[HIGH COURT OF AUSTRALIA.]

PAPADIMITROPOULOS . . . . . APPLICANT;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF VICTORIA.

H. C. OF A. 1957.

MELBOURNE, *Oct.* 24.

SYDNEY, *Nov.* 18.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Criminal Law—Rape—Ingredients of offence—Consent of prosecutrix—Given under belief that she was married to accused—Belief fraudulently induced by accused—Whether consent vitiated so as to make accused guilty of rape—Crimes Act 1928 (*No.* 3664) (*Vict.*), *s.* 40.

Rape is carnal knowledge of a woman without her consent. Carnal knowledge is the physical act of penetration. It is the consent to such physical act of penetration which is in question upon an indictment for rape. Such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. Once the consent is comprehending and actual, the inducing causes cannot destroy its reality and leave the man guilty of rape.

Where a woman consented to sexual intercourse under the belief, fraudulently induced by the man, that she was married to him,

Held, that the man was not guilty of rape.

Decision of the Court of Criminal Appeal of Victoria reversed.

APPLICATION for leave to appeal from the Court of Criminal Appeal of Victoria.

John Papadimitropoulos was charged with that at Fitzroy in the State of Victoria between 13th and 19th June 1956 he had carnal knowledge of Dina Karnezi without her consent. He pleaded not guilty and was tried before the Supreme Court of Victoria by *Gavan Duffy* J. and a jury of twelve men. The jury returned a verdict of rape with mitigating circumstances and the trial judge sentenced the accused to be imprisoned for four years.

H. C. OF A. 1957.

PAPADIMITROPOULOS v. THE QUEEN.

The accused applied for leave to appeal against the conviction and sentence. The application was heard before the Court of Criminal Appeal of the State of Victoria, constituted by *Lowe*, *O'Bryan* and *Monahan* JJ. which court, *Monahan* J. dissenting, on 23rd August 1957 refused the application.

From this decision the accused sought special leave to appeal to the High Court of Australia.

F. Galbally (solicitor), for the applicant. It is not disputed that fraud as to the nature of the act of intercourse or as to the identity of the person with whom intercourse is had can vitiate consent. The authorities are confined to fraud as to the essential nature of the act of intercourse. In the present case the prosecutrix consented to intercourse which she believed was marital intercourse. In fact it was extra-marital intercourse. Although there may be a great social and moral difference between the two things there is no essential difference in the nature of the act which would vitiate the consent given. Such an essential difference, it is submitted, must arise from the nature of the act itself. [He referred to *State of California* v. *Skinner* (1); *Reg.* v. *Clarence* (2).] *R.* v. *Harms* (3) is, it is submitted, wrongly decided.

Sir *Harry Winneke* Q.C., Solicitor-General for the State of Victoria (with him *J. F. Moloney*), for the respondent. This is not a case of fraud vitiating consent. It is put that there was no consent to the particular act of carnal knowledge charged against the prisoner. The prosecutrix consented to an act of marital intercourse not to one of fornication. There was such a difference in the act done to the prosecutrix and the act which she believed was being done as to make them essentially of a different nature. In some of the authorities the courts have acted on the basis that the prosecutrix knew the nature of the physical act but that because of some added belief she had in the quality or nature of the act, the consent she gave was not a consent to the act done to her. [He referred to *Reg.* v. *Case* (4); *Reg.* v. *Flattery* (5); *R.* v. *Williams* (6); *R.* v. *Harms* (3).]

F. Galbally, in reply.

(1) (1924) 33 Brit. Colum. Rep. 555.
(2) (1888) 22 Q.B.D. 23, at pp. 27, 30, 31, 33, 42, 43, 44.
(3) (1944) 2 D.L.R. 61.
(4) (1850) 1 Den. 580 [169 E.R. 381].
(5) (1877) 2 Q.B. 410.
(6) (1923) 1 K.B. 340, at pp. 346, 347.

THE COURT delivered the following written judgment :—

The applicant for special leave to appeal in this case was convicted before *Gavan Duffy* J. on 17th April 1957 of rape with mitigating circumstances and sentenced to four years' imprisonment. The case made against him was that he had obtained the actual consent of the woman to his having carnal knowledge of her by a fraudulent pretence which made it no consent at all. The presentment contained two counts. The first count stated that at Fitzroy in Victoria between 13th June and 19th June 1956 the applicant had carnal knowledge of Dina (probably a mis-spelling of Dena) Karnezi without her consent. The second count contained a charge that at that same place between the same dates the applicant stole certain money the property of Dina Karnezi.

It appears that since the events upon which the charge depends Dina Karnezi has married, and at the trial she was Dena Arvaniti. She is described as a Greek girl who has not learned to speak English. For some three months she had been employed at a factory in Fitzroy. On the morning of 14th June 1956, accompanied by the applicant, who is also a Greek but who speaks English intelligibly, she saw the manager. They requested that she should have a week off saying that they had been married that morning. Mrs. Arvaniti's story was that she met the applicant in Australia and that four or five days later he asked her to marry him. He bought her a ring and got her to wear it in the street. On the morning of 14th June 1956 he asked her to go to the registry office and get married. By the law of Victoria a registrar of marriages may at any time between eight o'clock in the morning and four o'clock in the afternoon celebrate a marriage in his office provided that the parties to the marriage have given him at least three days' written notice and such notice has been posted in his office for at least that period of time before the performance of the marriage. There must be two witnesses. The ceremony includes mutual declarations of the parties that he and she respectively take the other as his lawful wife or her lawful husband. The registrar must make out a marriage certificate and deliver a copy to one of the parties. (See *Marriage Act* 1928 (Vict.), ss. 19-23 and 26 as amended by Acts Nos. 4561, 4839 and 3816.) Mrs. Arvaniti said that on the morning of 14th June 1956, which was in fact a Thursday, in compliance with the applicant's request she went with him accompanied by her two cousins and an aunt, none of whom spoke English, to the registry office in Queen Street, Melbourne. There she and the applicant signed a card and a form which had been filled in by the officer on information supplied in English by the applicant. The two

H. C. OF A. 1957.

PAPADIMITROPOULOS v. THE QUEEN.

Dixon C.J. McTiernan J. Webb J. Kitto J. Taylor J.

documents were produced at the trial and identified by her and were respectively a notice of intention that the marriage would be celebrated and an information paper giving the particulars for registration and for the filling in of the marriage certificate. Mrs. Arvaniti said that then the applicant, speaking to her of course in Greek, told her that they were married. Next they went to her employer, as already stated, to obtain leave, and after that to his employer for the like purpose. Having done that they went to obtain a room at what is presumably a lodging house. It was in Brunswick Street, Fitzroy and was conducted by a Mrs. Fatouris. According to Mrs. Fatouris, the applicant had already bespoken the room for himself and his intended wife, and on this occasion the applicant introduced the girl as his wife and said that they had been married that morning at the registry. That night they went into occupation of the room. They lived there together for the next four days, during which, according to the evidence of Mrs. Arvaniti, they had sexual intercourse two or three times. On the Sunday morning he told her that they had to go to the registry again at 3 p.m. on the following day to collect a paper, a document. Early on Monday morning he left and did not return. She then discovered that there had not been a marriage ceremony. She said that when she came to live with him in the room she brought £400 with her in her handbag. She placed it in the wardrobe. From a drawer she had given the applicant twenty or thirty pounds but he knew she had the money. After his departure on the Monday she found that the money had gone. She received two letters from him dated 19th June and 21st June, which she produced, and he telephoned to her from Sydney. In both letters he professed his love for her. In the first he signed himself " your husband ", and in the second he addressed her as his " beloved little wife Dena ". He gave no reasons for leaving her but asked forgiveness and reiterated that it would be all right. In the second letter he wrote that he had obtained employment stating his wages and saying in effect that as soon as he could obtain accommodation for them both in Sydney he would send or come for her. She remained in Mrs. Fatouris's room until, according to the latter, she turned her out on discovering that she was " a bad girl ".

The applicant gave evidence on his own behalf. His story was that he had arranged with Dena Karnezi some time in 1955 that they should marry and that about a fortnight before they went to the registry they had arranged that the marriage should then take place. He had explained to her what had to be done and that they must go to the registry office twice. When they attended on

Thursday 14th June 1956 they were accompanied by Dena's two uncles and her aunt. One of her uncles, Stelios by name, knew English and did the translating to the registrar and to Dena. He told her that she was not yet married and that she would be married on Monday. They told Mrs. Fatouris they were married because otherwise they would not have obtained the room. The applicant said that he sought to have intercourse with Dena but she refused until Sunday, when she sought it and it took place. He left her next morning because, as he said in effect, he had been told stories about her earlier conduct and character and because he considered that she had had intercourse with some other man before him. However he did intend to return to her until he heard a worse account of her in Sydney. He had not stolen £400 from her and did not know that she possessed such a sum.

Gavan Duffy J. directed the jury that rape consisted in having carnal knowledge of a woman without her consent; but, in law, if the girl did believe that the accused had become her husband by marriage and acquiesced in sexual intercourse with him on that basis and would not have so acquiesced otherwise, and that belief of hers had been brought about by the accused representing to her that they were married, he knowing they were not, and with the intention of persuading her to consent to sexual intercourse with him as her husband, then there would be no consent at all.

The acquittal of the applicant on the charge of larceny may have been due to a failure to satisfy the jury that Mrs. Arvaniti ever had the money in her bag in the cupboard. Perhaps, however, the jury may have thought that some one else was possibly the thief, or yet again that perhaps the truth was that Mrs. Arvaniti did not lose her money.

Gavan Duffy J. confessed himself unable to explain the finding of mitigating circumstances attached to the finding of guilty of rape. Before the *Crimes Act* 1949 (Act No. 5379) s. 2 substituted imprisonment for not more than twenty years for the death penalty rape was, by sub-s. (1) of s. 40 of the *Crimes Act* 1928, a capital offence in Victoria. Sub-section (2), however, of that section provided that if at the trial of any person charged with rape the jury are satisfied that the offence charged has been committed but that there were circumstances connected with the commission of the crime which appear to mitigate the offence the jury may return as their verdict that such person is guilty of the offence so charged with mitigating circumstances. On the verdict the convicted man was liable to ten years' imprisonment, not death. In spite of rape being no longer a capital offence, the provision for

H. C. OF A. 1957.

PAPADIMITROPOULOS v. THE QUEEN.

Dixon C.J. McTiernan J. Webb J. Kitto J. Taylor J.

a verdict of guilty with mitigating circumstances remains. The applicant's counsel suggested that the jury's verdict meant that although the applicant had deceived the woman he had in fact meant to marry her on the Monday. As to this the learned judge said in sentencing the applicant: "It was for the jury and not for me to say whether there were mitigating circumstances, and all I need say about it is that I find it impossible to formulate for myself what were the circumstances that the jury was satisfied mitigated the crime of rape. To my mind this offence was a particularly cruel one. The jury must have found on the charge that I gave them that this girl never would have consented to intercourse at all except for the fact that she believed she was giving her husband his lawful rights in doing so, and that that belief was brought about intentionally by the prisoner, in order that he might have connection with her."

On application to the Full Court of the Supreme Court sitting as a Court of Criminal Appeal for leave to appeal that court was divided in opinion. *Lowe* and *O'Bryan* JJ. were of opinion that the direction to the jury was correct and that it was open to the jury to find that the woman's consent was vitiated by fraud and amounted to no consent. *Monahan* J. adopted a contrary conclusion. In the elaborate reasons which were given in the joint judgment of *Lowe* and *O'Bryan* JJ. on the one hand and by *Monahan* J. on the other hand the distinction was accepted between a consent given under a deception or mistake as to the thing itself, that is to say as to the act of intercourse, and a consent to that act itself induced by a deception or mistake as to a matter antecedent or collateral thereto. Under the first heading come the cases in which the woman is deluded into supposing that she is undergoing medical treatment, and the cases where in the dark she is induced to assume that her husband is the man with whom she is having intercourse. Under the second heading comes consent induced by fraudulent representations made by the man as to his wealth, position of freedom to marry the woman. Consent obtained by frauds of the latter character is nevertheless a consent. But *Lowe* and *O'Bryan* JJ. were of opinion that a misrepresentation as to the performance of the marriage ceremony fell under the former head. Their Honours said: "A mistake of such a kind in our opinion makes the act which took place essentially different from that to which she supposed she was consenting. What she was consenting to was a marital act, an act to which in her mistaken belief she was in duty bound to submit. What she got was an act of fornication—an act wholly different in moral character. On

principle it seems to us that the consent relied on is no real consent at all and should afford no help to the applicant." On the other hand *Monahan* J., speaking of the two classes of cases given above as examples of the first heading, said: "I have no more difficulty in understanding the essential difference between the act consented to and the act done in the personation cases than I have in understanding the same essential differences in the acts which have been considered in the medical cases. My difficulty arises when I am asked to say that there is the same essential difference between the act consented to and the act done in this case; the sexual act was the act to which the prosecutrix intended to consent and the prisoner was the person with whom she consented to perform that act."

The modern history of the crime of rape shows a tendency to extend the application of the constituent elements of the offence. The "*violenter et felonice rapuit*" of the old Latin indictment is now satisfied although there be no use of force: *R.* v. *Bourke* (1). The "*contra voluntatem suam*" requires only a negative absence of consent; (as to the need of the man's being aware of the absence of consent, see *R.* v. *Lambert* (2)). The "*violenter et felonice carnaliter cognovit*" is established if there has been some degree of penetration although slight, and no more force has been used than is required to effect it: *R.* v. *Bourke* (1); *R.* v. *Burles* (3).

There has been some judicial resistance to the idea that an actual consent to an act of sexual intercourse can be no consent because it is vitiated by fraud or mistake. The key to the difficulty may perhaps be found in a brief sentence of *Cussen* J. in *R.* v. *Lambert* (4): "Now, carnal knowledge is merely the physical fact of penetration, though, of course, there cannot be consent even to that without some perception of what is about to take place."

In 1822 *Bayley* J. reserved for the consideration of the twelve judges the case of one Jackson who had been convicted before him of burglary with intent to commit rape. Jackson had entered a dwelling house by night in the absence of the householder with the intention of personating him and deceiving his wife into submitting to sexual intercourse with him. As he was proceeding to his purpose she discovered the deception and he made off, "four judges thought, that having carnal knowledge of a woman whilst she was under the belief of its being her husband would be a rape, but the other eight judges thought it would not: and *Dallas* C.J.

(1) (1915) V.L.R. 289.
(2) (1919) V.L.R. 205, at p. 213.
(3) (1947) V.L.R. 392.
(4) (1919) V.L.R., at p. 212.

H. C. OF A. 1957.

PAPADIMITROPOULOS v. THE QUEEN.

Dixon C.J. McTiernan J. Webb J. Kitto J. Taylor J.

pointed out forcibly the difference between compelling a woman against her will, when the abhorrence which would naturally arise in her mind was called into action, and beguiling her into consent and co-operation; but several of the eight judges intimated that if the case should occur again they would advise the jury to find a special verdict": *R.* v. *Jackson* (1). The case did occur again. In *Reg.* v. *Saunders* (2) it appeared that the person had got into a married woman's bed and by personating her husband had connexion with her. *Bayley* J. directed the jury that he was bound to tell them that the charge of rape was not made out "as the crime was not committed against the will of the prosecutrix, as she consented believing it to be her husband." *Alderson* B. applied the same law in a similar case in the same year: *Reg.* v. *Williams* (3). Twelve years later a case arose for the consideration of the judges in which a prisoner who was a medical man had been convicted of assault on evidence that he had induced a girl of fourteen years of age to submit to his having connexion with her by leading her to believe that it was but "medical treatment for the ailment under which she laboured": the conviction was affirmed: *Reg.* v. *Case* (4). In 1854 another case was reserved for the judges in which a prisoner had been convicted of rape on evidence that he impersonated the woman's husband and so obtained her assent to sexual intercourse. The judges declined to permit the question to be re-opened and followed *Jackson's Case* (1): *Reg.* v. *Clarke* (5).

In 1868 the Court of Crown Cases Reserved quashed a conviction of rape based on a similar impersonation. "It falls", said *Bovill* C.J. for the judges, "within the class of cases which decide that, when consent is obtained by fraud, the act does not amount to rape": *Reg.* v. *Barrow* (6). In *Reg.* v. *Young* (7) the court upheld a conviction of a man who had connexion with a sleeping woman who, when she first woke, thought the man was her husband, and then discovering it was not threw him off. In the course of the reasons doubts were raised about the decisions beginning with *Jackson's Case* (1). In Ireland the court refused to follow the reasoning: *R.* v. *Dee* (8). In the meantime the Court of Crown Cases Reserved

(1) (1822) Russ. and Ry. 487 [168 E.R. 911].
(2) (1838) 9 Car. & P. 265 [173 E.R. 488].
(3) (1838) 8 Car. & P. 286 [173 E.R. 497].
(4) (1850) 1 Den. 580 [169 E.R. 381].
(5) (1854) Dearsly 397 [169 E.R. 779].
(6) (1868) L.R. 1 C.C.R. 156.
(7) (1878) 38 L.T. 540; 14 Cox C.C. 114.
(8) (1884) 15 Cox C.C. 579.

in *Reg.* v. *Flattery* (1) had questioned the decision in *Barrow's Case* (2). The facts resembled those in *Reg.* v. *Case* (3) except that the prisoner was not a medical man but a quack, and the representations about his giving some form of treatment were put to the mother as well as the girl, and in a form which might well have excited the mother's suspicions. *Field* J. said: "The question is one of consent, or not consent; but the consent must be to sexual connexion. There was no such consent." This decision was strongly criticised by Sir *James Fitzjames Stephen* in his *Digest of the Criminal Law*, 3rd ed. (1883), at p. 185, on the ground that it almost overruled the principle "that where consent is obtained by fraud the act does not amount to rape." At this point a declaration of the law was made by statute. Section 4 of the *Criminal Law Amendment Act* 1885 (48 & 49 Vict. c. 69) (Imp.) after reciting that doubts had been entertained whether a man who induces a married woman to permit him to have connexion with her by personating her husband is or is not guilty of rape, enacted and declared that every such offender should be deemed to be guilty of rape (cf. now *Sexual Offences Act* 1956 (4 & 5 Eliz. II c. 69), s. 1 (2)).

The next judicial step was taken in the case of *Reg.* v. *Clarence* (4). The decision was simply that a husband who infects his wife with venereal disease is not thereby guilty of inflicting grievous bodily harm. But this led to the judges' giving much consideration to what was involved in the wife's consent, ignorant as she was of her husband's condition. The judgments contain many observations which are pertinent to the distinction upon which this case turns. For example, in the judgment of *Wills* J. there is to be found, to say the least of it, a dyslogistic description of a fraud that will afford no basis for treating the woman's consent as a nullity and the act of intercourse as rape. "Take, for example," said his Lordship "the case of a man without a single good quality, a gaol-bird, heartless, mean and cruel, without the smallest intention of doing anything but possessing himself of the person of his victim, but successfully representing himself as a man of good family and connections prevented by some temporary obstacle from contracting an immediate marriage, and with conscious hypocrisy acting the part of a devoted lover, and in this fashion, or perhaps under the guise of affected religious fervour, effecting the ruin of his victim" (5). The conception which *Wills* J. had of what sufficed

(1) (1877) 2 Q.B. 410.
(2) (1868) L.R. 1 C.C.R. 156.
(3) (1850) 1 Den. 580 [169 E.R. 381].
(4) (1888) 22 Q.B.D. 23.
(5) (1888) 22 Q.B.D., at pp. 29, 30.

H. C. OF A. 1957.

PAPADIMITROPOULOS v. THE QUEEN.

Dixon C.J. McTiernan J. Webb J. Kitto J. Taylor J.

to vitiate consent is expressed as follows : " The essence of rape is, to my mind, the penetration of the woman's person without her consent. In other words it is, roughly speaking, where the woman does not intend that the sexual act shall be done upon her either at all, or, what is pretty much the same thing, by the particular individual doing it, and an assault which includes penetration does not seem to me under such circumstances to be anything but rape " (1). *Stephen* J. (2) refers to the conflict between the decision in *Reg.* v. *Barrow* (3) and the Irish decision in *Reg.* v. *Dee* (4) and remarks that the decisions were examined minutely in the latter case. *Stephen* J. proceeded : " I think they justify the observation that the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act " (5). *Field* J. speaks of the woman's consenting to the act of intercourse yet not consenting to it in its actual nature and conditions, and he again says that a consent obtained to one act is not a consent to an act of a different nature (6).

In *R.* v. *Williams* (7) a new version of the " medical treatment " cases was dealt with by the Court of Criminal Appeal. This time it was a singing master and the pretence was that the treatment was for breathing. Possibly the case went a little further than *Reg.* v. *Case* (8) and *Reg.* v. *Flattery* (9) but, if so, that is only with reference to the complexion the facts were given. The materiality of the case lies only in a broad statement which Lord *Hewart* C.J. quoted from a text book. " ' A consent or submission obtained by fraud is, it would seem, not a defence to rape or cognate offences ' " (10). It is interesting to notice that this statement is the contradictory of that of Sir *James Fitzjames Stephen* in the note in his *Digest* quoted above, in which he describes the principle to be " that where consent is obtained by fraud the act does not amount to rape." It is the contradictory too of that made by *Bovill* C.J. in *Reg.* v. *Barrow* (3) also quoted above. From what has been said already, however, it should be clear enough that the truth lies between the two opposing generalisations.

In the language of a note to the Canadian decision of *R.* v. *Harms* (11), fraud in the inducement does not destroy the reality of the

(1) (1888) 22 Q.B.D., at p. 34.
(2) (1888) 22 Q.B.D., at p. 43.
(3) (1868) L.R. 1 C.C.R. 156.
(4) (1884) 15 Cox C.C. 579.
(5) (1888) 22 Q.B.D., at p. 44.
(6) (1888) 22 Q.B.D., at pp. 60, 61.
(7) (1923) 1 K.B. 340.
(8) (1850) 1 Den. 580 [169 E.R. 381].
(9) (1877) 2 Q.B. 410.
(10) (1923) 1 K.B., at p. 347.
(11) (1944) 2 D.L.R. 61.

apparent consent ; fraud in the factum does. The note distinguishes " between the type of fraud which induces a consent that would not otherwise have been obtained but which is none the less a valid consent and the type of fraud which prevents any real consent from existing." The same distinction exists in relation to fraud inducing marriage itself. In *Moss* v. *Moss* (1), Lord *St. Helier*, as he afterwards became, said : " It has been repeatedly stated that a marriage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down (*Fulwood's Case* (2)) that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent " (3).

In Canada there are three decisions which are of assistance in applying the distinction.

In *State of California* v. *Skinner* (4) extradition to California was refused by the Court of British Columbia in a case of rape where the charge was based upon the view that consent was vitiated by fraud consisting of a feigned marriage. A form of marriage had been gone through by the woman in 1919 believing it was genuine, but no licence to marry had been obtained and the supposed clergyman performing the ceremony had no authority to celebrate marriages and was not a minister of religion. About four years later the woman discovered the fraud. The decision turned not so much on the law of California as upon that of Canada, by which rape was defined as follows :—" Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats of fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act " : s. 298 of the *Canadian Criminal Code*. It was held that the definition did not cover deception of the kind under consideration. The learned county judge, *Cayley* J., repeated the language of *Stephen* J. (5) : " cases of fraud as to the nature of the act done " and said : " This before me is not that kind of fraud at all. The woman here knew the nature of the act " (6).

(1) (1897) P. 263.
(2) (1638) Cro. Car. 482, at pp. 488, 493.
(3) (1897) P. 263, at pp. 268, 269.
(4) (1924) 33 Brit. Colum. Rep. 555.
(5) (1888) 22 Q.B.D., at p. 44.
(6) (1924) 33 Brit. Colum. Rep., at p. 558.

H. C. OF A. 1957. PAPADIMITROPOULOS v. THE QUEEN. Dixon C.J. McTiernan J. Webb J. Kitto J. Taylor J.

In *R.* v. *Harms* (1), the Court of Appeal in Saskatchewan sustained a conviction for rape based on the "medical treatment" cases. One may perhaps think that the facts went outside the limits of those cases. For, when all the humbug of treatment had been gone through and "Dr. Harms" proceeded to the sexual act, the woman, who understood what he was doing, resisted, but later was persuaded to submit. The editorial note makes the comments:—"In the present case the complainant appreciated the nature of the act but submitted because she thought that it was a necessary part of a medical treatment. Is there not in such circumstances a real consent?" (2).

In *R.* v. *Arnold* (3), although there seems to have been sufficient evidence of rape overcoming resistance, there was also evidence that the man had a little earlier held out some false promises or representations to induce consent. The defence was consent. As to this the jury were directed as follows:—"And the consent, if it be a consent, given by the woman, must be obtained without threats, inducements or anything of the kind, and must be freely and voluntarily given by the woman" (4). This was held a clear misdirection.

It must be noted that in considering whether an apparent consent is unreal it is the mistake or misapprehension that makes it so. It is not the fraud producing the mistake which is material so much as the mistake itself. But if the mistake or misapprehension is not produced by the fraud of the man, there is logically room for the possibility that he was unaware of the woman's mistake so that a question of his *mens rea* may arise. So in *R.* v. *Lambert* (5), *Cussen* J. says:—"It is plain that, though in these cases the question of consent or non-consent is primarily referable to the mind of the woman, if she has really a mind, yet the mind of the man is also affected by the facts which indicate want of consent or possible want of capacity to consent" (6). For that reason it is easy to understand why the stress has been on the fraud. But that stress tends to distract the attention from the essential inquiry, namely, whether the consent is no consent because it is not directed to the nature and character of the act. The identity of the man and the character of the physical act that is done or proposed seem now clearly to be regarded as forming part of the nature and character of the act to which the woman's consent is directed. That accords

(1) (1944) 2 D.L.R. 61.
(2) (1944) 2 D.L.R., at p. 62.
(3) (1947) 2 D.L.R. 438.
(4) (1947) 2 D.L.R., at p. 440.
(5) (1919) V.L.R. 205.
(6) (1919) V.L.R., at p. 213.

with the principles governing mistake vitiating apparent manifestations of will in other chapters of the law.

In the present case the decision of the majority of the Full Court extends this conception beyond the identity of the physical act and the immediate conditions affecting its nature to an antecedent inducing cause—the existence of a valid marriage. In the history of bigamy that has never been done. The most heartless bigamist has not been considered guilty of rape. Mock marriages are no new thing. Before the *Hardwicke Marriage Act* it was a fraud easily devised and readily carried out. But there is no reported instance of an indictment for rape based on the fraudulent character of the ceremony. No indictment of rape was founded on such a fraud. Rape, as a capital felony, was defined with exactness, and although there has been some extension over the centuries in the ambit of the crime, it is quite wrong to bring within its operation forms of evil conduct because they wear some analogy to aspects of the crime and deserve punishment. The judgment of the majority of the Full Court of the Supreme Court goes upon the moral differences between marital intercourse and sexual relations without marriage. The difference is indeed so radical that it is apt to draw the mind away from the real question which is carnal knowledge without consent. It may well be true that the woman in the present case never intended to consent to the latter relationship. But, as was said before, the key to such a case as the present lies in remembering that it is the penetration of the woman's body without her consent to such penetration that makes the felony. The capital felony was not directed to fraudulent conduct inducing her consent. Frauds of that kind must be punished under other heads of the criminal law or not at all: they are not rape. To say that in the present case the facts which the jury must be taken to have found amount to wicked and heartless conduct on the part of the applicant is not enough to establish that he committed rape. To say that in having intercourse with him she supposed that she was concerned in a perfectly moral act is not to say that the intercourse was without her consent. To return to the central point; rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.

H. C. OF A. 1957.

PAPADIMITROPOULOS v. THE QUEEN.

The application for special leave should be granted. The hearing of the application should be treated as the hearing of the appeal. The appeal should be allowed and the conviction quashed.

Special leave to appeal granted. Hearing of the application for special leave to be treated as the hearing of the appeal. Appeal allowed. Conviction quashed.

Solicitors for the applicant, *J. W. & F. Galbally.*

Solicitor for the respondent, *Thomas F. Mornane,* Crown Solicitor for the State of Victoria.

R. D. B.