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MANN C.J.

THE QUEEN v. KAIM KAIM.

In this case I came to the conclusion at the end of the trial that the argument advanced by Mr. Smith on behalf of the accused was sound, and that since the verdict depended wholly upon the outcome of that argument, the only possible verdict was Not Guilty. I accordingly entered that verdict and released the prisoner forthwith, indicating that I would give my reasons as soon as practicable thereafter.

The charge upon which the accused was presented was for contravention of Section 420A of the Criminal Code the substance of which Section so far as it affects this case, is to prohibit a person from being upon premises of another with intent indecently to insult or annoy any female inmate.

There are two elements of the offence, first, being on the premises of another person, and, second, the intent specified.

The evidence shows that the accused, who was a native, was employed as a house-boy by the householders, and that he lived in a "boy house" outside the main domestic building and situated not far from that building.

On the night in question, the accused, at about 12.40 a.m. when his employers, a married couple, were about to retire for the night, climbed on to the roof and looked in through the window after the light was extinguished. He was seen by the husband who saw the face of the accused in the darkness.

There is no suggestion that the accused had any intention of entering the house or disturbing the occupants in any way. It is clear that he was simply a "peeping Tom" and the idea of making his presence known to either inmate was entirely contrary to his wishes. The evidence shows that he wanted to watch the couple "kissing", as he explained. He gave a false excuse, that he went onto the roof to get pawpaws. He was a native of the Morobe District, a long way from home, and apart from natural curiosity on his part, there is no suggestion of vice or any evil intention.

I was invited by Mr. Mallon for the Crown to follow the previous ruling of this Court that the Section covered "peeping Tom" cases. There has been, however, no systematic record of reasons for Judgment in this Court, and although I have ascertained from correspondence and other

sources that this broad view has been expressed on several occasions, I can find no material which would afford reliable and authoritative guidance as to the limits of such an interpretation. "Peeping Tom" cases cover such a wide range of conduct and circumstances that I think it entirely wrong to regard this Section simply as "the peeping Tom" Section and arbitrarily bring all cases within it, for no better reason than that there is no other Section in force. It is clearly the Court's duty to construe the provision according to principle and with the aid of any available authorities.

On the first point, some difficulty arises since the Section is apparently designed not to intrude into the realm of a person's private home and is accordingly limited to conduct of a person in or upon any dwelling-house "of another". The element of trespass in some degree must therefore be present. The non-technical words "dwelling house of another"" and "female inmate thereof" indicate that no particular tenure of the property is required, and that the criterion is whether the person concerned lived there. The accused lived and was required to live in the boy-house, and undoubtedly had a licence to go elsewhere on the property for any reasonable and lawful purpose. Under different circumstances it may well have been an implied duty of his to go where he did, and it may have been quite proper at a different time or under different circumstances to look through the window.

I think that in the words of the Section it is impossible to say that the accused was in or upon "the dwelling house of another" if he was really in his own home. To what extent then may it be said that his right might be limited to proper purposes? In Harrison v. Duke of Rutland (1893) 1 Q.B. 142 and other cases noted in 2nd Halsbury XXXIII, p. 8, it is clear that where a right of the nature of a right of way is abused, the person concerned may be a trespasser.

The evidence although not entirely clear on the point, does indicate that he went to a part of the property of his employer which would be outside his own "home" if his whole purpose was entirely unlawful. In such an event, he would come within the principle explained in the Duke of Rutland's case and he would be a trespasser at common law. He could not therefore be said to be in his own home. I think that this is the true position here and that he was therefore a trespasser. (See as to the lawfulness or otherwise of his conduct Haisman v. Smelcher (1953) V.L.R. 625). The whole question therefore depends upon the second ingredient of the alleged offence, i.e. the intent.

226

Mr. Mallon referred to R. v. Price (1919) (? 1929) N.Z.G.L.R. 410. Unfortunately the full report is not available in the Territory but in Q.J.P. Vol. 49 p. 105 there appears a reference to the case suggesting that a child actually observed certain behaviour of an objectionable nature and that the real question was whether she was likely to be insulted or annoyed by it, having regard to her age or some other factor. The Court applied the test of what would be likely to annoy an ordinary female person and finding that the evidence satisfied this test, imputed to the accused the intent referred to in the Section.

I do not think that this is direct authority applicable to the facts of the present case, since there the conduct was observed, and as far as the extract referred to discloses, was intended to be observed in fact. The case does appear to assist the prosecution to this extent, however, that it suggests that an imputed intention based on objective considerations is to be applied. Even if a full report of the case revealed that the decision was fully applicable to the present case, I would not follow it, since in my opinion subsequent cases of greater authority make the position clear.

Mr. Smith for the Defence based his argument on the passages appearing in Glanville Williams on Criminal Law "The General Part" on pp. 35 (para. 13) and 77-81 (para. 27) and 705 (para. 228). Mr. Smith adds that the author's conclusion that there may be cases in which the result of one's actions becomes so much a matter of certainty as to give rise to a conclusive presumption that the result was intended must now be reconsidered in the light of the subsequent case of Lang v. Lang (1955) All. Eng. L.R. 402, at p. 428.

I think that no purpose would be served by detailed analysis of the earlier authorities which are clearly dealt with by Professor Glanville Williams. Taking into account Lang's case I think that the general principle applicable to all cases of intent may be stated thus:-

"It is the person's actual intent that is material and there is no legal fiction which can establish intent contrary to the fact. Intent means purpose, reason, desired end, as distinct from wish, motive or desire. It is the state of the will of the person concerned at the relevant time, which may be proved by direct evidence or admissions from the accused himself or may be established by inference from his conduct and surrounding circumstances. There is no irrebuttable presumption of law that a person intends the natural results of his actions, however obvious. It is a matter of weight of evidence. Where the fact of intent is in issue upon the evidence the onus of establishing that fact rests on the Crown.

There cannot be inconsistent intentions where an intention exists at all. The Court must ascertain by inference or otherwise what the real intention was and where such an inference is indicated by clear course of conduct, some apparently conflicting intention may on analysis become relegated to a mere wish or desire which cannot replace the inferred intention. If however, the evidence shows that the contrary intention is real and not merely a conflicting wish or desire the inference must fall.

In this case the evidence shows that the accused intended to avoid being seen and to avoid doing anything which could annoy or even disturb the female inmate of the house. Therefore there is in my opinion no justification for imputing to him the intent specified in the Section. If he had intended to attract the notice of the female inmate or do some act which to his knowledge must necessarily come to her notice, then some conflicting wish on his part that he might somehow escape detection or notice would not displace his real intention, but in this case I am satisfied that his real intention was not to be noticed or to do anything that might come to her notice.

(Sgd.) Alan Mann.

C.J.