***R v. Bourne*:**[1]

Lois S Bibbings

I. Background and Context

Although the legal reports of *Bourne* give few details as to its history, newspapers and journals of the time offer a good deal of information. Using these publicly-available sources a fuller account of this background is included here as it is important to an understanding of the case, not least as all the key players (the judge, lawyers, jury and witnesses) would have had knowledge of this context.

On 27 April 1938 a 14-year-old girl ("X") went with two girl friends to Horse Guards Parade in London to watch the changing of the guard. While there, a trooper offered to show X a horse. One of the girls, a '15 year old factory girl', went with X to look but when a soldier tried to kiss her she kicked him and ran away. As she left she saw X being pulled towards the stables.[2] There, despite screaming and fighting back, X was subjected to a sexual attack. Some of the soldiers stood by and watched. She was then seized by other men, dragged to their barrack room, held down by a number of them and raped. She escaped, reported what had happened to a police officer and an investigation began.[3]

Although a number of troopers were involved, only three suspects were identified; all were charged with rape. In late June 1938 they appeared at the Old Bailey in two separate trials.[4] One was convicted of rape, one of aiding and abetting that offence and another of a separate attempted rape. Mr Justice Du Parcq in sentencing made a point of emphasising the extreme nature of the offences, stating that '[h]e had seldom heard of a more horrible case'.[5]

Following these well-publicised trials another criminal case hit the headlines – and the connection was immediately evident as it was referred to in court and in the newspapers.[6] X had become pregnant as a result of the rape and on 14 June 1938 (between the rape committal proceedings and the troopers' trials) Mr Aleck William Bourne, an obstetrical surgeon, had carried out a surgical abortion on the 14-year-old, with both her and her parents' consent.

Bourne was tried on indictment for unlawfully using an instrument with intent to procure a miscarriage contrary to section 58 of the Offences Against the Person Act 1861. This trial also took place in the Old Bailey and was heard on the 18-19 July before Justice Macnaghten. At its conclusion Bourne was acquitted, meaning there was no possibility of an appeal - and no possibility of an authoritative legal statement.

As indicated above, however, *Bourne's* importance was to be greater than its technical legal status; indeed, Macnaghten's ruling on the parameters of the offence of abortion formed the basis upon which abortion could legally be performed in England, Wales and Scotland until the Abortion Act 1967 came into force and in Northern Ireland (albeit restrictively) until the present day. Before we turn to the judge's words it is worth pausing to consider the wider setting in which this trial took place in order better to understand the "original" as well as the two "new" summings-up.

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[1] [1939] 1 K.B. 687; [1938] 3 All E.R. 615 CCC. References here are to the former.
[2] Eg, 'GIRL SAYS SOLDIER TRIED TO KISS HER' *Daily Mail* (Hull, 18 May 1938) 4.
[3] Eg, 'GUARDSMEN AND THE GIRL' *Portsmouth Evening News* (11 May 1938) 14.
[4] Eg, 'TWO TROOPERS FOUND GUILTY' *Manchester Guardian* (29 June 1938) 3.
[5] Eg, 'PENAL SERVITUDE FOR TWO TROOPERS' *The Times* (30 June 1938) 11.
[6] Eg, 'GYNÆCOLOGIST FOR TRIAL IN TEST CASE' *Manchester Guardian* (2 July 1938) 18.

Public attention was already focused on abortion by 1938, with so called "professional" or "back street" abortionists (non-doctors who performed procedures for money) and the deaths their activities sometimes caused raising particular concern.[7] In 1937 a Ministry of Health 'Report of an Investigation into Maternal Mortality' drew attention to this issue[8] resulting in the creation of an Inter-Departmental Committee on Abortion.[9] As to doctors and abortion, opinion was divided – but at this time the Abortion Law Reform Association was campaigning for the legalisation and medicalisation of abortion. .[10]

Significantly, Bourne was on the Association's Legal Council, as was Dr Joan Malleson who had referred X's case to him. In so doing, Malleson had opined that 'public opinion would be immensely in favour of terminating pregnancy in cases of this sort'.[11] Bourne's response was to agree to perform the procedure; indeed, he had done so before, 'had not the slightest hesitation in doing it again' and would then 'write to the Attorney General, inviting him to take action'.[12] This he did not do (as the girl's parents had pleaded for secrecy). However, on the very day the procedure was carried out, Bourne received a visit from the police. He promptly admitted performing the abortion and requested that he be arrested.[13] This then, as the prosecution was to note at trial, *Bourne* was a carefully selected test case by which it was hoped the law would be liberalised.[14]

II. The 'Original' Summing-up

Thus, Bourne found himself in the dock of the Central Criminal Court – and it fell to Macnaghten to set out the law in relation to abortion. In fact, this was a two stage process as, following the presentation of the prosecution case, defence counsel requested that the judge give legal direction so that Bourne could be properly represented. This, in fairness to Bourne, Macnaghten did, later reiterating his pronouncements in his summing-up.[15]

In addressing the jury the judge had no difficulty in recounting the facts, as these were undisputed. He emphasised the brutality of the attack on X. He was also careful to distinguish Bourne from "professional" abortionists, noting that here the operation had been performed openly 'as an act of charity, without fee or reward', by a 'man of the highest skill' who 'unquestionably believ[ed] 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.'[16] As such, Macnaghten's construction of the facts was likely to be most in accord with the defence.

In terms of law, the judge thought this to be the first time that such a case had come before the courts, meaning there was no precedent for him to draw upon. Instead he relied upon

[7] *Bourne* at 689.
[8] Cmd 5422.
[9] Ministry of Health-Home Office, 'Report of the Interdepartmental Committee on Abortion' (HMSO, London 1939).
[10] See further Alice Jenkins, *Law for the Rich* (London, Victor Gollancz, 1960) 46-61.
[11] Eg, 'DISTINGUISHED GYNÆCOLOGIST ON TRIAL' *Manchester Guardian* (19 July 1938) 12.
[12] Eg, 'GYNÆCOLOGIST FOR TRIAL IN TEST CASE' *Manchester Guardian*, 2 July 1938, 18.
[13] Eg, 'CHARGE OF PROCURING ABORTION' *British Medical Journal* 1938; 2: 199, 199-200.
[14] Eg, 'CHARGE AGAINST SURGEON' *The Times* (2 July 1938) 9.
[15] Eg, 'CHARGE OF PROCURING ABORTION' *British Medical Journal* 1938; 2: 199, 200-1, 203-5.
[16] 689-90.

two statutory provisions. In his view section 58 of the 1861 Act was to be read alongside section 1(1) of the Infant Life Preservation Act 1929.

Macnaghten found that the word 'unlawful' in section 58 was crucial, as it implied that some abortions might be lawful. He then turned to the later provision for guidance. Section 1(1) of the 1929 Act created an offence of child destruction to cover the situation where a person who, intending to destroy the life of a child capable of being born alive, caused the child to die before it had an existence independent of its mother. However, the prosecution had not only to prove these elements beyond reasonable doubt, but also 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'. From this Macnaghten concluded that a termination was lawful where it was 'done in good faith for the purpose only of preserving the life of the mother'.[17]

It followed from this that the question for the jury was whether, in the light of both the account given by Bourne regarding his thinking and the evidence of medical experts concerning X's likely physical and mental health if an abortion was *not* performed, 'the Crown has satisfied [them] beyond reasonable doubt that he did not do this act in good faith for the purpose of preserving the life of the girl.' They were told that 'preserving the life of the mother' should be interpreted in a 'reasonable sense'; meaning that if the doctor had operated in the 'honest belief' that the 'probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck' a jury could find that the termination was lawful.[18]

This interpretation allowed for a more flexible approach to the current law than, for example, one which focused only upon the likelihood of a woman's imminent death as providing justification for an abortion – and Macnaghten's focus on Bourne's standing and motives already suggested to the jury that the 'good faith' element had been satisfied. The result was a carefully balanced statement of the law, but a summing-up which, taken as a whole, seemed perhaps to err on the side of defence.

III. The 'New' Summings-up

Of necessity, Justices McGuinness and Dellapenna ignore Macnaghten's mid-trial pronouncements in order to construct their own legal directions. Their texts provide very different approaches to the case – but both court controversy. McGuinness's summing-up is driven by a concern with women's rights and justice. Although in places Dellapenna echoes Macnaghten's words, there are major departures and significant silences, with this judge focusing upon the rights of the "unborn child".

A. Justice McGuinness

McGuinness's summing-up makes no bones about outlining the terrible background to the case, as well as considering the possible consequences of continuing the pregnancy. At the outset she reminds the jury that X was 'brutally gang raped', that the crime was 'horrific', stressing also that the resultant pregnancy was 'impossible for her to bear' and it was feared its continuation 'would render X a physical and mental wreck'.[19] This is a more powerful account than that relayed by Macnaghten and arguably one even more likely to arouse the jury's sympathies for X, consequently encouraging them to be more minded to side with the defence.

[17] 691.
[18] 694-5.
[19] 2.

In a similarly defence-minded vein, the text paints Bourne in a favourable light, describing him as 'a clinician of good standing'[20] with McGuinness emphasizing that he operated out of sympathy for X, with an unquestionable belief in both the legality and clinical necessity of what he did. Moreover, he 'took seriously his role as a clinician and, in this role, his obligations to X' operating to 'protect her future life'.[21]

As with Macnaghten, the word 'unlawful' is pivotal to McGuinness's legal direction. Taking into account section 58 of the 1861 Act and section 1(1) of the 1929 Act, McGuinness argues that '[i]t seems logical … that termination would also be permissible when the foetus is at a much earlier stage of gestation.'[22] She shores up this interpretation by pointing out that medical necessity had long been held to be a defence to the charge of procuring an abortion and the 1929 Act had merely adapted this notion.[23]

Next McGuinness turns her attention to the need for 'lawfulness' to be interpreted in a manner that is just. Here she looks at the law in practice, finding that current abortion law is 'inoperable' and 'impossible to police'.[24] Consequently, abortion is by no means uncommon. However, whilst wealthy women can access discreet private medical services,[25] working class women are unlikely to be fortunate enough to find a medic such as Bourne (who would risk prosecution and seek no payment) and must hunt out 'back street' abortionists.[26] For McGuinness, this inequality of access to safe terminations causes injustice.

The summing-up then moves on to consider the position of women in general. What follows is a compelling section on changes in attitudes and law – but for McGuinness legislation still lags behind the times, limiting women's ability to fulfil their roles as citizens because they 'cannot control the timing and number of their pregnancies'. Here feminist campaigner FW Stella Browne's demand for abortion to be available to *all* women 'without insolent inquisitions, nor ruinous financial charges, nor tangles of red tape' is cited[27] along with Justice McCardie's 1931 statement that no 'woman should be forced to bear a child against her will.'[28] Thus, for McGuinness '[t]he necessity of abortion is plain to see. Justice can no longer choose to be blind to the needs of women in this country.'[29]

McGuinness's closing words continue this theme, indicating that the jury should decide upon the meaning of 'unlawful' bearing in mind 'the relationship that you perceive as essential between law and justice'.[30] Whilst by no means a direction to acquit, this is a weighted and controversial summing-up – but one that is based upon a credible interpretation of the law.

B Justice Dellapenna

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[20] 3.
[21] 14.
[22] 5.
[23] 6.
[24] 6.
[25] 10-11.
[26] 8.
[27] 12 – see 'Abortion' in FW Stella Browne AM Ludovici, Harry Roberts [3 essays], *The Right to Abortion* (London, Allen and Unwin, 1935) 31.
[28] 13 – see 'JUDGE ON BIRTH CONTROL' *The Times* (19 December 1931) 12.
[29] 13.
[30] 14.

One of the things most notable about Dellapenna's summing-up is its limited consideration of X's experiences and welfare. This contrasts with both Macnaghten and McGuinness. In 1938 the summing-up considered the 'great violence' accompanying the rape, the physical effects of pregnancy upon a young girl, the 'mental effect produced by pregnancy brought about by the terrible rape' and the 'great mental anguish' of childbirth in these circumstance.[31] In the present day, McGuinness pays heed not only to X but also to other women and girls.

A good part of Dellapenna's summing-up takes a foray into history in its quest for a construction of the law as at July 1938. In his view abortion has been criminalised because of concern for the protection of 'the life of the unborn child',[32] although he acknowledges that worries about the dangers of abortion to the life and health of the 'mother' might have also been a factor.[33] Undoubtedly Dellapenna's choice of language in these musing is important - and it is again suggestive of views very different to those of McGuinness, in particular.

Given his rendering of the past, Dellapenna opines that, taking the 1929 statute and section 58 together, in the case of medical abortions 'there is an implied exception for the preservation of the life of the mother'. He advises the jury that life preservation might mean more than just 'the avoidance of [the mother's] immediate death', as 'the law does not insist that a doctor wait until the woman is immediate peril' if they are certain that she would die.[34] Moreover, ill-health might in extreme cases be taken to threaten life.[35]

So Dellapenna's concern centres upon 'the innocent life of an unborn child',[36] and his acceptance that in the direst of circumstances medical abortion can be lawful to protect the 'mother' seems reluctant. Consequently, his version of the law is more restrictive than Macnaghten's, and his perspective is poles apart from McGuinness'. But this is not the end of the matter, as he attempts to place another hurdle in the way of doctors who consider performing a termination.

Towards the end of his summing-up he constructs a defence in relation to section 58, reading the provision in conjunction with section 1(1). Despite the fact that the 1929 Act states 'no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith', Dellapenna tells the jury:

> The Crown must prove the offence beyond reasonable doubt, yet the claim that the attending doctor acted in good faith appears to be an affirmative defence. It is incumbent upon the physician claiming this defence to explain his medical decision and to convince the jury that he (the physician) was indeed acting in good faith …[37]

If this were a real summing-up, Bourne's defence might have preferred to know that they bore this burden a little earlier; at the very least, in fairness to the doctor, it might have been expected that the judge would follow this novel move with a recounting of the evidence as to 'why Mr. Bourne thought it right to perform the operation'.[38]

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[31] 694, 695.
[32] 6.
[33] 9.
[34] 11.
[35] 12.
[36] 13.
[37] 14.
[38] 15 (here the judge takes the opposite view).

IV. Aftermath

In concluding we return to 1938. With Bourne acquitted, there was applause in the courtroom and he was surrounded by well-wishers, including X.[39] Responses to the case published in the press, legal and medical journals were generally positive, although some doctors doubted whether sufficient clarity had been arrived at to enable practitioners to be entirely confident about the legality of their actions. Interestingly, there was also a feeling of disappointment that Bourne had not been convicted in order that the matter might have been appealed and an authoritative statement of the law given.[40] At the same time, there was criticism of the decision from those concerned about protection for the "unborn"[41] and from others who were dissatisfied at the limits of *Bourne* from a women's rights perspective.[42]

And so we are left with three summings-up, two of which are written with the benefit of hindsight. It remains to the reader to decide which they prefer – and to ponder what might have happened next had either McGuinness or Dellapenna presided over *Bourne*.

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[39] Eg, 'BMA CHEER VERDICT' *Western Morning News and Daily Gazette* (Plymouth, 20 July 1938), 8.
[40] Eg, 'THE BOURNE CASE' *British Medical Journal* 1938; 2: 262, 262.
[41] Eg, 'BOURNE TRIAL: Its Importance to Roman Catholics' *Manchester Guardian* (25 July 1938) 5.
[42] Eg, 'ABORTION LAW REFORM' *Nottingham Evening Post* (11 January 1939) 10.