
REX v. BOURNE

CENTRAL CRIMINAL COURT

Macnaghten, J.

18-19 July 1938.

Syllabus: A young girl, not quite 15 years of age, was pregnant as the result of rape. A surgeon, of the highest skill, openly, in one of the London hospitals, without fee performed the operation of abortion. He was charged under the Offences against the Person Act 1861, s. 58, with unlawfully procuring the abortion of the girl.

The jury were directed that it was for the prosecution to prove beyond reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of the girl. The surgeon had not got to wait until the patient was in peril of immediate death, but it was his duty to perform the operation if, on reasonable grounds and with adequate knowledge, he was of opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck.

[**Editorial Note:** As the accused was found not guilty, the statement as to the law in this matter is in the form of the direction to the jury. The judge carefully distinguishes between danger to life and danger to health, and between the act of the professional abortionist and an operation openly performed by a qualified surgeon. The case is one of first impression, and is, therefore, the only statement of the law as to the duties of a surgeon in such cases. As to Abortion, see HALSBURY (Hailsham Edn.), Vol. 9, pp. 458-460, paras. 783-785; and for Cases, see Digest, Vol. 15, pp. 836-838, Nos. 9190-9205.]

TRIAL OF AN INDICTMENT WITH A JURY. The defendant was charged under the Offences against the Person Act 1861, s. 58, that he unlawfully procured the abortion of a girl aged about 15 years. The facts are fully stated in the summing up.

The Attorney-General (Sir Donald Sumervell K.C.), L. A. Byrne and H. Elam for the Crown;

Roland Oliver K.C., and Gerald Thesiger for the defendant.

MACNAGHTEN J. Members of the jury, now that you have heard all the evidence and the speeches of counsel, it becomes my duty to sum up the case to you and to give you the necessary directions in law, and then it will be for you to consider the facts in relation to the law as laid down by me, and, after consideration, to deliver your verdict. You no doubt are aware that, under our system for the administration of justice, in a trial by jury it is for the judge to give directions to the jury upon matters of law, and it is for the jury to determine the facts. The jury, and the jury alone, are the judges of the facts in the case.

The charge against Mr. Bourne is the very grave charge under the Offences against the Person Act 1861, s. 58, that he unlawfully procured the abortion of the girl who was the first witness in the case. It is so grave a crime that the punishment may be penal servitude for life. It is one of those crimes, like murder, which is only triable by the judges of the High Court, and, judging by the cases that come before the court, [3 All E. R. 616] it is a crime by no means uncommon. This is the second case at these July sessions at this court where a charge of an offence against that section has been preferred, and I mention that case only to show you how different the case now before you is from the type of case which usually comes before a criminal court. In that case, a woman without any medical skill or any medical qualifications did what is alleged against Mr. Bourne here: she unlawfully used an instrument for the purpose of procuring the miscarriage of a pregnant girl. She did it for money. £2 5s. was her fee, and she came from a distance to a place in London to do it. £1 had to be paid to make the appointment. She came, she used her instrument, and, within an interval of time measured not by minutes but by seconds, the victim of her malpractice was dead on the floor. She was paid the rest of her fee and she went away. That is the class of case that usually comes before the court. The case here is very different. A man of the highest skill, openly, in one of our great hospitals, performs the operation. Whether it was legal or illegal you will have to determine, but he performs the operation as an act of charity, without fee or reward, and unquestionably believing that he was doing the right thing, and that he ought, in the performance of his duty as a member of a profession devoted to the alleviation of human suffering, to do it. That is the case that you have to try today.

It is, I think, true that it is a case of first instance, first impression. So far as I know, the matter has never arisen before a jury for them to determine in circumstances such as these, and there was, it seems, even amongst counsel some doubt as to what was the proper expression of the law in such a case as this. So, yesterday, in response to a request by Mr. Oliver, I indicated to you my view of the law. You will take the law from me. If I err in stating to you what the law is, and if you find the accused guilty, there is a Court of Criminal Appeal which will put the matter right. I have had an opportunity of reading the direction that I gave you yesterday, and I see no reason to alter or to modify it at all. The question that you have got to determine is whether the Crown has proved to your satisfaction beyond reasonable doubt that the act which Mr. Bourne admittedly did was not done in good faith for the purpose only of preserving the life of the girl. If the Crown has failed to satisfy you of that, Mr. Bourne is entitled, by the law of this land, to a verdict of acquittal. On the other hand, if you are satisfied beyond all real doubt that Mr. Bourne did not do it in good faith for the purpose only of preserving the life of the girl, your verdict should be a verdict of guilty.

There has been much discussion before you as to the meaning of the words "preserving the life of the mother." I will deal with that in a moment, but, before doing so, I desire to say that I fully

agree with the criticism of Mr. Oliver that the Infant Life (Preservation) Act 1929, is dealing with the case--indeed, I think I explained it to you yesterday--where the child is killed while it is being delivered from the body of [617] the mother. It provides that no one is to be found guilty of the offence created by the Act--namely, "child destruction"--unless it is proved that:

' the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.'

Those words express what, in my view, has always been the law with regard to the procuring of an abortion, and, although not expressed in s. 58 of the Act of 1861, they are implied by the word "unlawful" in that section. No person ought to be convicted under s. 58 of the Act of 1861 unless the jury are satisfied the act was not done in good faith for the purpose only of preserving the life of the mother. My view is that it has always been the law that the Crown have got to prove the offence beyond reasonable doubt, and it has always been the law that, on a charge of procuring abortion, the Crown have got to prove that the act was not done in good faith for the purpose of preserving the life of the mother. It is said--and, I think, rightly--that this is a case of great importance to the public, and more especially to the medical profession, but you will observe that it has nothing to do with the ordinary cases of procuring abortion to which I have already referred. In those cases, the operation is performed by a person of no skill, with no medical qualifications, and there is no pretence that it is done for the preservation of the mother's life. Cases of that sort are in no way affected by the consideration of the question that is put before you. In the ordinary cases, no question of that sort can arise. It is obvious that that defence could not be available to the professional abortionist. As I say, you have heard a great deal of discussion as to the difference between danger to life and danger to health. It may be that you are more fortunate than I am, but I confess that I have felt great difficulty in understanding what the discussion really meant. Life depends upon health, and it may be that health is so gravely impaired that death results. There was one question that was asked by the Attorney-General in the course of his cross-examination of Mr. Bourne, where the matter was put thus:

'I suggest to you, Mr. Bourne, that there is a perfectly clear line--there may be border-line cases--there is a clear line of distinction between danger to health and danger to life?'

That is the question that the Attorney-General put, and he assumes that it is so. Is it? Of course there are maladies that are a danger to health without being a danger to life. Rheumatism, I suppose, is not a danger to life, but a danger to health. Cancer is plainly a danger to life. But is there a perfectly clear line of distinction between danger to life and danger to health? I should have thought not. I should have thought that impairment of health might reach a stage where it was a danger to life. The answer of Mr. Bourne was:

'I cannot agree without qualifying it. I cannot say just yes or no. I can say there is a large group whose health may be damaged, but whose life almost certainly [618] will not be sacrificed. There is another group at the other end whose life will be definitely in very great danger.'

Then he added:

'There is a large body of material between those two extremes in which it is not really possible to say how far life will be in danger, but we find, of course, that the health is depressed to such an extent that their life is shortened, such as in cardiac cases, so that you may say that their life is in danger, because death might occur within measurable distance of the time of their labour.'

He is speaking of a case such as this. If that is a view which commends itself to you, so that you cannot say that there is this division into two separate classes with a dividing line between them, then it may be that you will accept the view that Mr. Oliver put forward when he invited you to give to the words "for the purpose of preserving the life of the mother" a wide and liberal view of their meaning. I would prefer the word "reasonable" to the words "wide and liberal." Take a reasonable view of the words "for the preservation of the life of the mother." I do not think that it is contended that those words mean merely for the preservation of the life of the mother from instant death. There are cases, we were told--and indeed I expect you know cases from your own experience--where it is reasonably certain that a woman will not be able to deliver the child with which she is pregnant. In such a case, where the doctor expects, basing his opinion upon the experience and knowledge of the profession, that the child cannot be delivered without the death of the mother, in those circumstances the doctor is entitled--and, indeed, it is his duty--to perform this operation with a view to saving the life of the mother, and in such a case it is obvious that the sooner the operation is performed the better. The law is not that the doctor has got to wait until the unfortunate woman is in peril of immediate death and then at the last moment snatch her from the jaws of death. He is not only entitled, but it is his duty, to perform the operation with a view to saving her life.

Here let me diverge for one moment to touch upon a matter that has been mentioned to you--namely, the various views which are held by different people with regard to this operation. Apparently there is a great divergence of view even in the medical profession itself. Some there may be, for all I know, who hold the view that the fact that the woman desires the operation to be performed is a sufficient justification for it. That is not the law. The desire of a woman to be relieved of her pregnancy is no justification for performing the operation. On the other hand, no doubt there are people who, from what are said to be religious reasons, object to the operation being performed at all, in any circumstances. That is not the law either. On the contrary, a person who holds such an opinion ought not to be a doctor practising in that branch of medicine, for, if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of some religious opinion, and the woman died, he would be in grave peril of being brought before this court on a charge of man-[619]slaughter by negligence. He would have no better defence than would a person who, again for some religious reason, refused to call in a doctor to attend his child, where a doctor could have been called in and the life of the child saved. If the father, for a so-called religious reason, refused to call in a doctor, he also would be answerable to the criminal law for the death of his child. I mention those two extreme cases merely to show that the law--whether or not you think it a reasonable law is immaterial--lies at any rate between those two. It does not permit of the termination of pregnancy except for the purpose of preserving the life of the mother. As I have said, I think that those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are

quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman.

These general considerations have got to be applied to the particular facts of this case. The verdict of the jury must depend on the facts of the case proved before them. No doubt--and I think the evidence now makes it clear--it is very undesirable that a young girl should be delivered of a child. Parliament has recently raised the age of marriage for a girl from 12 to 16, presumably on the view that it is very undesirable that a girl under the age of 16 should marry and have a child. The medical evidence given here establishes that view. Apparently the pelvic bones are not set until a girl is 18, and it is an observation that appeals to one's common sense that it must be undesirable that a girl should go through the state of pregnancy, and, finally, of labour, when she is of tender years. Then, too, you must consider the evidence about the effect of rape, especially on a child, as this girl was, under the age of 15. Within the last ten days she has reached the age of 15. Here you have the evidence of Dr. Rees, a gentleman of eminence in the profession, that, from his experience and his knowledge, the mental effect produced by pregnancy brought about by the terrible rape which Dr. Gorsky described to you must be most prejudicial. You are the judges of the facts, and it is for you to say what weight you give to the testimony of the witnesses, but no doubt you will think it is only common sense that a girl who for 9 months has to carry in her body the reminder of the dreadful scene and then go through the pangs of childbirth must suffer great mental anguish, unless, indeed, she is a girl of a very exceptional character, such as a feeble-minded girl, or one belonging to the class described as "the prostitute class," some girl "marked cross from the womb and perverse." In the case of an ordinary decent girl, brought up in an ordinary decent way, you may well think that Dr. Rees was not over-stating the effect on her mind of giving birth to her child. So far as danger to life is concerned, you cannot, of course, be certain of the [620] result unless you wait until a person is dead. Nobody suggests that the operation only becomes legal when a patient is dead. The case was mentioned of a person suffering from acute appendicitis, and the circumstances that would justify the surgeon in performing the operation for the removal of the appendix. Take the case of a child suffering from symptoms which the doctor diagnoses as appendicitis. The symptoms subside, and the doctor says: "The symptoms have subsided, and the child will probably get quite well, but at the same time I am not sure that they have definitely subsided, and tomorrow the child may be much worse." The doctor says to the parents: "If you will let me operate today, I can guarantee the life of your child. The operation can be performed, and can be performed with perfect safety. If, however, the child gets worse, and the appendicitis becomes acute, I may have to operate, and I will have to operate then in such circumstances that I cannot guarantee the life of the child. I will do my best, but the child may die." Supposing that choice is put to a parent: "Will you have the operation today or will you wait until tomorrow to see if the operation becomes immediately necessary?" What man or woman can answer the question except by saying: "Do it, and do it now. Do it while it is still safe to do it. Do not wait to see whether she is near death." When the operation is performed, it may be found that the appendix is not inflamed, and that the diagnosis was mistaken, but is the surgeon to blame for performing the operation? He used his best judgment. There you have a case where only the result can prove whether the diagnosis was right or wrong, whether the anticipation was right or wrong. In the case that we are considering--that of the danger to the child--the doctor or the surgeon who has to decide the matter can only base his opinion on knowledge and experience, and, if he in good faith thinks that it is necessary for the purpose of preserving the life of the girl, in the circumstances that I

have explained to you, then not only is he entitled to perform the operation but it is also his duty to do so. With regard to any other operation on the human body, obviously no difficulty arises. The surgeon is justified in cutting off an arm or a leg, or taking out an eye, if, in his honest opinion, he thinks it is desirable to do so for the sake of the patient's health. The difficulty that arises in the case of abortion is that by the operation the potential life of the unborn child is destroyed. The law of this land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother.

I do not think it is necessary for me to recapitulate the evidence that has been given before you with regard to the reasons why Mr. Bourne in this case thought it right to perform the operation. He has given his evidence, and the Attorney-General accepts his evidence as a frank [621] statement of what actually passed through his mind. In view of the age of the girl and the fact that she had been raped with great violence, he thought that the operation ought to be performed. As I told you yesterday, and as I tell you today, the question that you have got to determine is not whether you are satisfied that he did it in good faith for the purpose of preserving the life of the girl. The question is whether the Crown have proved the negative of that. Have the Crown proved that he did not remove the pregnancy of this girl in good faith for the purpose of preserving her life? That is the question you have got to answer when you come to consider the facts. If the Crown have satisfied you beyond reasonable doubt--if there is a doubt, by our law the accused is always entitled to be acquitted--that he did not do this act in good faith for the purpose of preserving the life of the girl, then he is guilty of the offence with which he is charged. If the Crown have failed to satisfy you of that, then by the law of England he is entitled to a verdict of acquittal. The case is a grave case, and no doubt raises matters of grave concern both to the medical profession and to the public. As I said at the beginning of my summing up, it does not touch the case of the professional abortionist. As far as the members of the medical profession themselves are concerned and they alone could properly perform such an operation--we may hope and expect that none of them would ever lend themselves to the malpractices of professional abortionists. As Mr. Bourne said, in cases of this sort no doctor would venture to act except after consulting some other member of the profession of high standing, so as to confirm his view that the circumstances were such that an operation ought to be performed and that the act was legal.

Solicitors: *The Director of Public Prosecutions* (for the Crown); *Le Brasseur & Oakley* (for the defendant).

[Reported by REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

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