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CRIMINAL LAW IN TENNESSEE IN 1968 — A CRITICAL SURVEY

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The *Brown* case is of marginal significance in the development of a clearly defined notion of the term "deadly weapon." Yet it does as much as any court is willing to do, since it is desirable that the concept be left in a state of appropriate vagueness to accommodate the variety of items which may present themselves.[13] The decision adds one item to the list of devices which clearly fall within the definition, at least when the victim is actually struck with the bottle. The quoted passage is at best ambiguous as to the result where the victim is threatened with a soft drink bottle, but the threat is not carried out, perhaps because the victim acquiesces to the assailant's demands. Indeed, a literal reading suggests that a soft drink bottle is *not* a deadly weapon *until* the assailant strikes the victim with such force that death might result. This clearly would be an undesirable restriction on the concept. The opinion is preferably read to mean that *since* a soft drink bottle can be wielded in such a manner that it could reasonably be expected to cause death, *therefore* when a soft drink bottle is employed as a weapon, it is a deadly weapon. It may be argued that this interpretation is overlybroad, leaving open the possibility that virtually anything—a book or pencil, for example—could conceivably be used in such a manner as to cause death. Here it is suggested that a test of reasonableness could be employed in terms of the relative likelihood that the object in question could cause death.

2. Carnal Knowledge

Tennessee has the most stringent carnal knowledge statute in the United States, setting the age at which a woman is capable of giving consent to sexual intercourse at twenty-one.[14] The presumption of inability to consent is conclusive.[15] To mitigate the severity of this offense, the statute provides a series of defenses available to the accused, among them the following:

[E]vidence of the female's reputation for want of chastity, at and

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to produce death or great bodily harm, whereas the contrary would be true as against a vigorous adversary." *Id.* at 1078, 204 S.W.2d at 779. *See also* Commonwealth v. Dorazio, 365 Pa. 291, 74 A.2d 125 (1950), holding that the fist of a contender for the heavyweight boxing championship may be a deadly weapon.

13. *See generally* 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 361 (Anderson ed. 1957) (hereinafter cited as WHARTON).

14. TENN. CODE ANN. § 39-3706 (1955). *See* MODEL PENAL CODE § 207.4, Comment (Tent. Draft No. 4, 1955).

15. That is to say, whether the victim was of such maturity as to be fully capable of giving knowing and understanding consent to the act of sexual intercourse is not a factual issue before the trial court. It is true that the defenses stipulated in the statute by-and-large reflect a belief that certain factual circumstances are persuasive evidence that the victim was capable of consent and is not in need of protection. These are, however, collateral approaches to the issue, and even here the actual ability of the victim to consent is not before the court.

> before the time of the commission of the alleged offense, shall be admissible in behalf of the defendant.[16]

This defense was liberally construed in favor of the defendant in 1947 in *Ledbetter v. State*.[17] There the prosecutrix testified that she met the defendant in a "beer joint" only a few days prior to the alleged offense. She was at that time in the company of a woman described by the court as "of unsavory reputation" who was the mother of two illegitimate children. The prosecutrix was fifteen years old at the time of the alleged offense; the defendant was twenty-two. After their first encounter, the prosecutrix wrote the defendant an amorous letter urging him to meet her at a designated place. The defendant complied with her request and ultimately spent the night with her in the same room where her aunt and uncle were sleeping. It was during this time that the defendant was alleged to have had sexual intercourse with the prosecutrix. The court held that establishing a reputation for want of chastity did not require proof of any specific act of intercourse,[18] and that the facts proven established the prosecutrix' reputation for want of chastity and constituted a complete defense.[19]

This issue was again raised in the recent decision of *Mangrum v. State*.[20] In this case the prosecutrix was nineteen years of age; the defendant was twenty-four. The trial court refused to give a charge to the jury requested by the defendant which attempted to state the reputation for want of chastity defense as explained in the *Ledbetter* case.[21] Rather, it charged the jury, in material part, as follows:

16. TENN. CODE ANN. § 39-3706 (1955) (only applicable if the victim is over the age of fourteen). It may be noted that the statute merely provides that the evidence "shall be admissible in behalf of the defendant," not that it constitutes a defense per se. However, in Ledbetter v. State, 184 Tenn. 396, 199 S.W.2d 112 (1947), it was held that proof of such a reputation would constitute a complete defense to the charge.
17. 184 Tenn. 396, 199 S.W.2d 112 (1947).
18. The statute establishes as a separate defense that the female was "at the time and before the carnal knowledge, a bawd, lewd, or kept female." TENN. CODE ANN. § 39-3706 (1955). *See* Jamison v. State, 117 Tenn. 58, 94 S.W. 675 (1906).
19. "[T]he female, Lela Smith, by her general conduct in loitering around 'beer joints,' associating constantly with well known prostitutes in public drinking places, coupled with a willingness to use her uncle's home as a place of assignation, thereby established a reputation for sexual impurity." 184 Tenn. at 403, 119 S.W.2d at 115.
20. 432 S.W.2d 497 (Tenn. Crim. App. 1968).
21. "I have been asked to charge you and do charge you that if a woman has a reputation of being unchaste she is considered a lewd character within the meaning of Section 39-3706 even though there is no proof of any specific act of illicit relationship." 432 S.W.2d at 499. This is a somewhat inarticulate statement of the defense in that it confuses the "reputation for want of chastity" defense and the "bawd, lewd or kept female" defense. The trial court thus might be justified in refusing this charge if the "want of chastity" defense was adequately covered in the charge as given.

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22. 432 S.W.2d at 500.
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> The question is, whether she is actually chaste and virtuous at the time of the alleged carnal knowledge. In other words, the reputation for want of chastity is not a conclusive defense, for the offense is predicated upon character rather than the reputation of a female for chastity and virtue. If her character, that is, what she really is at the time of the alleged carnal knowledge or act charged, is pure and virtuous, and she is at the time chaste, is the question.[22]

The Court of Criminal Appeals held that this charge was inadequate, quoting from *Ledbetter* to the effect that the reputation of the woman for want of chastity can be established without proof of any specific acts of intercourse.

The *Mangrum* decision, as the *Ledbetter* decision, reflects a judicial awareness of who the parties are and the relative contribution of the man and the woman to the nefarious enterprise. The carnal knowledge of a female between the ages of twelve and twenty-one statute, enacted in 1893, is hopelessly anachronistic in the late 20th Century, at least in those instances in which it is applied to individuals of relatively mature years.[23] There is little the courts can do about that.[24] They can, however, within the context of the existing law, liberally construe the defenses available for this offense and thereby alleviate to some degree the existing disparity between the statute and contemporary societal values.

B. *Against Property*

1. Receiving Stolen Property

In *Deerfield v. State*[25] it was held that in order to be guilty of receiving stolen property,[26] it must be shown that the defendant received the property from a third party, that is, the defendant could not be guilty of the offense if he stole the property himself.[27] In absence of such evidence, the conviction in this case could not stand.[28] However, the court observed that *concealing* stolen property was a separate offense,

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22. 432 S.W.2d at 500.
23. For one suggested solution, see Myres, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1965).
24. *But see* People v. Hernandez, 61 Cal.2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).
25. 420 S.W.2d 649 (Tenn. 1967).
26. TENN. CODE ANN. § 39-4217 (1955).
27. To same effect, Franklin v. State, 202 Tenn. 666, 308 S.W.2d 417 (1957) (cited in the principal case). *See also* 2 WHARTON § 576. *Cf.* Peek v. State, 213 Tenn. 323, 375 S.W.2d 863 (1964).
28. Curiously, the defendant had not assigned as error that the crime of receiving stolen property had not been proven. Rather, according to the court, "The State has called to the attention of this Court the fact that this record contains no evidence establishing the fact that the defendant was guilty of receiving and concealing stolen property." 420 S.W.2d at 651. The court agreed with the state's argument on behalf of the defendant.