Louisiana Law Review

Volume 20 | Number 3
April 1960

Criminal Law - Strict Construction of Penal Statutes

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that the state court in the instant case had particularized the interest of the state to an extent which was not present in the *Sweezy* decision. It also seems to appear that the Court may be developing a distinction between the right of *anonymous* political association as presented in the instant case and the other First Amendment freedoms, such as those of political association and academic freedom as found in the *Sweezy* decision. Apparently, these latter freedoms will be given somewhat more protection from invasion than the former.[19] It is to be noted that the Court in the instant case did not treat the matter of procedural due process. This may be accounted for by the fact that the Court had before it a determination by the highest state court as to the state legislature's desire for the information sought, a circumstance not present in the *Sweezy* case. However, it is to be remembered that the Court has repeatedly stated that each due process case will largely turn on the facts there presented.[20] For this reason it is not felt that the instant case necessarily stands for the proposition that procedural due process will not be inquired into in future cases of like nature.

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CRIMINAL LAW — STRICT CONSTRUCTION OF PENAL STATUTES

Defendant was convicted of public intimidation of an officer for a battery committed while he was an inmate at the state penitentiary. The basis of the conviction was the fact that he had struck a prison guard who seized his arm when he ignored a re-

19. Compare Scull v. Virginia, 359 U.S. 344 (1959); NAACP v. Alabama, 357 U.S. 449 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957), with Barrenblatt v. United States, 360 U.S. 109 (1959) and Wyman v. Uphaus, 360 U.S. 72 (1959).

20. E.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *Cf.* Scull v. Virginia, 359 U.S. 344 (1959), where the Supreme Court reversed a conviction of contempt when petitioner refused to answer questions propounded by a Virginia state legislative committee authorized to investigate: (1) tax structure of racial organizations, (2) the effect of integration or its threat on public schools of Virginia and the state's general welfare, and (3) violation of statutes on champerty, barratry, and maintenance or unauthorized practice of law. The basis of the decision was that the petitioner was not informed of the pertinency of the questions asked and whether or not any of them fell into one of the three areas authorized for investigation. As a result, any conviction for refusal to answer under these circumstances would result in a denial of procedural due process of law under the Fourteenth Amendment. The Court cited NAACP v. Alabama, 357 U.S. 449 (1958), and said that this was an imposition on a troubled area of speech, press, and association in an area of great public interest. Four members of the Court reiterated their position announced in the *Sweezy* case that they could not at this time think of any circumstances which would be sufficient to permit an invasion by the states into these areas of constitutionally protected rights.

quest to go to the end of a meal line. On appeal to the Louisiana Supreme Court, on rehearing, *held*, conviction reversed.[1] Under an application of the maxim of strict construction of penal statutes it is clear the defendant's act was not for the purpose of influencing an officer in relation to his position[2] but was merely a spontaneous act of mild violence caused by defendant's resentment, and therefore did not amount to public intimidation. *State v. Daniels*, 236 La. 998, 109 So.2d 896 (1959).

Louisiana has long recognized the common law maxim of strict construction of penal statutes.[3] Strict construction really means that close questions as to the coverage of a criminal statute are to be resolved in favor of the accused.[4] Some of the reasons given for this maxim are: (1) The power of punishment is vested in the legislature rather than the judiciary; this legislative power guards against creation of crimes not contemplated by the legislature by judicial construction.[5] (2) Since the state makes the laws, these laws should be construed against the state in case of ambiguity or doubt.[6] (3) In order that people of ordinary understanding may be given notice of what conduct is proscribed as criminal, penal statutes will not be construed to include anything beyond the clear meaning of the words employed.[7] Criminal statutes are also subject to the general rule of statutory interpretation that the intention of the legislature should be ob-

1. On original hearing the Supreme Court did not discuss the maxim of strict construction of criminal statutes, holding that the crime of public intimidation requires a specific intent to influence the conduct in relation to his position, employment, or duty of any public officer, grand juror, witness, or voter, which intent was not present in this case.

2. "The resentment of the defendant displayed itself in a spontaneous act of mild violence and nothing more. It does not contain any showing that the resentment and mild violence were for the purpose of influencing the conduct of the officer in relation to his position, employment, or duty." State v. Daniels, 236 La. 998, 1025, 109 So.2d 896, 905 (1959).

3. See, e.g., State v. Viator, 229 La. 882, 87 So.2d 115 (1956); State v. Sloan, 139 La. 881, 72 So.2d 428 (1916); State v. Palanque, 133 La. 36, 62 So. 224 (1913); State v. Peters, 37 La. Ann. 730 (1885); State v. King, 12 La. Ann. 593 (1857).

4. See, e.g., State v. Viator, 229 La. 882, 87 So.2d 115 (1956); State v. Brunson, 162 La. 902, 111 So. 321 (1927); Lane v. State, 120 Neb. 302, 305, 232 N.W. 96, 98 (1930); Caldwell v. State, 115 Ohio St. 458, 461, 154 N.E. 792, 793 (1926).

5. See United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); Simms v. Bean, 10 La. Ann. 346 (1855); State v. Lowery, 166 Ind. 372, 77 N.E. 728 (1905); Woodruff v. State, 68 N.J.L. 89, 52 Atl. 294 (1902). See also 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 54, § 5605 (1943).

6. This evidently is an analogy to contract law. See Wade, *Acquisition of Property by Wilfully Killing Another — A Statutory Solution*, 48 HARV. L. REV. 748, 750 (1935).

7. See State v. Hebert, 179 La. 190, 153 So. 688 (1934); State v. Terrill, 169 La. 144, 124 So. 673 (1929); People v. Koch, 250 App. Div. 623, 294 N.Y. Supp. 987 (1937). See also 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 54, § 5605 (1943).

served.[8] Thus, conduct may be within the letter of the statute and yet not within the statute because it is not within its spirit, nor within the activities sought to be covered by the legislature.[9] Conversely, applying the maxim that the true legislative intent shall be sought, courts have held that a literal construction should not be permitted to defeat the policy and purposes of the statute.[10] Today the legislatures of many states have abrogated or modified the rule of strict interpretation of criminal statutes.[11] The substitution of a more liberal rule of construction first appeared in specific types of statutes,[12] but some modern penal codes have adopted blanket or general provisions calling for a liberal or at least a fair and genuine construction.[13] These codes generally state that the common law rule of strict interpretation of penal statutes is no longer applicable, and substitute in its place some statement of genuine interpretation.

At the time of the adoption of the Louisiana Criminal Code in 1942, one of the code draftsmen strongly urged that the rule of strict interpretation be expressly abolished.[14] The rule of strict interpretation was not expressly abolished, but a rule of genuine construction was adopted by Article 3, which provides that "the articles of this code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to

8. See, e.g., State v. Penniman, 224 La. 95, 68 So.2d 770 (1953); State v. Broussard, 213 La. 338, 34 So.2d 883 (1948); State v. Cook, 203 La. 95, 13 So.2d 478 (1943).

9. See Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). This case involved a federal statute prohibiting the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States. The Court held that the statute did not apply to a contract between an alien and a church in this country where the alien was to serve as minister of the church.

10. See, e.g., State v. Broussard, 213 La. 338, 34 So.2d 883 (1948); State v. Davis, 208 La. 954, 23 So.2d 801 (1945); State v. Cook, 203 La. 95, 13 So.2d 478 (1943).

11. E.g., ARIZ. REV. CODE ANN. § 4477 (1928); CALIF. PENAL CODE § 4 (1933); N.Y. Penal Law § 21 (1909). See 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 59, § 5606 (1943).

12. E.g., Tenn. Acts, c. 5, § 5 (1824); Va. Acts, c. 35, § 9 (1802). See 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 58, § 5606 (1943).

13. E.g., ILL. REV. STAT. ANN. c. 131, § 1 (1933); MINN. STAT. § 9908 (1927). See 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 60, § 5606 (1943).

14. Professor Morrow urged that the rule of strict interpretation should be discredited on historical, theoretical, and practical grounds. He pointed out that every state which had reconsidered the problem legislatively had repudiated the common law rule. He also argued that the civil law had done away with the distinction between narrow and liberal interpretation. See Morrow, *The Louisiana Criminal Code of 1942 — Opportunities Lost and Challenges Yet Unanswered*, 17 TUL. L. REV. 4 (1942).

the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."[15] This article is based upon the work of Edward Livingston,[16] and represents a substantial restatement of the rules of interpretation for which he contended and which he placed in Article 4 of his proposed penal code of 1825. Livingston, however, did not favor a liberal interpretation of penal statutes; he favored a logical and genuine interpretation. He felt that the first constructive extension of a penal statute beyond its letter was an ex post facto law, as regards the offense to which it is applied, and is an illegal assumption of legislative power.[17] Although it has been argued that Article 3 of the present Criminal Code permits liberal construction of criminal statutes,[18] subsequent cases have generally adhered to a strict construction.[19] In *State v. Arkansas Louisiana Gas Co.*,[20] a case involving a violation of the common purchaser law, the court held that criminal statutes in Louisiana are subject to strict interpretation, and said that this rule of construction is well settled. In *State v. Viator*[21] the court, in holding that beer was excluded from a statute prohibiting the sale of alcoholic liquor to persons under twenty-one, stated that "penal statutes are to be strictly construed and cannot be extended to cases not included within the clear import of their language. Where any doubt exists as to the interpretation upon which a prosecution is based, such doubt must be resolved in favor of the accused."

Louisiana Revised Statutes 14:122 provides that "Public Intimidation is the use of violence, force, or threats upon any of the following persons, with the intent to influence his conduct in relation to his position, employment, or duty: (1) public officer

15. Now LA. R.S. 14:3 (1950).
16. LIVINGSTON, REPORT ON LOUISIANA PENAL CODE 135 (1822).
17. *Id.* at 22.
18. After the Code was adopted, Professor Morrow argued that under the language of Article 3, the Criminal Code offenses could be liberally construed. He has stated: "It seems obvious that the court cannot give the Code's provisions a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the provision, and yet indulge in strict interpretation." He also stated that most of those who had anything to do with the project, while they feared an express repudiation of the common law rule on policy grounds, nevertheless favored its suppression in some form. See Morrow, *The Louisiana Criminal Code of 1942 — Opportunities Lost and Challenges Yet Unanswered*, 17 TUL. L. REV. 11 (1942).
19. See, e.g., State v. Viator, 229 La. 882, 87 So.2d 115 (1956); State v. Arkansas La. Gas Co., 227 La. 179, 78 So.2d 825 (1955); State v. Tanner, 226 La. 278, 76 So.2d 5 (1954); State v. Mack, 224 La. 886, 71 So.2d 315 (1954); State v. Penniman, 224 La. 95, 68 So.2d 770 (1953).
20. 227 La. 179, 78 So.2d 825 (1955).
21. 229 La. 882, 87 So.2d 115 (1956).

or employee, (2) witness, (3) juror . . . ." Cases prior to the instant case involved the clearly covered situations of jurors and witnesses. In the instant case the court was faced with a situation involving a public employee and it was held that striking a prison guard who was trying to discipline a prisoner is not public intimidation. The court applied the maxim used in *State v. Viator* that penal statutes must be strictly construed and cannot be extended to cases not included within the clear import of their language. Justice Hamlin, writing the majority opinion, stressed the fact that in the instant case the resentment of the defendant displayed itself in a spontaneous act of mild violence and nothing more. There was no showing that the force employed was for the purpose of influencing the conduct of the officer *in relation to his position, employment, or duty* in the sense that these words are employed in the statute. According to the court, to punish the defendant for public intimidation in this case would be tantamount to "extending the application of a state law to a case and circumstances not intended by the lawmakers."[22] According to the maxim of strict construction of penal statutes, doubtful cases are to be resolved in favor of the accused. This doctrine of strict construction was not mentioned in the subsequent case of *State v. Miller*,[23] where the defendant was indicted for aggravated rape but was convicted of simple rape. Defendant's contention, that there was no evidence in the record to support the verdict of simple rape, was based on the argument that the simple rape article did not cover cases where the victim's acquiescence was obtained by force or threats of force. He contended that the article covered only consent obtained by a narcotic or anesthetic agent, or by intoxication, or unsoundness of the mind. In affirming the conviction the Louisiana Supreme Court pointed out that under the simple rape article the female may be incapable of resisting or understanding "by reason of stupor or abnormal condition of the mind *from any cause*." (Emphasis added.)[24] The victim had testified that force was used and that she was afraid to the point of hysteria. The court stated that a forcible attack by a rapist

22. State v. Daniels, 236 La. 998, 1026, 109 So.2d 896, 906 (1959): "To extend the statute to the present situation would be tantamount to allowing the state to do what the law and jurisprudence reprobates, i.e., to punish defendant by extending the application of a state law to a case and circumstances not intended by the lawmakers."

23. 237 La. 266, 111 So.2d 108 (1959).

24. LA. R.S. 14:43 (1950): "Simple rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:

"(1) Where she is incapable of resisting or understanding the nature of the act, by reason of stupor or abnormal condition of the mind produced by an intoxi-

may produce terror and abnormal condition of the mind and therefore evidence of a forcible attack would support a verdict of simple rape. The court did not talk about a strict or liberal construction of statutes. However, a strict construction of the statute may well have led to the conclusion that a forcible attack was not included within the meaning of the words "from any cause."[25]

A determination that criminal statutes should be strictly construed actually amounts to deciding to resolve doubts of interpretation in favor of the defendant. In determining how to construe a statute the court has a great deal of freedom; in fact Professor Llewellyn states that "there are over 26 different describable ways in which a court can handle a prior case or a rule of construction."[26] Since there is always more than one available justifiable approach, the court may select among the various maxims of construction. It must try to "make sense as a whole out of our law as a whole."[27] The good sense of the situation, a simple construction of the available language to achieve that sense, and a look to the future effect determine the course of judicial decision. After the basic decision is arrived at, "statutory construction is a diplomatic tongue for maneuver."[28] When a court is convinced that it is logical and socially desirable to convict for certain conduct, the canon of strict construction is not mentioned; but when the court feels that it is not appropriate to include the case at bar within a criminal statute, the rule of strict construction becomes an important tool in the judicial process.[29] Thus in the instant case the court excluded the striking of the prison guard from the crime of public intimidation, urging the maxim of strict construction to achieve a logical result. If the conduct in the instant case were to be treated as public intimidation, any person

cating, narcotic, or anesthetic agent, administered by or with the privity of the offender; or when she has such incapacity, by reason of a stupor or abnormal condition from any cause; and the offender knew or should have known of her incapacity. . . ."

25. Under accepted rules of statutory construction the court could have reached the opposite decision. The principle of ejusdem generis requires that general words which follow a series of specific designations can only be construed to include things of the same general nature as those specifically enumerated. If this principle were applied in construing the words "any cause" in the simple rape article, it could hardly be said that fear and terror are in the same general class as the enumerated elements of stupor from intoxication or drugs, mistake induced by fraud, or lack of understanding because of unsoundness of the mind. See Note on *State v. Miller, infra* page 606.

26. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed,* 3 VAND. L. REV. 395 (1950).

27. *Id.* at 401.

28. *Id.* at 398.

29. *Id.* at 395.

who resisted a simple order or direction of a police officer would become guilty of that offense. Such an all-embrasive interpretation would hardly conform to the spirit or purpose of the public intimidation article. The *Miller* case held that the statute there involved included the particular situation of destroying the victim's reasoning power by causing a condition of hysteria and terror. It can be argued that the conduct of the defendant was not at variance with the legislative definition of simple rape. Simple rape, being a lesser degree of the crime of aggravated rape, can well be construed as covering a case where the "abnormal condition of the mind" is from terror and hysteria not quite sufficient to amount to complete prevention of resistance. When this result is reached, however, the maxim of strict construction of criminal statutes will be conspicuous by its absence.

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CRIMINAL PROCEDURE — SIMPLE RAPE AS A RESPONSIVE VERDICT UNDER AN INDICTMENT FOR AGGRAVATED RAPE

Defendant was indicted for aggravated rape[1] and convicted of simple rape.[2] The state's case consisted primarily of the alleged victim's testimony that she submitted to the defendant because he threatened to kill her if she refused. Defendant moved for a new trial on the ground that there was not the "slightest scintilla of evidence in the record"[3] to support the verdict of simple rape.[4] This contention was based on the argument that evidence of force and threats to secure consent does not meet the definition of simple rape. The trial judge overruled the motion. On appeal to the Louisiana Supreme Court, *held*, affirmed. A female who is faced by an attacker intending to ravish her forcibly is immediately thrown into a state of fear and confusion which renders her incapable of resisting or of understanding the act of intercourse. Proof of aggravated rape by force necessarily constitutes proof of the lesser crime of simple rape because simple rape requires only that the victim's consent be vitiated by her incapacity *from*

1. LA. R.S. 14:42 (1950).

2. *Id.* 14:43. Simple rape was made responsive to a charge of aggravated rape by La. Acts 1948, No. 161, § 1, which amended LA. CODE OF CRIM. PROC. art. 386 (1928). This article is now LA. R.S. 15:386 (1950).

3. State v. Miller, 237 La. 266, 274, 111 So.2d 108, 110 (1959).

4. A motion for a new trial is the only procedural vehicle available for presentation of a claim that there has been a total lack of evidence to support an essential element of an offense. State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958).