WHITEHEAD v THE PEOPLE (1968) ZR 9 (HC)

HIGH COURT
EVANS J
19th APRIL 1968

Flynote and Headnote

[1] **Criminal law - Showing hatred based on colour - Mens Rea.**
Section 58F (1) of the Penal Code creates an absolute liability in the sense that the prosecution need not prove that the accused intended to show hatred.

[2] **Criminal law - Absolute liability - Showing hatred based on colour.**
See [1] above.

[3] **Criminal law - Indecent assault - Defences - Drunkenness.**
For purposes of Penal Code, section 118 (1) (indecent assault), short of intoxication causing insanity or genuine mistake of fact, drunkenness is no defence.

[4] **Criminal law - Intoxication - Indecent assault, defence to charge of.**
See [3] above.

Statute construed:
Penal Code (1965, Cap. 6), ss. 58F (1) and 118 (1).

Carruthers, for the appellant
Chandran, State Advocate, for the respondent

Judgment

Evans J: The 25 - year - old European accused was convicted after trial on two counts. The first was a charge of "showing hatred for any person wholly because of his colour", contrary to section 58F (1) of the Penal Code, the particulars being that, on the 26th November, 1967, at Kabwe, he uttered words to a group of persons, Moffat Chanda, Kenneth Kalengo, John Michael Bwalya, Hunter Kawongo and Stephen Zulu, showing hatred wholly because of their colour, as follows: "1 cannot trust an African because he is as black as President Kaunda." The second count was one of indecent assault, contrary to section 118 (1) of the Penal Code. It was alleged that, on the same day and at the same place, the appellant unlawfully and indecently assaulted Rose Likukela, to wit, did slap her buttocks and touch her breast. On the 17th January, 1968, the learned resident magistrate sentenced him to consecutive terms of three months' I.H.L. and six months' I.H.L. on the said two counts.

He now appeals against the convictions and sentences. He lodged his own grounds of appeal, but he was represented by counsel on the hearing, and with leave, counsel filed further grounds. The following grounds were argued:

1. Against conviction on count 1:

(a) The prosecution failed to prove that the consent of the Director of Public Prosecutions had been obtained under Section 58F (2) of the Penal Code.

(b) The learned resident magistrate misdirected himself as to the law relating to drunkenness in so far as it affected these convictions.

Particulars of Misdirection

(i) At page 6, lines 21 - 23: "The accused *seems* to have alleged that he was drunk at the time. In the instant circumstances, of course, this is no defence - he must be taken to intend the natural consequences of his acts."

(ii) Page 7 of the judgment, lines 6 - 8: "I am likewise satisfied beyond all reasonable doubt that accused was not so affected by drink that he was incapable of forming the intention necessary to commit these offences."

2. Against conviction under count 2:

(a) The learned resident magistrate misdirected himself as to the law relating to drunkenness in so far as it affected this conviction.

Particulars of Misdirection

(i) Page 6 of the judgment, lines 35 - 40: "Again the accused seems to have raised the defence of drunkenness. It is, of course, in the present circumstances, no defence. There is here some evidence of intoxication. Although it is uncertain whether accused is raising it as a defence or not, it is incumbent upon the court to examine and evaluate that evidence."

(ii) Page 7 of the judgment, lines 6 - 8: "I am likewise satisfied beyond all reasonable doubt that the accused was not so affected by drink that he was incapable of forming the intention necessary to commit these offences."

3. Against sentence on both counts - that the learned resident magistrate failed to take into account the fact that the accused was affected by alcohol when these offences were committed and was a first offender.

As to the first ground of appeal - ground 1 *(a)* - against conviction on count 1, it has now been established, by an affidavit sworn by the learned resident magistrate on the 6th April, 1968, that the Director of Public Prosecutions did issue his written consent to the appellant's prosecution. It was dated the 6th December, 1967, that is, before the appellant's first appearance in court on the 19th December, when it was produced to the lower court. Until this affidavit was sworn (a course proposed by me, agreed to by the learned State advocate and not objected to by the appellant's counsel), there was doubt as to whether the consent had been given, because, although it is filed with the case record, the learned resident magistrate omitted to make any reference to it on the record. That disposes of this ground of appeal.

[1] [2] In support of ground 1 (b) of appeal against conviction on count 1, Mr Carruthers argued that, whereas he could not dispute the finding that the appellant did utter the words charged nor that those words could constitute the offence charged, it was necessary for the State to prove that the appellant *intended* to show hatred. He submitted that, although section 58F (1) is silent on the point, intent is an implied ingredient of the offence. He could refer to no authority on the point, but submitted, generally, that *mens rea* must be proved unless a statute clearly excludes it, otherwise, he said, a member of a group of friends of different races or nationalities, who were joking about each other's national traits (for example, the frugality of Scotsmen), who spoke in certain terms about such traits, could be guilty of an offence under section 58F (1). I disagree with these submissions. In my view, this section creates an offence of strict liability. As I have said, it does not mention intent, and it contains no such words even as "calculated to show hatred". On the contrary, the relevant words are: "Any person who utters any words . . . *expressing or showing hatred*" (*italics added*). To hold otherwise would be to fly in the face of the plain meaning of the section and to defeat the object of Parliament, which is clearly, by creating the offence, to deter people from angering others (thus possibly leading to violence and/or racial disturbances) by offensive utterances. I hold that *mens rea*, in the sense of intention, does not have to be proved under this section. It suffices to prove the uttering of words which express or show hatred, etc. That being so, it is not necessary to consider the further question of whether the appellant's alleged drunkenness affected his capacity to form the intention (and there is no suggestion here that the appellant was, by reason of intoxication, insane). I cannot think that Parliament intended that a drunken man, who is not insane but whose restraints and inhibitions are removed by alcohol and who utters remarks such as the appellant undoubtedly did, should go unpunished. Accordingly, the appeal against conviction on count l fails.

[3] [4] Regarding the charge of indecent assault, Mr Carruthers submitted that, whereas he could not dispute the finding that the appellant touched the complainant's buttocks and breast, he did dispute that he did so with the *intention* of assaulting her and of doing so indecently. Again, he submitted, intention must be proved, as opposed to, for example, mere jocular pushing, and he argued that it should have been proved that the appellant touched the girl not believing she would consent and intending to do something indecent. He submitted that, if a drunken man's view of what a woman will accept is so blurred that he genuinely believes the woman is consenting to what he is doing, then he is not guilty of indecent assault. He conceded that this last argument applies only to non-serious cases, but I cannot accept its applicability to any case of indecent assault In which there were no prior intimate or affectionate acts to which the woman consented. To hold otherwise would

be to license any beer - hall drunk to behave indecently to women with impunity when his passions are inflamed by alcohol, in the belief, genuine or otherwise, that they will consent. I can find no authority directly in point, and I have been referred to none, but I hold that, short of intoxication causing insanity of genuine mistake, drunkenness is no defence to a charge of indecent assault. In this case, there can be no doubt that the appellant knew that the girl did not consent to his indecent acts, in which he persisted after she had vividly demonstrated (by slapping his face) her lack of consent, and in any event the learned resident magistrate did in fact consider the appellant's condition and say that he was satisfied beyond reasonable doubt that he was not so affected by drink as to be incapable of forming what the resident magistrate referred to as "the intention necessary to commit these offences".

Having closely perused the trial record and considered all the mitigating factors which counsel so ably advanced, I see no reason to disturb the sentences. It is true that the appellant is a young man and a first offender, and the imposition of fines would not have been inappropriate, but, in all the circumstances of the offences, I cannot say that the sentences should have been concurrent or that they were manifestly excessive or based on wrong principles. Indeed, it is only after anxious consideration that I have decided not to recommend (in his own interests) the appellant's deportation from Zambia under section 33 (1) (b) of the Penal Code.

Appeal dismissed.