SWEET v. PARSLEY: DISAPPOINTMENT AND DANGER

Somewhat like the latest box-office smash the decision in *Sweet v. Parsley,* now reported,[1] falls somewhat short of its advance notices. The first report in *The Times* (January 24, 1969) of what had by then become a cause célèbre suggested that the House of Lords may finally have clarified the muddy waters of strict liability.[2] A reading of the full report leads to the conclusion that the House of Lords said nothing which had not been said at least twenty-three years earlier by Lord Goddard C.J. in *Brend v. Wood*[3] in so far as statutory crime is concerned, and eighty years earlier by Stephen J. in *R. v. Tolson*[4] in so far as common law crime is concerned, namely that (and I paraphrase both decisions) 'the full definition of every crime contains expressly or by implication a proposition as to a state of mind and that unless the statute in case of statutory crime either clearly or by necessary implications rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.' It is shocking that this case should have had to go as far as it did for a re-statement of these seemingly elementary principles of criminal justice.

The accused, Miss Sweet, was the tenant of a farm house near Oxford. She sublet rooms to various tenants. While she herself had a room reserved for her occasional use, she actually lived several miles away. Unknown to her (and this was admitted by the prosecution) some of the tenants used marijuana on the premises and ultimately a police search revealed this fact. Despite her lack of knowledge of such forbidden use of the premises[5] Miss Sweet was convicted. Her appeal to the Divisional Court was dismissed. The Divisional Court originally refused leave to appeal to the House of Lords. But the public outcry which followed a letter to *The Times* by Miss Sweet's uncle, the noted poet and scholar Robert Graves, led to sober second thoughts, the granting of leave to appeal and finally a successful appeal to the House of Lords. (In the course of his judgment Lord Reid[6] remarked: "fortunately the press in this country are vigilant to expose injustices." One wonders, unhappily, about those less fortunate

1. [1969] 2 W.L.R. 470, [1969] 1 All E.R. 347 (H. of L.).
2. The use of this term rather than the term "absolute liability" is discussed more fully later in this note.
3. (1946) 174 L.T. 306; 110 J.P. 317; 62 T.C.R. 462.
4. (1889) 23 Q.B.D. 168.
5. Section 5 of the Dangerous Drugs Act (1965) reads in part as follows:
   "If a person—(a) being the occupier of any premises, permits those premises to be used for the purpose of smoking . . . cannabis resin . . . or (b) is concerned in the management of any premises used for such purpose as aforesaid, he shall be guilty of an offence against this Act."
6. The House in this case was composed of Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Wilberforce and Lord Diplock.

in their choice of uncles than Miss Sweet who have no one of rank or status to write letters to the editor for them.)

While all their Lordships (with the exception of Lord Wilberforce who stopped with what he himself termed a prosaic interpretation of the Subsection) commented at length on the question of *mens rea* in criminal offences, the actual decision rested on an interpretation of the meaning of the following term in the Subsection: "a person . . . concerned in the management of any premises (used for the forbidden purpose". Their Lordships unanimously held on that question that the said term must be narrowly interpreted as referring only to one who manages premises actually and specifically for the forbidden purposes, and does not apply to a person who manages premises for a legal purpose but on which premises unknown to the manager someone is conducting an illegal activity.

Only Lord Diplock commented at length on the unsatisfactory and ambiguous use of the terms "absolute liability" and *"mens rea"* and sought to go beyond a mere re-statement of established principles.

As Taschereau J. (Later C.J. Supreme Court of Canada) stated in *R. v. King:*[7] "These words *mens rea,* though they are in common use, are, as Stephen J. said in *Tolson* . . . most unfortunate and not only likely to mislead but actually misleading". What is often forgotten is the fundamental point made by Stephen J. in *Tolson ,supra,* namely that the mental element of "different crimes differ widely" and that "in every case knowledge of facts is to some extent an of criminality as much as competent age and sanity". Thus the term *mens rea* may at times be used when an "active" state of mind is being considered, i.e., intention or recklessness, or it may be used when it is the accused's knowledge of material facts which is at issue: (One thinks of the oft-repeated dictum of Sir Richard Couch in *Bank of New South Wales v. Piper,*[8] that "the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent").

It is this distinction between the mental state of intending a prohibited act or being reckless thereto on the one hand, and the mental state of knowing particular and material facts on the other which is blurred by the term *mens rea;* and the failure to make the distinction is, it is submitted, the cause of much of the apparent confusion in terminology between the use of the terms "strict liability" and "absolute liability." I have long urged that the term "absolute liability"

7. [1962] S.C.R. 746.
8. [1897] A.C. 383, 76 L.T. 572.

should be confined to those crimes in which even ignorance of material fact is no excuse, and the term "strict liability" be used only to describe those offences with respect to which Parliament has said or implied that lack of intention or recklessness is no excuse, but has not thereby ruled out as a defence lack of knowledge of or an honest mistake as to material facts.

There has been a welcome post-war trend in clarifying the law in this area (e.g., *Harding v. Price*[9] and *Lim Chin Aik v. The Queen*[10] and Lord Diplock's judgment in the *Sweet* case constitute an admirable summary of these developments. It is regrettable, however, that in a most opportune case the entire House did not lay down clear principles in this area.

There is one other significant point which arises from the Judgments upon which comment must be made at this time.

In the *Sweet* case three of the members of the House, Lord Reid, Lord Pearce and Lord Diplock, dealt with a suggestion first advanced in 1968 in *Warner's* case,[11] namely, that in order to ease the burden on the Crown consequent upon rigid adherence to the requirement of proof of *mens rea* beyond a reasonable doubt, a "half-way house" (Lord Pearce's phrase) ought to be adopted pursuant to which an accused while permitted the defence of honest mistake would have the burden of proof of such mistake cast upon him. Lord Reid and Lord Pearce recognized the difficulty placed in the way of such an approach by the *Woolmington* decision.[12] Lord Reid in fact spoke of this difficulty as one of the "bad effects" of the decision, while Lord Pearce stated that there were many cases where the width of Viscount Sankey L.C.'s opinion in *Woolmington, supra,* had "caused awkward problems". Both their Lordships purported to find support in Australian jurisprudence for the proposition that there should be a burden placed upon an accused of proving a mistake of fact on the balance of probabilities. However, Lord Diplock found in Australian jurisprudence no stricter rule than that there is at most an *evidentiary burden* on an accused who seeks to rely on a particular defence such as mistake of act, but once there is some evidence for the jury to consider the general rule as to *onus probandi* remains as it was first enunciated in *Woolmington.* It is submitted that Lord Diplock's approach is sounder, and is preferable on policy grounds to the unfortunate attack now underway against the "golden thread" rule propounded in *Woolmington.*

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9. [1948] 1 All E.R. 283.
10. [1962] A.C. 160, 174.
11. **Warner v. Metropolitan Commissioner** (H. of L.) [1968] 2 W.L.R. 1303; [1968] 2 All E.R. 365.
12. **Woolmington v. D.P.P.** [1935] A.C. 462.

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