1962

*Mar. 15, 16
June 25

HER MAJESTY THE QUEEN .....APPELLANT;

AND

GRANT E. KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Driving motor vehicle while ability impaired by drug—Drug administered as anaesthetic by dentist—Accused warned not to drive until his head was perfectly clear—Whether driver guilty—Whether mens rea a necessary element of the offence—Criminal Code, 1953-54 (Can.), c. 51, ss. 222, 223.

*PRESENT: Taschereau, Locke, Martland, Judson and Ritchie JJ.

The accused went to his dentist by appointment to have two teeth extracted. He was injected with a drug known as sodium pentothal, a quick-acting anaesthetic. Earlier, he had been required to sign a printed form containing a warning not to drive after the anaesthetic until his head had cleared. After he regained consciousness, the nurse in attendance, to whom he appeared to be normal, warned him not to drive until his head was "perfectly clear". He replied that he intended to walk. The accused said that he heard no such warning and did not remember signing any form containing a warning. He remembered getting into his car and that while driving he became unconscious. His car ran into the rear of a parked vehicle. Medical evidence was given that his mental and physical condition (he was staggering and his co-ordination was poor) was consistent with the after-effects of the drug in question which may induce a state of amnesia accompanied by a period during which the subject may feel competent to drive a car and in the next second be in a condition in which he would not know what was happening. The accused stated that he did not know anything about this drug.

He was charged and convicted of the offence of driving a motor vehicle while his ability to do so was impaired by a drug, contrary to s. 223 of the *Criminal Code*. After a trial *de novo* before a County Court judge under s. 720 of the Code, his conviction was affirmed. The Court of Appeal granted him leave to appeal and quashed the conviction. The Crown was granted leave to appeal to this Court on the question as to whether *mens rea* relating to both the act of driving and to the state of being impaired was an essential element of the offence.

Held: The appeal should be dismissed.

Per Taschereau J.: There can be no *actus reus* unless there is a will-power to do an act whether the person knows or not that it is prohibited by law. In the present case, intention was not to be confused with *mens rea*. Intention is an element of the offence in question only when the offender voluntarily takes liquor or a drug. There must be an act proceeding from a free will which may bring about the mental condition necessary to meet the requirements of s. 223. When a doctor has given an injection of a drug to a patient, who is not aware of the state of mind it may produce, there is no volitive act done by the patient and he could not be convicted under s. 223.

Per Locke and Judson JJ.: The question of law propounded did not arise upon the facts found at the trial *de novo* by the County Court judge who found as a fact that the accused knew that he had had a drug and that he was warned not to drive after the anaesthetic, but did not find that the accused's condition was such that he could not appreciate the warnings given to him. The Court of Appeal found that the accused believed that the drug did not possess properties which would impair or were likely to impair his ability to drive or that he was led to believe and honestly believed that the drug could not have the effect of impairing such ability. These findings were directly in conflict with those of the trial judge. However, as the Crown did not ask leave to appeal on the ground that the Court of Appeal had exceeded its jurisdiction and that question was not argued, the proper course was to dismiss the appeal.

Per Martland and Ritchie JJ.: The enactment of s. 223 of the *Criminal Code* added a new crime to the general criminal law, and neither the language in which it was enacted nor the evil which it was intended to

1962

THE QUEEN
v.
KING

prevent are such as to give rise to a necessary implication that Parliament intended to rule out *mens rea* as an essential ingredient of the crime therein described. When it has been proved that a driver was driving while his ability was impaired by alcohol or a drug, a rebuttable presumption arises that his condition was voluntarily induced. But if it appears that the impairment was produced as a result of using a drug in the form of medicine on a doctor's order or recommendation and that its effect was unknown to the patient, the presumption is rebutted. *Mens rea* need not necessarily be present in relation both to the act of driving and to the state of being impaired in order to make the offence complete. The defence that the accused became impaired through no act of his own will and could not reasonably be expected to have known that his ability was impaired or might thereafter become impaired when he undertook to drive and drove his motor vehicle, was a good defence in this case.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing the conviction of the accused. Appeal dismissed.

W. C. Bowman, Q.C., for the appellant.

Irving Himel, Q.C., for the respondent.

TASCHEREAU J.:—I substantially agree with the reasons of my brother Ritchie, and I only wish to add a few personal observations.

In his judgment the trial judge, His Honour Judge Timmins, came to the conclusion that s. 223 of the *Criminal Code* is an express prohibition in respect to driving a motor car when the driver had a drug impairing his driving, and that the defence set up by the accused that this was all involuntary, was not a defence against this section. The Court of Appeal of Ontario[1] reached a different conclusion and held that no moral fault could be imputed to the accused and that the act committed in the circumstances of this case must be regarded as involuntary. It held also that the undertaking of the accused to drive the motor car was not a conscious act of the respondent's volition.

The trial judge found the accused guilty, but the Court of Appeal directed a verdict of acquittal. In this Court, special leave to appeal was granted on the following question:

Whether the Court of Appeal erred in law in holding that mens rea relating to both the act of driving and to the state of being impaired by *alcohol or drug* is an essential element of the offence of driving while impaired contrary to section 223 of the Criminal Code.

[1] [1961] O.W.N. 37, 34 C.R. 264, 129 C.C.C. 391.

This section 223 Cr. C., under which the respondent was charged, reads as follows:

> 223. DRIVING WHILE ABILITY TO DRIVE IS IMPAIRED. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable. . . .

The Crown's contention is that under s. 223 Cr. C., the driver of an automobile, whether conscious or not, if he has imbibed liquor or drugs, is guilty of driving while impaired. The result is, as found by the trial judge, that although involuntarily impaired, the accused cannot be absolved.

The Crown did not appeal to this Court that part of the judgment of the Court of Appeal dealing with the mental capacity of the respondent. Therefore, the question of jurisdiction of the Court of Appeal to deal with the mental capacity of the respondent is not before this Court. The real question arises from the statement of the trial judge (trial *de novo*) who said in his judgment: "The defence set by the accused that this was all involuntary is not a defence as against this section." The majority of the Court of Appeal took the opposite view.

I entirely disagree with the proposition of the Crown that whether the accused knew he was impaired or not he must be found guilty, and that under s. 223 Cr. C., no mental element has to be considered, and that the mere fact of impairment is sufficient to create the offence.

It is my view that there can be no *actus reus* unless it is the result of a willing mind at liberty to make a definite choice or decision, or in other words, there must be a will-power to do an act whether the accused knew or not that it was prohibited by law.

These words *mens rea,* though they are in common use, are, as Stephen J. said in *The Queen v. Tolson*[1], most unfortunate and not only likely to mislead but actually misleading. In the present case, intention must not be confused with *mens rea.* Intention is not an element of the offence of driving while impaired by liquor or drugs, when the offender voluntarily takes liquor or drugs, and then drives a motor vehicle or takes the care or control of it. There must be an

[1] (1889), 23 Q.B.D. 168, 60 L.T. 899, 16 Cox C.C. 629.

1962

THE QUEEN v. KING

act proceeding from a free will that may bring about the mental condition necessary to meet the requirements of s. 223 Cr. C.

Taschereau J.

When a doctor has given an injection of a drug to a patient, who is not aware of the state of mind it may produce, there is no volitive act done by the driver and he cannot be convicted.

I would dismiss the appeal.

The judgment of Locke and Judson JJ. was delivered by

LOCKE J.:—The charge laid against the respondent and which was tried by a magistrate in Toronto was that he did on October 8, 1959, at the Municipality of Metropolitan Toronto, unlawfully:

> While his ability to drive a motor vehicle was impaired by a drug, drive a motor vehicle License No. 94,547 for the year 1959, at about 3.35 p.m. on Indian Grove near Dundas St. W., contrary to the Criminal Code, section 223.

Section 223 reads in part:

> Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction . . .

The Crown elected to proceed by asking for a summary conviction and the matter was so dealt with by the police magistrate who found the respondent guilty and imposed a fine.

The respondent appealed from this conviction to a County Court judge of the County of York, under the provisions of s. 720 of the *Criminal Code*. After a trial *de novo*, as required by s. 727, before His Honour Judge Timmins, the conviction was affirmed and the appeal dismissed. The learned County Court judge gave reasons for his judgment and made findings of fact upon which he based his conclusion.

The appeal to the Court of Appeal was taken under the provisions of s. 743 of the *Criminal Code* with leave of that Court. The section, so far as relevant, reads:

> An appeal to the Court of Appeal as defined in section 581 may with leave of that court be taken on any ground that involves a question of law alone, against
>
> (*a*) a decision of a court in respect of an appeal under section 727.

The application for leave to appeal to the Court of Appeal was made upon various grounds and, while leave was granted, the question of law in respect of which the leave was granted is not stated in the judgment of that Court.

The Crown applied to this Court for leave to appeal from the judgment of the Court of Appeal[1] and that leave was granted on the following question of law:

> Whether the Court of Appeal erred in law in holding that *mens rea* relating to both the act of driving and to the state of being impaired by alcohol or drug is an essential element of the offence of driving while impaired, contrary to section 223 of the Criminal Code.

At the outset of this appeal there lies the question as to whether this question of law arises upon the facts which are to be considered. This is an appeal and not a reference and, unless the question arises upon the facts as found by the learned County Court judge, it should not, in my opinion, be answered.

The judgment of the majority of the Court of Appeal, to which I will hereafter refer, disagreed with the findings made by the learned County Court judge but, as to this, and with the greatest respect, it is upon the facts as found by the County Court judge alone that we can deal with this matter.

The findings of the learned County Court judge were, so far as they need be considered, expressed as follows:

> The accused King had gone to see an oral surgeon and had made an appointment to have two teeth extracted on the 8th of October 1959. He attended at the office, the dentist office around two o'clock in the afternoon and he was asked to fill out a form to give the dentist certain written instructions and he says that he filled out the form and then he says that the dentist gave him a needle. The teeth were then extracted and he was taken into the recovery room where he remained for, I believe, half an hour and after that when he came to there was a nurse who had conversation with him, gave him certain instructions and asked him how he was going home and warned him about driving a motor vehicle and then she gave him a receipt and then he left. He walked over to where he had his motor car parked and he proceeded to drive away. He hadn't gone very far when he said he became unconscious and had a slight accident with another car. Now in a general way that is the evidence.

After referring to the statement of the accused that he did not know anything about sodium pentothal or what its effect would be and that he remembered signing a form but did not admit that there was any warning on the form in respect

[1] [1961] O.W.N. 37, 34 C.R. 264, 129 C.C.C. 391.

1962

THE QUEEN v. KING

Locke J.

of the drug and that he did not deny the conversation with the nurse, merely saying that he did not remember it, the learned judge said:

> He says at the time that he was leaving the office he was not asked if his head was clear although he says that his head was clear. Now the serious defence of the accused is that he had no knowledge of the drug, he did not know anything about the effect of the drug on him and that there was nothing voluntary on his part in respect to driving of the motor car because he was unconscious at the time of the accident and that he cannot be responsible for something that he did involuntarily. The next thing is that he did not know what effect the drug would have therefore he did not know that when he got into his motor car that he might not be subject to further effects of the drug. In other words he says I had no knowledge that it was this drug that was administered to me, I had not knowledge of what the effect would be on me and I have no recollection of this warning that was said to have been given to me and if I did anything that was wrong it was involuntary.

After referring to s. 223 of the Code, the reasons proceed:

> Now having regard to the evidence of the accused, he knew that he had a drug and he was given a warning, with respect to not driving a motor car. The section is an express prohibition in respect to driving a motor car when you have had a drug which will impair your driving and that the defence set up by the accused that this was all involuntary is not a defence as against this section. There were certain warnings that we have heard in evidence here today and I have got to pay some attention to. First is that he was expected to sign a form, and that form contained a warning,—"Patient is cautioned not to drive after anaesthetic until head clears." I would have thought that that warning in itself was sufficient and the accused does not admit that he signed this form, he admits he signed some form.
>
> * * *
>
> Now the other warning was that Nurse Childs saw him when he regained consciousness in the recovery room and that she talked with him, she gave him some instructions, his account was paid and she asked him how he was going home and he said that he was walking, she told him you can't drive until your head is perfectly clear, he said that he was walking and he left.
>
> * * *
>
> This young man apparently had his motor car in the district to drive home. He knew that he was going to get some treatment, some injection or he was going to be given something in the doctor's office in order to have his teeth extracted. He was given a drug intravenously and a certain state of amnesia was produced. He was given a warning I find by the dental nurse. I find as a fact that he was given that warning but whether he deliberately lied to the nurse or whether he unconsciously lied to her the fact of the matter is that he did misinform the nurse that he was walking. He took the responsibility of going to the car, he took the responsibility of driving his car knowing that he had had a drug, he was driving his car and the charge is that he was in charge of a motor vehicle when his ability was impaired. There is no doubt that on all the evidence that he was impaired. In argument by counsel for the accused there were reflections cast upon the dental profession that they should never allow persons who have had this drug in respect to extractions of teeth to leave their office unless he

is accompanied by some other adult person so that he cannot get into trouble. In this case there were warnings and the accused paid no attention to them.

The judgment of the majority of the Court of Appeal was given by Schroeder J.A. and it is upon the facts as found by him that the case for the respondent has been argued before us. In the reasons delivered by that learned judge the following appears:

> The learned County Court judge reached the conclusion upon the evidence that the appellant was or should have been aware that his ability to drive a motor car might be impaired by the use of this drug and accordingly he held that he was bound to uphold the conviction. In my respectful opinion the evidence falls far short of supporting that conclusion. On the contrary, the evidence indicates at most that the accused was advised by the nurse and at a time when his mind was probably in a muddled or confused state (undetected mental impairment as described by Dr. Lucas) that he should not drive "until his head was perfectly clear." It is highly probable that, as he stated, he did not observe the caution on the printed form mentioned by Dr. Richards. The evidence of Dr. Lucas suggests rather forcibly that the appellant would not have been fully restored to normalcy for at least eight hours, yet he was told that he should not drive until "his head was perfectly clear." This was left to the judgment of a man who, at that time, was probably in a state of "undetected mental impairment." In that condition, he would unwittingly delude both the nurse and himself. The evidence overwhelmingly supports the view that when the appellant undertook to drive his motor car he did not know and could not reasonably be expected to have known that his ability to drive was then or might thereafter become impaired, and in a criminal case any contrary view would, in my opinion, be untenable.
>
> The question to be determined is whether the absence of such knowledge on the part of the appellant in the particular circumstances is sufficient to exculpate him.

Later the reasons continue:

> The problem thus presented is this: If A attends at the office of a duly qualified surgeon where a drug is administered to him, and he honestly believes that such drug does not possess properties which will impair or are likely to impair his ability to drive a motor car; or to fit the case at bar more precisely—if he is led to believe and honestly believes that when his head is perfectly clear the drug cannot then have the effect of impairing his ability to drive and he, in good faith, believes that advice and acts upon it, would A, in the supposed circumstances, be guilty of the crime of driving a motor car while his ability to drive was impaired if that condition should develop unexpectedly after he had entered his motor car and had commenced to operate it?

And again:

> Where, therefore, a person is given a drug by his physician who does not warn him that it is likely to affect his ability to drive, and the patient not being negligent in failing to realize that fact, the drug takes sudden effect while he is driving he would not, in my view, be guilty of an offence against section 223. The facts must be viewed as a whole commencing at

1962

THE QUEEN
v.
KING

Locke J.

the point when the drug was first administered by the doctor. The conclusion cannot be avoided that in that case the patient was not even negligent.

* * *

Here the appellant had no reason to anticipate that the drug administered to him would impair his ability to drive a motor car "after his head had cleared." His undertaking to drive or his driving of the motor car was not, in the circumstances, a conscious act of the appellant's volition.

* * *

Unless the appellant knew or ought to have known that when he undertook to drive, the effect of the drug would incapacitate him within the meaning of section 223, he could not have entertained the will to drive while his ability to do so was impaired or was likely to become impaired.

McKay J.A., who dissented and would have dismissed the appeal, agreed with the findings of fact made by the learned trial judge but pointed out that the form signed by the respondent which contained the warning against driving was signed on Tuesday October 6th, two days in advance of the extraction of his teeth, at which time there is no suggestion that he was under the influence of any drug, and the further fact that when he was apprehended by the police officer he told him that he had been to the dentist and been given sodium pentothal, which is at variance with the respondent's evidence that he did not know what drug had been given to him, and that this fact was stated by him as his explanation for the accident.

It will be seen from the foregoing that the trial judge found as a fact that the respondent knew that he had had a drug and that he was warned not to drive after the anaesthetic. In referring to the warning on the form, the learned judge said that he would have thought that warning was sufficient and found further as a fact that the respondent had been warned by the nurse and that he had made the statement to her that he was walking after leaving the dentist's office, which was untrue, and that his action in driving the car in these circumstances was deliberate. The learned judge did not find that the condition of the respondent was such that he could not appreciate the warnings given to him.

Schroeder J.A. did not proceed upon the footing that there was no evidence to support these findings but, upon his own view of the evidence, he considered that at the time the warning was given by the nurse the respondent was in a muddled or confused state and that it was highly probable

that he did not observe the caution on the printed form and that, in the condition he was, "he would unwittingly delude both the nurse and himself." It was said further that the evidence overwhelmingly supported the view that he "did not know and could not reasonably be expected to have known that his ability to drive was then or might thereafter become impaired." The statement thereafter made as to the question to be determined is based upon the premise that the respondent honestly believed that the drug did not possess properties which would impair or were likely to impair his ability to drive or that he was led to believe and honestly believed that the drug could not have the effect of impairing such ability. These findings directly conflict with those of the judge at the trial.

In my view, the question of law upon which leave to appeal was granted upon the application of the Crown does not arise upon the facts found by the learned County Court judge and these are the facts upon which the appeal must be determined. Upon those findings of fact, in agreement with McKay J.A. I consider that the accused was properly found guilty and the judgment should not have been set aside.

While the findings of fact made in the majority judgment in the Court of Appeal do raise the question propounded, since this is not a reference I do not consider that we should answer the question since it is unnecessary for the disposition of the appeal. Had the respondent been successful in obtaining a finding of fact from the learned County Court judge that he was unaware of the probable effect of the drug and had not been warned as to this, issues which were matters of defence, the situation would be otherwise, but there are no such findings.

The Crown, however, did not ask leave to appeal on the ground that the Court of Appeal had exceeded its jurisdiction and the question was not argued before us. In these circumstances, the proper course to be pursued, in my opinion, is to dismiss this appeal.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal by the Crown at the instance of the Attorney-General for Ontario from a judgment rendered by the majority of the Court of Appeal of

1962

THE QUEEN v. KING

Ritchie J.

that province[1] (MacKay J.A. dissenting) which allowed the respondent's appeal from a conviction entered against him after a trial *de novo* held before Judge Timmins of the County Court of the County of York for the offence of driving a motor vehicle while his ability to do so was impaired by a drug contrary to s. 223 of the *Criminal Code*.

The circumstances giving rise to this appeal are that on October 8, 1959, the respondent went to his dentist's office, by appointment, for the purpose of having two teeth extracted, and that he was there injected with a drug known as sodium pentothal, a quick-acting anaesthetic which produces unconsciousness, removes pain and gives a certain amount of relaxation during the period of an operation, and before using which the dentist stated that it was the practice of his office to have patients sign a printed form containing the following warning: "Patients are cautioned not to drive after anaesthetic until head clears." After he had regained consciousness, the respondent paid his bill by cheque to a nurse who was in attendance and who states that at this time he appeared "perfectly normal" and that she warned him not to drive his car until his head was "perfectly clear" to which he replied that he intended to walk. The respondent says that he heard no such warning and remembers signing no form containing any warning, but he does remember getting into his car which he had parked about a block away and proceeding across an intersection, after which he became unconscious, and his car ran into the left rear portion of a parked vehicle, whereafter the police appeared to find that he was staggering and that his physical co-ordination was poor. This was later verified by a sergeant at the police station where the respondent was submitted to certain tests. Medical evidence was given to the effect that this mental and physical condition was consistent with the after-effects of being injected with sodium pentothal and that this drug may induce a state of amnesia accompanied by a period during which the subject may feel perfectly competent to get in a car and drive and in the next second or so be in a condition in which he would not know what was happening. The respondent stated that he did not know anything about the drug which was administered to him.

[1] [1961] O.W.N. 37, 34 C.R. 264, 129 C.C.C. 391.

The learned County Court judge convicted the respondent on the ground that "he knew that he had a drug and he was given a warning with respect to driving a motor car" and also that "he took the responsibility of going to the car, he took the responsibility of driving his car knowing that he had had a drug".

The respondent's sole defence was that he had no knowledge of the effect of the drug which resulted in his being unaware of any warning and unaware of the fact that he was impaired when he took the responsibility to drive and did drive his car.

The County Court judge expressed the following view of the evidence as to the effect of the drug:

> Evidence seems to point out that this would produce amnesia and that the patient would go unconscious and that this may last for some considerable time or it might last just for a short time.

If the County Court judge had found that the respondent knew of the possible effects of the drug before he took it or that he was capable of being aware of the fact that he was impaired when he started to drive and drove his car, then the question now before this Court would not have arisen in this case, but the judge made no such finding but disposed of the respondent's only defence in accordance with his view of the legal effect of s. 223 of the *Criminal Code* which he expressed as follows:

> The section is an express prohibition in respect to driving a motor car when you have had a drug which would impair your driving and that *the defence set up by the accused that this was all involuntary is not a defence against this section.* (The italics are mine.)

Expressing the same opinion in slightly different language, he later said: "There is nothing in Section 223 of the Code about an involuntary act. The section is specific."

The question of law so determined was made a ground of appeal and for leave to appeal to the Court of Appeal of Ontario, and Mr. Justice MacKay, in the course of his dissenting opinion, stated the issue before that Court in the clearest terms, saying: "I think all these grounds of appeal raise only one issue, that is, to what extent, if at all, does the doctrine of *mens rea* apply to this offence."

Just as the learned County Court judge dealt with this issue in the concluding paragraph of his reasons by saying: "In this case the accused was impaired by reason of a drug.

1962

THE QUEEN v. KING

Ritchie J.

I cannot hold anything else, *and, therefore, the conviction will be affirmed . . . .*", so Mr. Justice MacKay expressed the same conclusion rather more fully by saying:

> For these reasons I have come to the conclusion that the offence here charged is one of strict liability in which proof of *actus reus* alone is required, that is, proof that the defendant drove his car and was in fact impaired. In this particular case the defendant knew he had been given a drug and he intentionally drove his car. Even if it was a fact that he did not know or did not believe that he was impaired such knowledge or belief is not material and is not a defence.

On the other hand, Mr. Justice Schroeder, speaking for the majority of the Court, stated the exactly opposite view in these words:

> Even in the case of statutory crimes, therefore, the offender should not be condemned if his conduct was not voluntary, save in cases where such exception is expressly or by necessary implication excluded in the Act creating the offence. . . .
>
> Unless the appellant knew or ought to have known that when he undertook to drive, the effect of the drug would incapacitate him within the meaning of section 223, he could not have entertained the will to drive while his ability to do so was impaired or was likely to become impaired. This is a true case of *ignorantia facti* which should have been held to have excused the *actus reus* prohibited by the statute.

These quotations are sufficient to indicate the sharp difference of opinion which existed in the Courts below as to a decisive question of law, and although it may be said, with all respect, that the judges in the Court of Appeal strayed into the making of some unnecessary observations on the facts, it is nonetheless the question of law which gave rise to this difference which has been made the subject of the sole ground upon which leave to appeal to this Court has been granted under the provisions of s. 41(3) of the *Supreme Court Act*. That question is expressed in the order by which leave to appeal was granted as follows:

> Whether the Court of Appeal erred in law in holding that mens rea relating to both the act of driving and to the state of being impaired by alcohol or drug is an essential element of the offence of driving while impaired contrary to Section 223 of the Criminal Code.

The provisions of s. 223 of the Code are as follows:

> 223. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable

(a) for a first offence, to a fine of not more than five hundred dollars and not less than fifty dollars or to imprisonment for three months or to both,

(b) for a second offence, to imprisonment for not more than three months and not less than fourteen days, and

(c) for each subsequent offence, to imprisonment for not more than one year and not less than three months.

The cases in England and Australia which have been so fully reviewed by the Court of Appeal indicate that there have been differences in approach in determining the extent to which "knowledge of the wrongfulness of the act" is to be regarded as a constituent in statutory offences.

In the decision of Wright J. in *Sherras v. De Rutzen*[1], that learned judge stated:

> There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered.

On the other hand, in the case of *Hobbs v. Winchester Corporation*[2], which involved the sale of tainted meat contrary to the *Public Health Act,* Kennedy L.J. concluded that "there is a clear balance of authority that in construing a modern statute this presumption as to *mens rea* does not exist".

The weight of opinion, however, clearly favours the view expressed by Wright J. and the rule has been forcefully stated on more than one occasion by Lord Goddard C.J. who expressed himself in the following language in *Harding v. Price*[3]:

> The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in *Brend v. Wood,* (1946) 62 T.L.R. 462, 463: "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind".

(See also *Younghusband v. Luftig*[4], and the decision of the Supreme Court of Nova Scotia in *Regina v. Jollimore*[5] per Mr. Justice V. C. MacDonald at p. 306 *et seq.*)

[1] [1895] 1 Q.B. 918 at 921. [2] [1910] 2 K.B. 471.
[3] [1948] 1 K.B. 697 at 700, 1 All E.R. 283.
[4] [1949] 2 All E.R. 72 at 80, 2 K.B. 354.
[5] (1961), 36 C.R. 300, 131 C.C.C. 319.

1962

THE QUEEN v. KING

Ritchie J.

This view has been adopted by this Court in unmistakable terms in *Beaver v. The Queen*[1], where Cartwright J., speaking for the majority of the Court at p. 538, adopted the following statement made by Estey J. in *Watts and Gaunt v. The Queen*[2]:

> While an offence of which *mens rea* is not an essential ingredient may be created by legislation, in view of the general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention.

As there is no express language in s. 223 of the *Criminal Code* disclosing the intention of Parliament to rule out *mens rea* as an essential ingredient of the crime therein described, it becomes necessary to determine whether it can be said that such an intention is disclosed by necessary implication.

In classifying the types of statute in which such an intention has been implied, the learned authors, writing under the title "Criminal Law and Procedure" in vol. 10 of Halsbury's Laws of England, 3rd ed., at p. 275, adopt the three exceptions to the general rule which are suggested by Wright J. in *Sherras v. De Rutzen, supra,* at p. 921 and state:

> Most statutes creating a strict liability fall under three heads. First, where the acts are not criminal in any real sense, but are prohibited under a penalty in the public interest. Secondly, where the acts are public nuisances; thus, an employer has been held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders. Thirdly, where, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right.

Mr. Justice MacKay concluded that s. 223 of the *Criminal Code* comes within the first exception to the general rule in that it is "an act perhaps not criminal in any real sense but which is in the public interest prohibited". He finds that:

> A person whose ability to drive is impaired by alcohol or drugs, driving on the highway, is a danger to the general public and in my view the offence falls within the first classification referred to by Wright J. in the *Sherras* case. It is an act perhaps not criminal in any real sense but which is in the public interest prohibited.

I am, with respect, unable to agree that the offence created by s. 223 is "perhaps not criminal in any real sense". On the contrary, it appears to me that if a person takes charge of a motor vehicle on the highways of this country knowing that his ability to do so is impaired by alcohol or

[1] [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129.
[2] [1953] 1 S.C.R. 505 at 511, 16 C.R. 290, 105 C.C.C. 193, 3 D.L.R. 152.

a drug, he is doing an act which is not only criminal in the sense of being punishable by the *Criminal Code* but which is also criminal in the "real sense" as those words were used by Wright J. because such a driver must be taken to be aware that his impaired condition constitutes a danger to the life, limb and safety of other users of the highway, and the question of whether he acted knowingly or not, therefore, seems to me to be all the more important.

It is to be observed also that when Wright J. was referring to acts "which . . . are not criminal in any real sense, ..." he was referring to such things as the possession of liquorice by a beer retailer, the possession of adulterated tobacco, the possession of game by a carrier and such like matters, all of which are far removed from the offence of driving a potentially highly dangerous machine when your ability to do so is impaired.

In my view the seriousness of the offence created by s. 223 removes it entirely from the categories referred to by Wright J. and this will be seen to be recognized by the mandatory provisions in s. 223(*b*) and (*c*) which provide for imprisonment for a second or subsequent offence.

In the course of his decision in *Beaver v. The Queen, supra,* at p. 542, Cartwright J. had occasion to observe that in that case:

> Counsel informed us that they have found no other statutory provision which has been held to create a crime of strict responsibility, that is to say, one in which the necessity for *mens rea* is excluded, on conviction for which a sentence of imprisonment is mandatory.

No such statute has been referred to us in the present case, and it appears to me that the nature of the penalty imposed by s. 223(*b*) and (*c*) affords an indication that Parliament did not intend to exclude *mens rea* as an essential ingredient of the offence which it created.

It is, however, submitted on behalf of the appellant that s. 223 ought to be construed to create an offence of absolute liability on the ground that "the object of the legislation is patently to protect the public from danger", but I am unable to agree that the legislative intention to protect the public from harm or danger can, of itself, provide an exception to the general rule as to the existence of *mens rea.* If

1962

THE QUEEN v. KING

Ritchie J.

this were so, it would indeed encompass a wide variety of criminal acts, for as Rand J. said in *Lord's Day Alliance v. Attorney-General for British Columbia*[1]:

> Undoubtedly criminal acts are those forbidden by law, ordinarily at least if not necessarily accompanied by penal sanctions, *enacted to serve what is considered a public interest or to interdict what is deemed a public harm or evil.* (The italics are mine.)

In the course of his most interesting dissenting opinion, MacKay J.A. refers to the decision of Dixon J. of the High Court of Australia in *Proudman v. Dayman*[2]. The learned judge in that case was dealing with an offence against the *Road Traffic Act* of South Australia which is a jurisdiction where no code of criminal law exists, and he had occasion to say of the presumption as to the existence of *mens rea* as an essential ingredient of crime:

> The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced.

In my view the enactment of s. 223 of the *Criminal Code* added a new crime to the general criminal law, and neither the language in which it was enacted nor the evil which it was intended to prevent are such as to give rise to a necessary implication that Parliament intended to impose absolute liability unless the impaired condition which the section prohibits was brought about by some conscious act of the will or intention.

Consideration of this phase of the question should not be concluded without noting the decision in *Armstrong v. Clark*[3], in which the Queen's Bench Division had to consider the question of

> . . . whether the taking of insulin by the respondent was, in the circumstances which occurred, to be regarded as taking a drug which would make him liable to be found guilty of an offence under s. 15(1) . . . .

of the *Road Traffic Act,* and in which Lord Goddard said:

> This case must go back with a direction that the justices may take into account a great many things, but they must remember, and everyone must remember, that this section was designed for the protection of the

[1] [1959] S.C.R. 497 at 508, 30 C.R. 193, 123 C.C.C. 81, 19 D.L.R. (2d) 97.
[2] (1941), 67 C.L.R. 536 at 540.
[3] [1957] 1 All E.R. 433, 2 Q.B. 391.

public, and if people happen to be in a condition of health that renders them subject to going into a coma, or forces them to take remedies which may send them into a coma, the answer is that they must not drive because they are a danger to the rest of Her Majesty's subjects.

I do not think that anything that was said by Lord Goddard in that case can be taken as changing the law with respect to *mens rea* in statutory offences as it was stated by the same learned judge and adopted by this Court in the cases hereinbefore referred to. It is noteworthy, however, that in the course of this decision, Lord Goddard does make the observation with respect to the statutory offence with which he was dealing: "The penalty, I need hardly say, is entirely at the discretion of the bench."

The existence of *mens rea* as an essential ingredient of an offence and the method of proving the existence of that ingredient are two different things, and I am of opinion that when it has been proved that a driver was driving a motor vehicle while his ability to do so was impaired by alcohol or a drug, then a rebuttable presumption arises that his condition was voluntarily induced and that he is guilty of the offence created by s. 223 and must be convicted unless other evidence is adduced which raises a reasonable doubt as to whether he was, through no fault of his own, disabled when he undertook to drive and drove, from being able to appreciate and know that he was or might become impaired.

If the driver's lack of appreciation when he undertook to drive was induced by voluntary consumption of alcohol or of a drug which he knew or had any reasonable ground for believing might cause him to be impaired, then he cannot, of course, avoid the consequences of the impairment which results by saying that he did not intend to get into such a condition, but if the impairment has been brought about without any act of his own will, then, in my view, the offence created by s. 223 cannot be said to have been committed.

The existence of a rebuttable presumption that a man intends the natural consequences of his own conduct is a part of our law, but its application to any particular situation involves a consideration of what consequences a man might be reasonably expected to foresee under the circumstances.

1962

THE QUEEN v. KING

Ritchie J.

In the course of the lecture on "The Criminal Law" which is contained in the well-known work by O. W. Holmes Jr. on the "Common Law", that learned author says:

> As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law.

It seems to me that it can be taken as a matter of "common experience" that the consumption of alcohol may produce intoxication and, therefore, "impairment" in the sense in which that word is used in s. 223, and I think it is also to be similarly taken to be known that the use of narcotics may have the same effect, but if it appears that the impairment was produced as a result of using a drug in the form of medicine on a doctor's order or recommendation and that its effect was unknown to the patient, then the presumption is, in my view, rebutted.

For all the above reasons, I do not think that the Court of Appeal erred in holding that *mens rea* was an essential element of the offence of driving while impaired contrary to s. 223 of the *Criminal Code,* but I am of opinion that that element need not necessarily be present in relation both to the act of driving and to the state of being impaired in order to make the offence complete. That is to say, that a man who becomes impaired as the result of taking a drug on medical advice without knowing its effect cannot escape liability if he became aware of his impaired condition before he started to drive his car just as a man who did not appreciate his impaired condition when he started to drive cannot escape liability on the ground that his lack of appreciation was brought about by voluntary consumption of liquor or drug. The defence in the present case was that the respondent became impaired through no act of his own will and could not reasonably be expected to have known that his ability was impaired or might thereafter become impaired when he undertook to drive and drove his motor vehicle.

I would dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: W. C. Bowman, Toronto.

Solicitor for the respondent: I. Himel, Toronto.