No. 149/A1/80

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Thursday, 9th April, 1981

Before:

LORD JUSTICE SHAW

MR. JUSTICE TUDOR EVANS

and

MR. JUSTICE SHELDON

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R E G I N A

-v-

LILY MARCUS

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(From the Shorthand Notes of Walsh, Cherer & Co. Ltd., 36/38 Whitefriars Street, Fleet Street, London EC4Y 8BH. Telephone No. 01 583 7635. Shorthand Writers to the Court.)

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MR. H. TORRANCE appeared for the Appellant.

MR. A. FRENCH appeared for the Crown.

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J U D G M E N T

MR. JUSTICE TUDOR EVANS: This is an appeal against conviction on a point of law. On the 13th December 1979, the Appellant was convicted at the Central Criminal Court of an attempt to cause to be taken a noxious thing with intent to injure, aggrieve or annoy contrary to section 24 of the Offences

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Against the Person Act, 1861. On the 7th February 1980, the Appellant was made subject to an order to enter into her own recognizance in the sum of £300 to come up for judgment if called upon within the three years. She was also ordered to pay £150 towards the Legal Aid Costs of her defence.

The Appellant lived very close to a family named Laskey. There had been trouble between them for a number of years. For some days before the 15th May 1978, the Laskey family had noticed that there was something wrong with the milk that was being delivered to their house. At first they blamed the dairy, but eventually they became suspicious and informed the police. On the 12th May, one of the milk bottles was handed in for analysis. On the morning of the 15th May a police officer started to keep watch. He first saw the Appellant with some children in the yard area between her house and the Laskey's house. At 8.40 a.m. a milkman delivered two bottles of red top milk at the Laskey's back door leaving them in a basket. By that time the Laskeys had left home for the day. The police officer who was concealed in a ground floor room then saw the Appellant hurry over to the Laskey's back door and remove the two bottles of milk. She took them into her own house. Very shortly afterwards she was seen to emerge from her own house carrying two bottles of red top milk. She replaced them in the basket at the Laskey's back door. The red top on one of the bottles was found to be intact. The top of the other bottle was slightly loose.

A toxicologist, Mr. Wilson, was called to give

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evidence on behalf of the Crown. He analysed the contents of the bottle, which the Laskeys had handed in on the 12th May, as well as the bottle which had been found to have a slightly loose top. The bottle handed in on the 12th May gave a positive test for some type of household detergent. Mr. Wilson was of the opinion that the detergent present could not be harmful. The incident of the 12th May did not form part of the indictment. However, Mr. Wilson found that the contents of the other bottle were contaminated by two powdered substances which he identified as Nitrazepan and Dichloralphenazone. These chemical substances were used in the preparation of well known types of sedative and sleeping tablets. The former was sold only under the trade name Mogadon. The latter was used in sleeping tablets sold under a number of trade names but most commonly under the name Willdorm. Mr. Wilson found that the powdered drugs were impacted up to a level of half an inch from the bottom of the bottle. He also found, in the contents of the bottle, a trace of a well known pain killer called paracetamol. The presence of paracetamol in the milk could have been explained if the person who had put the sleeping tablets into the milk had just been handling a drug containing paracetamol.

Mr. Wilson and Mr. Tozeland, a toxicologist called for the defence, were agreed that there were three to four doses of each of the sleeping tablets in the bottle. Mr. Tozeland thought that at least eight tablets had been put into it. They were also agreed that the dose of the drugs would be likely to cause sedation and even sleep.

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The speed at which the drugs would operate would depend upon the amount taken and upon the contents of the stomach at the time. The greater the amount of food in the stomach, the longer it would take for the drugs to have effect; if taken on an empty stomach, the effect would be more immediate and deeper.

Mr. Wilson said in evidence that in his opinion little harm would arise from the toxicity of the drugs themselves but that there was a danger to someone carrying out potentially hazardous operations, for example, driving a car. He said that he would never describe a drug as harmless since the object of a drug is to affect the physiology of the person who takes it. Although this may operate in an appropriate case beneficially, there may be concurrent adverse side effects. Mr. Tozeland substantially agreed with him.

According to the Appellant, on the morning of the 15th May, she had seen two bottles of red top milk on her draining board. She was unable to remember if she had brought the bottles into her house. At some stage, because she had had a bad night, she had in her hands a couple of tablets known as Solpdene. These were pain-killing tablets containing paracetamol, a trace of which was subsequently found in the bottle containing the sleeping tablets. The Appellant said that she had pushed the top of one of the bottles down but then, because of the colour of the top, she realised that the milk was not hers and she then put them outside the Laskey's back door.

There was evidence before the jury that the Appellant

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had previously taken sleeping tablets, (including Mogadon but not Willdorm) but that she did not have sleeping tablets at the time of the alleged offence. When interviewed by the police, the Appellant denied putting anything into the milk but later she said that she had been upset and annoyed by the Laskeys and had put two Solpdene tablets into their milk.

There was ample evidence before the jury upon which they could find that the Appellant had put at least eight tablets into the milk bottle and that, when she did so, she intended to injure, aggrieve or annoy the Laskeys. But counsel for the Appellant contends that an offence was not committed because the tablets were not a "noxious thing" within section 24 of the Act.

Two submissions are made. First, it is said that for a thing to be noxious within the meaning of section 24, it must be noxious in itself. A thing which is intrinsically harmless cannot become noxious or harmful because it is given in excess quantity. In support of this submission, counsel relies upon obiter dicta of Lord Widgery C.J. in R. v. Cato (1976) 1 W.L.R. 110. Secondly, it is submitted that the word "noxious" means harmful and that the meaning is necessarily confined to injury to bodily health. The word cannot mean harm involving an impairment of faculties. Counsel submits that on the undisputed evidence there was in fact no risk of injury to bodily health. If any one member of the Laskey family had drunk the milk, or part of it, he or she would have been sedated or at most would have been caused to fall asleep.

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In Cato the Appellant had been convicted of manslaughter and of an offence under section 23 of the Offences Against the Person Act, by the administration of heroin.

Section 23 is in language similar to section 24, but concerns the endangering of life or the causing of grievous bodily harm. At page 119 of the report, Lord Widgery C.J. observed, speaking of section 23: "The thing must be a 'noxious thing' and it must be administered 'maliciously.' What is a noxious thing and in particular is heroin a noxious thing? The authorities show that an article is not to be described as noxious for present purposes merely because it has a potentiality for harm if taken in overdose. There are many articles of value in common use which may be harmful in overdose, and it is clear on the authorities when looking at them that one cannot describe an article as noxious merely because it has that aptitude. On the other hand, if an article is liable to injure in common use, not when an overdose in the sense of an accidental excess is used but is liable to cause injury in common use, should it then not be regarded as a noxious thing for present purposes?" It was then held that heroin was a noxious thing for the purposes of section 23.

Counsel for the Appellant, relying upon these observations, submits that the sleeping tablets, being harmless in themselves, could not be regarded as noxious within section 24 simply because the Appellant had attempted to administer or cause to be administered an excess quantity of them. The question whether a thing could be noxious

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within the Act if administered in excessive quantity was considered in a number of authorities in the last century. It was held in cases to which we shall refer that although a substance may be harmless if administered in small quantities, it may nevertheless be noxious if administered in excessive quantities.

In R. v. Hannah 13 Cox's Criminal Law Cases 113, the defendant was charged with administering cantharides, contrary to section 24 of the Act. In his judgment, Sir Arthur J. Cockburn, C.J. clearly envisaged that although a substance may be harmless in small quantities, it may be noxious within the section, if a sufficient quantity were administered. At page 549, he is reported as saying: "Upon the medical evidence before us, cantharides, or, as it is commonly called, Spanish Fly, is administered medicinally and in small quantities, and up to a certain extent, is incapable of producing any effect. What is important to the present case is that the quantity administered was incapable of producing any effect. The statute makes it an offence to administer, although not with the intention of taking life or doing any serious bodily harm, any noxious thing with intent to cause injury or annoyance. But unless the thing is a noxious thing in the quantity administered, it seems exceedingly difficult to say logically there has been a noxious thing administered. The thing is not noxious in the form in which it has been taken; it is not noxious in the degree or quantity in which it has been given and taken. We think, therefore, the indictment will not hold.

"It would be very different if the thing administered,

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as regards either its character or degree, were capable of doing mischief."

In The Queen v Cramp 5 QBD. 307, the Appellant was convicted of an offence under section 58 of the Act of 1861, which, inter alia, makes it an offence to procure or attempt to procure an abortion by administering or causing to be administered any poison or other noxious thing. The poison or noxious thing administered was a half ounce of juniper. It was submitted on behalf of the defendant, as it is in this case, that the offence consists of administering a thing in itself noxious and that the statute does not make it an offence to administer harmless substances even in excessive doses. The submission was unanimously rejected by a court of five judges. We need refer only to two passages.

Lord Coleridge C.J. said at page 309 of the report: "The intent with which the oil of juniper was given was proved and it was further proved that it was noxious in the quantity administered. What is a poison? That which when administered is injurious to health or life, such is the definition of the word poison. Some things administered in small quantities are useful, which, when administered in large quantities are noxious."

Mr. Justice Denman said: "Where a person administers with the improper and forbidden intent large quantities of a thing which so administered is noxious, though when administered in small quantities it is innocuous, the case falls within the statute."

We are of the opinion that for the purposes of

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section 24 the concept of the "noxious thing" involves not only the quality or nature of the substance but also the quantity administered or sought to be administered. If the contention of the Appellant is correct, then, on the assumption that the drugs were intrinsically harmless, it would follow that if the Appellant had attempted to administer a dose of 50 tablets by way of the milk, an amount which, if taken, would have been potentially lethal, she would have committed no offence. We do not consider that such a result can follow from the language of section 24. The offence created by the section involves an intention to injure, aggrieve or annoy.

We consider that the words "a noxious thing" mean that the jury has to consider the very thing which on the facts is administered or sought to be administered both as to quality and as to quantity. The jury has to consider the evidence of what was administered or attempted to be administered both in quality and in quantity and to decide as a question of fact and degree in all the circumstances whether that thing was noxious. A substance which may have been harmless in small quantities may yet be noxious in the quantity administered. Many illustrations were put in the course of the argument: for example, to lace a glass of milk with a quantity of alcohol might not amount to administering a noxious thing to an adult but it might do so if given to a child.

We do not consider that Lord Widgery C.J. in Cato was intending to lay down the general proposition that a substance harmless in itself and in small quantities could

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never be noxious within section 24 of the Act if administered in large quantities. Cato was a very different case from the present. The court was concerned with heroin, plainly a dangerous substance. The Queen v Cramp (supra) was not cited to the court.

We shall now consider the second submission for the Appellant that the word "noxious" means harmful in the sense of injury to bodily health. Counsel took us through the relevant sections of the Act. In a number of sections (including section 24) the words "poison or other destructive or noxious thing" appear. It was submitted that the meaning of the word "noxious" must take colour from the preceding words. We do not accept that construction. It seems to us, looking at the relevant sections, that the statute is dealing with offences in a declining order of gravity and that by "noxious" is meant something different in quality from and of less importance than poison or other destructive things.

On this part of his argument, counsel relies upon evidence from the toxicologists on both sides that the dose would do no more harm than cause sedation or possibly sleep and was therefore harmless. In fact, the evidence was not so confined. In the course of his summing up, the learned judge, having referred to the evidence relating to sedation and sleep, continued: "Mr. Wilson said that little harm is likely to arise, in his opinion, from the toxicity of the drugs themselves, but there is a danger to someone carrying out normal but potentially hazardous operations, for example, driving whilst their faculties are impaired. You may think that it would not have to be driving, it might be crossing

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a London street, for example; one could think of a lot of things."

There was therefore evidence before the jury that the drugs in the quantity in which they were present in the milk were potentially harmful in the sense of being capable of causing injury to bodily health. The result of the evidence was that the milk might have had a direct physical effect on the victim. But we do not consider that the word "noxious" bears the restricted meaning for which counsel contends.

In the course of his summing-up, the learned judge quoted the definition of "noxious" from the shorter Oxford English Dictionary, where it is described as meaning "injurious, hurtful, harmful, unwholesome." The meaning is clearly very wide. It seems to us that even taking its weakest meaning, if for example, a person were to put an obnoxious (that is objectionable) or unwholesome thing into an article of food or drink with the intent to annoy any person who might consume it, an offence would be committed. A number of illustrations were put in argument, including the snail said to have been in the ginger beer bottle (to adapt the facts in Donaghue v. Stevenson (1932) A.C. 562. If that had been done with any of the intents in the section, it seems to us that an offence would have been committed.

The learned judge, when summing up to the jury, reminded them fully of the evidence and directed them that it was a matter of fact and degree for them to decide whether the drugs in the milk were noxious. His direction in law was unexceptionable. The appeal must be dismissed.

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