgment, the law should develop upon a case by case basis rather than upon general propositions to which, in the changing times in which we live, exceptions may arise from time to time not expressly covered by authority.

SOURCE 2

Extract adapted from *Criminal Law*. 10th Edition. Michael Jefferson. Pearson Education Ltd. 2011. P 517.

Neither a wife nor anyone else can consent to the reckless infliction of serious harm. This was the strong view of the Court of Appeal in *Dica*… The court held that where the victim is unaware of the fact that the accused is infected with a disease, here HIV/AIDS, and the latter had unprotected sexual intercourse with the former, the victim did not impliedly consent to the risk of being infected. If the victim was aware of the accused's condition, then the consent to sexual intercourse would be consent to the risk of infection and therefore a defence to s 20 … Consent will only be effective if the victim gives informed consent. It is not informed consent if the victim does not know that the accused has the disease. Even where the victim knows that the accused is HIV positive, and thereby consents to the risk of being infected, the latter is guilty of GBH with intent to commit GBH contrary to s 18 of the OAPA. There was a second appeal in *Dica*… after a retrial. The Court of Appeal dismissed the appeal and refused leave to appeal but did certify a point of law of general public importance: 'in what circumstances, if any, might a defendant who knows or believes that he is infected with a serious sexually transmitted infection and recklessly transmits it to another through consensual sexual activity be convicted of inflicting grievous bodily harm, contrary to s 20 of the Offences against the Person Act 1861?' It would have been useful for the highest court to have resolved the issue.

SOURCE 3

Extract adapted from the judgment of Lord Templeman in *R v Brown (and other appeals)* [1994] 1 AC 212 (House of Lords).

In the present case each of the appellants intentionally inflicted violence upon another (to whom I refer as "the victim") with the consent of the victim and thereby occasioned actual bodily harm or in some cases wounding or grievous bodily harm. Each appellant was therefore guilty of an offence under section 47 or section 20 of the Act of 1861 unless the consent of the victim was effective to prevent the commission of the offence or effective to constitute a defence to the charge.

In some circumstances violence is not punishable under the criminal law. When no actual bodily harm is caused, the consent of the person affected precludes him from complaining … Even when violence is intentionally inflicted and results in actual bodily harm, wounding or serious bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating. Surgery involves intentional violence resulting in actual or sometimes serious bodily harm but surgery is a lawful activity. Other activities carried on with consent by or on behalf of the injured person have been accepted as lawful notwithstanding that they involve actual bodily harm or may cause serious bodily harm. Ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities …

Counsel for the appellants argued that consent should provide a defence to charges under both section 20 and section 47 because, it was said, every person has a right to deal with his body as he pleases. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally. In any event the appellants in this case did not mutilate their own bodies. They inflicted bodily harm on willing victims ...

… There was no evidence to support the assertion that sado-masochist activities are essential to the happiness of the appellants or any other participants but the argument would be acceptable if sado-masochism were only concerned with sex, as the appellants contend. In my opinion sado-masochism is not only concerned with sex. Sado-masochism is also concerned with violence. The evidence discloses that the practices of the appellants were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless …

In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty and result in offences under sections 47 and 20 of the Act of 1861.

SOURCE 4

Extract adapted from *Unlocking Criminal Law*. 4th Edition. Jacqueline Martin and Tony Storey. Routledge. 2013. P 211.

There are limits to anyone's right to consent to the infliction of harm upon themselves. Consensual killing is still murder (or possibly manslaughter on the ground of diminished responsibility), or euthanasia as it is popularly known. According to Lord Mustill in *Brown and others* … 'The maintenance of human life is "an overriding imperative".' However, V may consent to a high risk of injury, or even death, if justified by the purpose of D's act. This depends on the social utility of the act. Where the act has some social purpose, it is a question of balancing the degree of harm which will or may be caused, against the value of D's purpose. In *Attorney-General's Reference (No. 6 of 1980)* … two youths, aged 17 and 18, decided to settle an argument with a bare-knuckle fist fight. One sustained a bloody nose and a bruised face. Following acquittals, the Court of Appeal held that the defence of consent was not available in this situation. Lord Lane CJ said:

'It is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason… Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.'

SOURCE 5

Extract adapted from the judgment of Lord Woolf C.J. in *R v Barnes* [2005] 1 W.L.R 910.

The fact that the participants in, for example, a football match, implicitly consent to take part in a game, assists in identifying the limits of the defence. If what occurs goes beyond what a player can reasonably be regarded as having accepted by taking part in the sport, this indicates that the conduct will not be covered by the defence. What is implicitly accepted in one sport will not necessarily be covered by the defence in another sport …

On the other hand, the fact that the play is within the rules and practice of the game and does not go beyond it, will be a firm indication that what has happened is not criminal. In making a judgment as to whether conduct is criminal or not, it has to be borne in mind that, in highly competitive sports, conduct outside the rules can be expected to occur in the heat of the moment, and even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal. That level is an objective one and does not depend upon the views of individual players. The type of the sport, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury, the state of mind of the defendant are all likely to be relevant in determining whether the defendant's actions go beyond the threshold.

Whether conduct reaches the required threshold to be criminal will therefore depend on all the circumstances. However, there will be cases that fall within a 'grey area', and then the tribunal of fact will have to make its own determination as to which side of the line the case falls. In a situation such as we have on this appeal, to determine this type of question the jury would need to ask themselves among other questions whether the contact was so obviously late and/or violent that it could not be regarded as an instinctive reaction, error or misjudgment in the heat of the game …

We appreciate the difficulty that the judge had summing up this case because of the state of the authorities. The concept of 'legitimate sport' in itself is not unhelpful. However, it required an explanation of how the jury should identify what is and what is not 'legitimate' in the context of the relevant sport. The case called out for the jury to be given help as to the approach they should adopt in determining what is or is not 'legitimate sport'. The judge should have given the jury a direction to determine for themselves what actually happened at the critical time when the injury was inflicted. Broadly speaking, were they satisfied that the case for the prosecution was correct? They should have been told that if they were not, and they thought that the appellant's description of what occurred might be correct, then that was in all probability the end of the case. It should have been pointed out to the jury that even if the offending contact was a foul, it was still necessary for them to determine whether it could be anticipated in a normal game of football or was it something quite outside what could be expected to occur in the course of a football game. The summing up should also have made it clear that even if a tackle results in a player being sent off, it may still not reach the necessary threshold to constitute criminal conduct.

SOURCE 6

Extract adapted from *Criminal Law*. 4th Edition. Alan Reed and Ben Fitzpatrick. Sweet and Maxwell. 2009. Pp 416–417.

Most of the contentious issues concerning what constitutes a valid consent arise in the area of sexual offences … However, the principles are the same for both sexual and non-sexual offences …

In some situations the law holds that consent which has been given is not valid. This might be because the victim who has purported to give the consent is too young to appreciate what he is consenting to; in sexual offences there are offences which specify the age at which a valid consent might be given. In the non-sexual field, age limits are rarely specified, but the court will decide whether the person could be expected to understand the consent he or she was giving. Consent may also be invalid because the person is mentally incapable of making a sound decision. Parents and guardians may give consent on behalf of their children, for example, in relation to surgical operations.

Where the consent is obtained by force or threats of force it will be invalid. The law draws a line between real consent and mere submission.

Where the victim has given consent due to a mistake as to the nature and quality of the act or the identity of the person with whom it is to be performed the consent will be ineffective. This will normally occur due to fraud by the accused, but not necessarily so; the nature of the fraud vitiating consent is strictly construed … In *Richardson* a dentist who had been suspended from dental practice by the General Dental Council was convicted of assault occasioning actual bodily harm for treatment given to patients whilst disqualified. The Court of Appeal accepted the defendant's argument that the patients had consented to receiving proper dental treatment and that is what they received. It was immaterial that the patients would not have consented to treatment had they realised the dentist had been struck off the Register. Would, however, the answer have been the same had the person performing the treatment no qualifications whatsoever. Would she have received proper dental treatment or would this now be a mistake as to the nature of the act and identity of the person? Would it make any difference whether or not the treatment given was the correct treatment albeit at the hands of a complete amateur? It is suggested that a different outcome would follow; the act consented to was construed to be proper dental treatment by a dental practitioner. There must be a fundamental deception of the very attributes of the criminal act before it will vitiate consent. In *Tabassum* … The Court of Appeal determined that whilst the victims had consented to the *nature* of the act, which constituted the touching of the breasts, they had not consented to the *quality* of the act since they had falsely believed that he was medically qualified and that they were being touched for sound medical reasons. In truth, the women would not have submitted to the defendant's acts if they had not believed that he had medical qualifications; and that he knew that this was so. The victim's mistake as to the *quality* of the act was fundamental rather than the fact that the mistake derived from any misrepresentation by the defendant that was material. If followed subsequently this represents a novel distinction between lack of consent as to either nature or quality of the act vitiating consent.