LOUIS BEAVER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1957

*May 30
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Narcotic drugs—Possession—What constitutes—Physical possession of package without knowledge of true nature of contents—The Opium and Narcotic Drug Act, R.S.C. 1952, c. 201, s. 4(1)(d).

One who has physical possession of a package which he believes to contain a harmless substance but which in fact contains a narcotic drug, cannot be convicted of being in possession of the drug under s. 4(1)(*d*) of the *Opium and Narcotic Drug Act*. The essence of that crime is the possession of the forbidden substance and in a criminal case there

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is in law no possession without knowledge of the character of the forbidden substance. Section 4(1)(*d*) is not an enactment of the class that excludes *mens rea* as an essential ingredient of the offence, and there is nothing in the wording of s. 17 of the Act requiring such a construction of s. 4(1)(*d*). It is, therefore, misdirection for a trial judge to tell the jury that, if possession of a package is established, the only question for them to decide is whether or not the package in fact contained a narcotic drug, and that the accused's knowledge or lack of knowledge of that fact, or even his honest but mistaken belief that it was a harmless substance, are wholly irrelevant to the question of his guilt or innocence and must not be considered by them.

Rex v. Hess, [1949] 1 W.W.R. 577, approved; *Morelli v. The King* (1932), 58 C.C.C. 120; *Rex v. Lawrence*, [1952] O.R. 149, overruled.

Per Fauteux and Abbott JJ., *dissenting*: The statute creates an absolute prohibition and *mens rea* is therefore not an essential element of the offence of possession. The principle underlying the Act is that possession of drugs covered by it is unlawful and where any exception is made to this principle that exception is made subject to particular controlling provisions and conditions.

APPEAL by the accused from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal from convictions. Appeal allowed in part.

C. L. Dubin, Q.C., for the appellant.

Walter M. Martin, Q.C., for the respondent.

The judgment of Rand, Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—The appellant was tried jointly with one Max Beaver before His Honour Judge Forsyth and a jury in the Court of General Sessions of the Peace for the County of York on an indictment reading as follows:

The jurors for our Lady the Queen present that LOUIS BEAVER and MAX BEAVER, at the City of Toronto, in the County of York, on or about the 12th day of March, in the year 1954, unlawfully did sell a drug, to wit, diacetylmorphine, without the authority of a license from the Minister of National Health and Welfare or other lawful authority, contrary to Section 4(1)(*f*) of the Opium and Narcotic Drug Act, Revised Statutes of Canada, 1952, Chapter 201 and amendments thereto.

2. The said jurors further present that the said LOUIS BEAVER and MAX BEAVER, at the City of Toronto, in the County of York, on or about the 12th day of March, in the year 1954, unlawfully did have in their possession a drug, to wit, diacetylmorphine, without the authority of a license from the Minister of National Health and Welfare or other lawful authority, contrary to Section 4(1)(*d*) of the Opium and Narcotic Drug Act, Revised Statutes of Canada 1952, Chapter 201, and amendments thereto;

AND FURTHER that the said LOUIS BEAVER is an habitual criminal;

AND FURTHER that the said MAX BEAVER is an habitual criminal.

(1) [1956] O.W.N. 798, 116 C.C.C. 231, 25 C.R. 53.

On September 19, 1955, the accused were found guilty on both counts and on the same day the learned trial judge found them to be habitual criminals. On October 17, 1955, the learned judge sentenced them to 7 years' imprisonment on each count, the sentences to run concurrently, and also imposed sentences of preventive detention.

Max Beaver has since died and we are concerned only with the case of the appellant.

The appellant appealed to the Court of Appeal for Ontario against both convictions and against the finding that he was an habitual criminal. These appeals were dismissed.

On February 19, 1957, the appellant was given leave to appeal to this Court from the convictions on the two counts on the following grounds:

1: The learned trial Judge erred in failing to instruct the jury that if they accepted the evidence of Louis Beaver or were in doubt as a result of it, he was not guilty of the offence.

2: The learned trial Judge erred in holding that the accused Louis Beaver was guilty of the offence charged whether he knew the package handed by the accused Max Beaver to the Police were drugs or not.

3: The learned trial Judge erred in instructing the jury that the only point that they had to decide was whether in fact the package handed the police by the accused Max Beaver was diacetylmorphine.

4: The charge to the jury by the learned trial Judge and the Court of Appeal is in error in holding that the accused Louis Beaver could be convicted of the offence charged in the absence of knowledge on his part that the substance in question was a drug.

By the same order, leave to appeal from the finding that the appellant was an habitual criminal was granted, conditionally upon the appeals from the convictions being successful.

It is not necessary to set out the facts in detail. There was evidence on which it was open to the jury to find (i) that Max Beaver sold to a police officer, who was working under cover, a package which in fact contained diacetylmorphine, (ii) that the appellant was a party to the sale of the package, (iii) that while the appellant did not have the package on his person or in his physical possession he and Max Beaver were acting jointly in such circumstances that the possession which the latter had of the package was the possession of both of the accused,

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and (iv) that the appellant had no knowledge that the substance contained in the package was diacetylmorphine and believed it to be sugar of milk.

I do not mean to suggest that the jury would necessarily have made the fourth finding but there was evidence on which they might have done so, or which might have left them in a state of doubt as to whether or not the appellant knew that the package contained anything other than sugar of milk.

The learned trial judge, against the protest of the appellant, charged the jury, in effect, that if they were satisfied that the appellant had in his possession a package and sold it, then, if in fact the substance contained in the package was diacetylmorphine, the appellant was guilty on both counts, and that the questions (i) whether he had any knowledge of what the substance was, or (ii) whether he entertained the honest but mistaken belief that it was a harmless substance were irrelevant and must not be considered. Laidlaw J.A., who delivered the unanimous judgment of the Court of Appeal, was of opinion that this charge was right in law and that the learned trial judge was bound by the decision in *Rex v. Lawrence* (1), to direct the jury as he did. The main question on this appeal is whether this view of the law is correct.

The problem is one of construction of the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, and particularly the following sections, which at the date of the offences charged read as follows:

> 4. (1) Every person who . . .
> (*d*) has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority; . . .
> (*f*) manufactures, sells, gives away, delivers or distributes or makes any offer in respect of any drug, or any substance represented or held out by such person to be a drug, to any person without first obtaining a licence from the Minister, or without other lawful authority; . . .
>
> is guilty of an offence, and is liable
> (i) upon indictment, to imprisonment for any term not exceeding seven years and not less than six months, and to a fine not exceeding one thousand dollars and not less than two hundred dollars, and, in addition, at the discretion of the judge, to be whipped; or

(1) [1952] O.R. 149, 102 C.C.C. 121, 13 C.R. 425.

(ii) upon summary conviction, to imprisonment with or without hard labour for any term not exceeding eighteen months and not less than six months, and to a fine not exceeding one thousand dollars and not less than two hundred dollars.

(2) Notwithstanding the provisions of the *Criminal Code,* or of any other statute or law, the court has no power to impose less than the minimum penalties herein prescribed, and shall, in all cases of conviction, impose both fine and imprisonment; . . .

11. (1) No person shall, without lawful authority or without a permit signed by the Minister or some person authorized by him in that behalf, import or have in his possession any opium pipe, opium lamp, or other device or apparatus designed or generally used for the purpose of preparing opium for smoking, or smoking or inhaling opium, or any article capable of being used as or as part of any such pipe, lamp or other device or apparatus.

(2) Any person violating the provisions of this section is liable, upon summary conviction, to a fine not exceeding one hundred dollars, and not less than fifty dollars, or to imprisonment for a term not exceeding three months, or to both fine and imprisonment.

15. Where any person is charged with an offence under paragraph (*a*), (*d*), (*e*), (*f*), or (*g*) of subsection (1) of section 4, it is not necessary for the prosecuting authority to establish that the accused had not a licence from the Minister or was not otherwise authorized to commit the act complained of, and if the accused pleads or alleges that he had such licence or other authority the burden of proof thereof shall be upon the person so charged.

17. Without limiting the generality of paragraph (*d*) of subsection (1) of section 4, any person who occupies, controls, or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug or any article mentioned in section 11 is found, shall, if charged with having such drug or article in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug or article was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof.

In the course of the argument counsel also referred to the following provisions of other statutes of Canada:

The Interpretation Act, R.S.C. 1952, c. 158, s. 28(1):

28(1) Every Act shall be read and construed as if any offence for which the offender may be

(*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence;

(*b*) punishable on summary conviction, were described or referred to as an offence; and

all provisions of the *Criminal Code* relating to indictable offences, or offences, as the case may be, shall apply to every such offence.

The Criminal Code, R.S.C. 1927, c. 36, s. 5:

5. In this Act, unless the context otherwise requires, . . .

(*b*) having in one's possession includes not only having in one's own personal possession, but also knowingly,

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(i) having in the actual possession or custody of any other person, and

(ii) having in any place, whether belonging to or occupied by one's self or not, for the use or benefit of one's self or of any other person.

2. If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

The judgment in appeal is supported by earlier decisions of appellate Courts in Ontario, Quebec and Nova Scotia, but a directly contrary view has been expressed by the Court of Appeal for British Columbia. While this conflict has existed since 1948, this is the first occasion on which the question has been brought before this Court.

It may be of assistance in examining the problem to use a simple illustration. Suppose X goes to the shop of Y, a druggist, and asks Y to sell him some baking-soda. Y hands him a sealed packet which he tells him contains baking-soda and charges him a few cents. X honestly believes that the packet contains baking-soda but in fact it contains heroin. X puts the package in his pocket, takes it home and later puts it in a cupboard in his bathroom. There would seem to be no doubt that X has had actual manual and physical possession of the package and that he continues to have possession of the package while it is in his cupboard. The main question raised on this appeal is whether, in the supposed circumstances, X would be guilty of the crime of having heroin in his possession?

It will be observed at once that we are not concerned with the incidence of the burden of proof or of the obligation of adducing evidence. The judgment of the Court of Appeal states the law to be that X must be convicted although he proves to the point of demonstration that he honestly believed the package to contain baking-soda.

I have examined all the cases referred to by counsel in the course of their full and helpful arguments but do not propose to refer to them in detail as the differences of opinion which they disclose are not so much as to the principles by which the Court should be guided in con-

struing a statute which creates a crime as to the result of applying those principles to the Act with which we are concerned.

The rule of construction has often been stated.

In *The Company of Proprietors of the Margate Pier v. Hannam et al.* (1), Lord Coke is quoted as having said:

> Acts of Parliament are to be so construed as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged.

In *The Attorney General v. Bradlaugh* (2), Brett M.R. said:

> Now, to my mind, it is contrary to the whole established law of England (unless the legislation on the subject has clearly enacted it), to say that a person can be guilty of a crime in England without a wrongful intent—without an attempt to do that which the law has forbidden. I am aware that in a particular case, and under a particular criminal statute, fifteen judges to one held that a person whom the jury found to have no intent to do what was forbidden, and whom the jury found to have been deceived, and to have understood the facts to be such that he might with impunity have done a certain thing, was by the terms of that Act of Parliament guilty of a crime, and could be imprisoned. I say still, as I said then, that I cannot subscribe to the propriety of that decision. I bow to it, but I cannot subscribe to it: but the majority of the judges forming the Court so held because they said that the enactment was absolutely clear.

In *Reynolds v. G. H. Austin & Sons Ld.* (3), Devlin J. says at pp. 147-8:

> It has always been a principle of the common law that mens rea is an essential element in the commission of any criminal offence against the common law. In the case of statutory offences it depends on the effect of the statute. In *Sherras v. De Rutzen,* [1895] 1 Q.B. 918, 921, Wright, J., in his well-known judgment, laid it down that there was a presumption that mens rea was an essential ingredient in a statutory offence, but that that presumption was liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it dealt. . . . Kennedy, L.J., in *Hobbs v. Winchester Corporation,* [1910] 2 K.B. 471, 483, thought that in construing a modern statute this presumption as to mens rea did not exist. In this respect, as he said, he differed from Channell, J., in the court below. But the view of Wright, J., in *Sherras v. De Rutzen* has consistently been followed. I need refer only to the dictum of Lord Goddard, C.J., in *Harding v. Price,* [1948] 1 K.B. 695, 700: "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

(1) (1819), 3 B. & Ald. 266 at 270, 106 E.R. 661.
(2) (1885), 14 Q.B.D. 667 at 689-90.
(3) [1951] 2 K.B. 135, [1951] 1 All E.R. 606.

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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'."

In *Regina v. Tolson* (1), Stephen J. says at p. 188:

> . . . I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.
>
> I am unable to suggest any real exception to this rule, nor has one ever been suggested to me.

and adds at p. 189:

> Of course, it would be competent to the legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case.

I adhere to the opinion which, with the concurrence of my brother Nolan, I expressed in *The Queen v. Rees* (2), that the first of the statements of Stephen J. quoted above should now be read in the light of the judgment of Lord Goddard C.J., concurred in by Lynskey and Devlin JJ., in *Wilson v. Inyang* (3), which, in my opinion, rightly decides that the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining that essential question.

In *Watts and Gaunt v. The Queen* (4), Estey J. says:

> 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.

I do not suggest that the principle stated in the above excerpts was absent from the minds of the learned judges in the Courts of Appeal in Ontario, Quebec and Nova Scotia who decided the cases on which the respondent relies. Those decisions are founded on the judgment of

(1) (1889), 23 Q.B.D. 168.
(2) [1956] S.C.R. 640 at 651, 115 C.C.C. 1, 24 C.R. 1, 4 D.L.R. (2d) 406.
(3) [1951] 2 K.B. 799, [1951] 2 All E.R. 237.
(4) [1953] 1 S.C.R. 505 at 511, 105 C.C.C. 193, 16 C.R. 290, [1953] 3 D.L.R. 152.

the Court of King's Bench, Appeal Side, in *Morelli v. The King* (1), in which Bond J., at p. 128, concluded his reasons as follows:

> I therefore reach the conclusion that while it is a principle of our law that to constitute an offence there must be a guilty mind, and that principle must be imported into the statute (*per* Cockburn, C.J., 8 Cox C.C., at p. 478), yet by apt words Parliament may exclude such a requirement, and in the case now under consideration has effectively done so.

When the decisions as to the construction of the *Opium and Narcotic Drug Act* on which the respondent relies are examined it appears that two main reasons are assigned for holding that *mens rea* is not an essential ingredient of the offence created by s. 4(1)(*d*), these being (i) the assumption that the subject-matter with which the Act deals is of the kind dealt with in the cases of which *Hobbs v. Winchester Corporation* (2) is typical and which are sometimes referred to as "public welfare offence cases", and (ii) by implication from the wording of s. 17 of the Act.

As to the first of these reasons, I can discern little similarity between a statute designed, by forbidding the sale of unsound meat, to ensure that the supply available to the public shall be wholesome, and a statute making it a serious crime to possess or deal in narcotics; the one is to ensure that a lawful and necessary trade shall be carried on in a manner not to endanger the public health, the other to forbid altogether conduct regarded as harmful in itself. As a necessary feature of his trade, the butcher holds himself out as selling meat fit for consumption; he warrants that quality; and it is part of his duty as trader to see that the merchandise is wholesome. The statute simply converts that civil personal duty into a public duty.

A few passages from the judgment in *Hobbs v. Winchester Corporation* will show the view taken of the purpose of the legislation there under consideration:

Cozens-Hardy M.R., at p. 476:

> Before reading the material words of these sections it is perhaps convenient to indicate what is the plain and apparent object of the Act with regard to the sale of unsound meat. The object is to prevent danger to the public health by the sale of meat for human consumption in a state or condition in which it is dangerous to human health.

(1) 58 C.C.C. 128, [1932] 3 D.L.R. 620.

(2) [1910] 2 K.B. 471.

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Farwell L. J., at p. 481:

> Who is to take the risk of the meat being unsound, the butcher or the public? In my opinion the Legislature intended that the butcher should take the risk and that the public should be protected, irrespective of the guilt or innocence of the butcher. The knowledge or possible means of knowledge of the butcher is not a matter which affects the public; it is the unsound meat which poisons them; and I think that the Legislature intended that the butcher should sell unsound meat at his peril.

Kennedy L. J., at pp. 484-5:

> A man takes upon himself to offer goods to the public for their consumption with a view to making a profit by the sale of them. Those goods may be so impregnated with disease as to carry death or at any rate serious injury to health to any one consuming them. To say that the difficulty of discovering the disease is a sufficient ground for enabling the seller to excuse himself on the plea that he cannot be reasonably expected to have the requisite technical knowledge or to keep an analyst on his premises, is simply to say that the public are to be left unprotected and must submit to take the risk of purchasing an article of food which may turn out to be dangerous to life or health. I think that the policy of the Act is this: that if a man chooses for profit to engage in a business which involves the offering for sale of that which may be deadly or injurious to health he must take that risk, and that it is not a sufficient defence for any one who chooses to embark on such a business to say "I could not have discovered the disease unless I had an analyst on the premises."

Assuming that *Hobbs v. Winchester Corporation* was rightly decided I do not think that its reasoning supports the decision of the Court of Appeal in the case at bar. The difference between the subject-matter of the legislation there considered and that of the Act with which we are concerned is too wide.

As to the second reason, the argument is put as follows: Using again the illustration I have taken above, it is said (i) that the words of s. 17 would require the conviction of X if the package was found in his bathroom cupboard "unless he prove that [it] was there without his authority, knowledge or consent", that is, he is *prima facie* presumed to be guilty but can exculpate himself by proving lack of knowledge, and (ii) that since no such words as "unless he prove that the drug was in his possession without his knowledge" are found in s. 4(1)(*d*) it must be held that Parliament intended that lack of knowledge should be no defence.

In my view all that s. 17 accomplishes, still using the same illustration, is, on proof that the package was in his cupboard, to shift to X the onus of proving that he did not have possession of the package. To this X would

answer: "Of course I had possession of the package, I bought it, paid for it, carried it home and put it in my cupboard. My defence is that I thought it contained baking-soda. I had no idea it contained heroin." If it be suggested that X could not usefully make this reply if what was found in his house was not a sealed package but an article of the sort described in s. 11 the answer would appear to be that many persons might not recognize an opium lamp or an article capable of being used as part of such a lamp. The wording of s. 17 does not appear to me to compel the Court to construe s. 4 as the Court of Appeal has done. It still leaves unanswered the question: Has X possession of heroin when he has in his hand or in his pocket or in his cupboard a package which in fact contains heroin but which he honestly believes contains only baking-soda? In my opinion that question must be answered in the negative. The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance. Just as in *Regina v. Ashwell* (1) the accused did not in law have possession of the complainant's sovereign so long as he honestly believed it to be a shilling so in my illustration X did not have possession of heroin so long as he honestly believed the package to contain baking-soda. The words of Lord Coleridge C.J. in *Regina v. Ashwell* at p. 225, quoted by Charles J. delivering the unanimous judgment of the Court of Criminal Appeal in *Rex v. Hudson* (2):

> In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it.

might well be adapted to my illustration to read: "In good sense it seems to me he did not have possession of heroin till he knew what he had got."

In my view the law is correctly stated in the following passage in the judgment of O'Halloran J.A., with whom Robertson J.A. concurred, in *Rex v. Hess* (3):

> To constitute "possession" within the meaning of the criminal law it is my judgment that where, as here, there is manual handling of a thing, it must be co-existent with knowledge of what the thing is, and both these

(1) (1885), 16 Q.B.D. 190.
(2) [1943] 1 K.B. 458 at 462, [1943] 1 All E.R. 642, 29 Cr. App. R. 65.
(3) [1949] 1 W.W.R. 577 at 579, 94 C.C.C. 48 at 50-1, 8 C.R. 42.

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elements must be co-existent with some act of control (outside public duty). When those three elements exist together, I think it must be conceded that under sec. 4(1)(*d*) it does not then matter if the thing is retained for an innocent purpose.

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If the matter were otherwise doubtful I would be drawn to the conclusion that Parliament did not intend to enact that *mens rea* should not be an essential ingredient of the offence created by s. 4(1)(*d*) by the circumstance that on conviction a minimum sentence of 6 months' imprisonment plus a fine of $200 must be imposed. 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. The legislation dealt with in *Hobbs v. Winchester Corporation, supra*, provided that a sentence of imprisonment might, not must, be imposed on a convicted person. As to this Kennedy L.J. said at p. 485:

> Great stress is laid on the character of the punishment that may be inflicted under s. 117. I protest for myself that we are not to assume that where a judicial discretion is granted by the Legislature the tribunal, whatever its rank may be, exercising that discretion will exercise it otherwise than in a judicial manner. Because there may be a case, as there obviously may be, in which a man unknowingly exposes for sale food which is dangerous to health, and because the offence created by the statute is punishable by imprisonment in the first instance, that to my mind is not a ground for holding that a mens rea must be shewn in every case. If it is shewn that the man had no guilty knowledge the magistrate would probably inflict a merely nominal fine . . .

At p. 481 Cozens-Hardy M.R. expressed himself in similar terms.

It would, of course, be within the power of Parliament to enact that a person who, without any guilty knowledge, had in his physical possession a package which he honestly believed to contain a harmless substance such as baking-soda but which in fact contained heroin, must on proof of such facts be convicted of a crime and sentenced to at least 6 months' imprisonment; but I would refuse to impute such an intention to Parliament unless the words of the statute were clear and admitted of no other interpretation. To borrow the words of Lord Kenyon in *Fowler v. Padget* (1):

(1) (1798), 7 Term Rep. 509 at 514, 101 E.R. 1103.

> I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for . . .

The conclusion which I have reached on the main question as to the proper construction of the word "possession" makes it unnecessary for me to consider the other points raised by Mr. Dubin in his argument as to the construction of s. 4(1)(*d*). For the above reasons I would quash the conviction on the charge of having possession of a drug.

As to the charge of selling, as is pointed out by my brother Fauteux, the appellant's version of the facts brings his actions within the provisions of s. 4(1)(*f*) since he and his brother jointly sold a substance represented or held out by them to be heroin; and I agree with the conclusion of my brother Fauteux that the conviction on the charge of selling must be affirmed.

For the above reasons, I would dismiss the appeal as to the first count (that is, of selling) but would direct that the time during which the appellant has been confined pending the determination of the appeal shall count as part of the term of imprisonment imposed pursuant to that conviction. As to the second count (that is, of having possession) I would allow the appeal, quash the conviction and direct a new trial. As leave to appeal from the finding that the appellant is an habitual criminal was granted conditionally upon the appeal from the convictions being successful, and as the appeal as to one conviction has failed, we are without jurisdiction to review the finding that the appellant is an habitual criminal and in the result that finding stands.

The judgment of Fauteux and Abbott JJ. was delivered by

FAUTEUX J. (*dissenting*):—The appellant Louis Beaver appeals, with leave of this Court, from a unanimous judgment of the Court of Appeal for Ontario (1) affirming his conviction by a jury on an indictment charging him, jointly with his brother Max Beaver, on two counts: (i) possession

(1) [1956] O.W.N. 798, 116 C.C.C. 231, 25 C.R. 53.

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and (ii) sale, on March 12, 1954, of a drug, to wit, diacetylmorphine, contrary to s. 4(1)(*d*) and s. 4(1)(*f*), respectively, of the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201.

Subsequent to this conviction, the appellant was found to be an habitual criminal and this conviction, being appealed, was also unanimously confirmed by the Court of Appeal. Leave to appeal as to this conviction has been granted, conditionally upon the appeal against the conviction on the primary charge being successful.

To appreciate and determine the points of law raised on behalf of the appellant on the appeal related to the primary charge, it is expedient but sufficient to relate the following facts.

The evidence for the prosecution shows that in the forenoon of March 12, 1954, Constable Tassie of the R.C.M.P., known and operating under the name of Al Demeter, was introduced to the appellant by one Montroy, a drug addict, as one who was interested to obtain, jointly with him, one ounce of heroin. The price asked by the appellant for such a quantity being $800, it was agreed that only half an ounce would be bought and, further, that delivery and payment would be made at four o'clock in the afternoon, at the same place; the appellant insisting, however, that only one of either Tassie or Montroy was then to appear. At the appointed time and place, Tassie arrived and boarded the car driven by the appellant, then in company of his brother Max Beaver. Having travelled a certain distance, the car stopped; Max Beaver walked out towards a lamp-post, picked up a parcel, came back and boarded the car, and while proceeding to another destination, gave the parcel to Tassie who paid him the agreed price. Admittedly, this package contained half an ounce of diacetylmorphine.

The appellant did not challenge these incriminating facts but, testifying in his own defence, gave the following evidence: The day before the above-related occurrences, appellant and Montroy met together. The latter explained to the former that one Al Demeter had "double crossed" him, that he wanted to "get even" with him and, to achieve this purpose, made the following proposal, to which appellant acceded. It was agreed that Montroy

would introduce Demeter, who wanted to have drugs, to appellant as one from whom they could be obtained; a sale would be made; but sugar of milk instead of drugs would be delivered and the price received by the appellant would be remitted to Montroy. Feeling indebted to Montroy, from whom he and his brother, Max Beaver, had received certain favours while in a penitentiary, appellant executed this fraudulent plan.

Hence, on his story, appellant's defence was that he never intended to deal in drugs and never knew that the parcel delivered contained any. This was not accepted by the trial judge or by the Court of Appeal as being a valid defence in law under the *Opium and Narcotic Drug Act*. The jury, therefore, did not consider that defence which was withdrawn from them.

The grounds of law upon which leave to appeal was granted are the following:

1: The learned trial Judge erred in failing to instruct the jury that if they accepted the evidence of Louis Beaver or were in doubt as a result of it, he was not guilty of the offence.

2: The learned trial Judge erred in holding that the accused Louis Beaver was guilty of the offence charged whether he knew the package handed by the accused Max Beaver to the Police were drugs or not.

3: The learned trial Judge erred in instructing the jury that the only point that they had to decide was whether in fact the package handed the police by the accused Max Beaver was diacetylmorphine.

4: The charge to the jury by the learned trial Judge and the Court of Appeal is in error in holding that the accused Louis Beaver could be convicted of the offence charged in the absence of knowledge on his part that the substance in question was a drug.

The first proposition of law, submitted by counsel for the appellant, is that want of knowledge as to the nature of a substance found in the possession of an accused is a good defence to a charge that he had in his possession a drug, contrary to s. 4(1)(*d*) of the *Opium and Narcotic Drug Act*.

This submission rests on the presumption that *mens rea* is a necessary ingredient in every offence. But, as stated by Wright J. in *Sherras v. De Rutzen* (1), this presumption is liable to be displaced and this may be done either by the words of the statute creating the offence or by the subject-matter with which it deals, both of which must be considered. This view of the law and of the method

(1) [1895] 1 Q.B. 918 at 921.

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of interpreting a statute when the question arises, is expressed in many other cases, such as *Hobbs v. Winchester Corporation* (1), and *Reynolds v. G. H. Austin & Sons Ld.* (2).

It appears convenient to deal first with the subject-matter of the Act and consider afterwards the provisions directly relevant to the offence of possession.

The plain and apparent object of the Act is to prevent, by a rigid control of the possession of drugs, the danger to public health, and to guard society against the social evils which an uncontrolled traffic in drugs is bound to generate. The scheme of the Act is this: The importation, exportation, sale, manufacture, production and distribution of drugs are subject to the obtention of a licence which the Minister of National Health and Welfare may issue, with the approval of the Governor General in council, and in which the place where such operations may be carried on is stated. Under the same authority are indicated ports and places in Canada where drugs may be exported or imported, the manner in which they are to be packed and marked for export, the records to be kept for such export, import, receipt, sale, disposal and distribution. The Act also provides for the establishment of all other convenient and necessary regulations with respect to duration, terms and forms of the several licences therein provided. Without a licence, it is an offence to import or export from Canada and an offence for any one who, not being a common carrier, takes or carries, or causes to be taken or carried from any place in Canada to any other place in Canada, any drug. Druggists, physicians, dentists and veterinary surgeons stand, of course, in a privileged class; but even their dealings in drugs for medicinal purposes are the object of a particular control. Under penalties of the law, some of them have to keep records of their operations, while others have the obligation to answer inquiries in respect thereto. Having in one's possession drugs without a licence or other lawful authority, is an offence. In brief, the principle underlying the Act is that possession of drugs covered by it is unlawful; and where any exception is

(1) [1910] 2 K.B. 471.
(2) [1951] 2 K.B. 135, [1951] 1 All E.R. 606.

made to the principle, the exceptions themselves are attended with particular controlling provisions and conditions.

The enforcement sections of the Act manifest the exceptional vigilance and firmness which Parliament thought of the essence to forestall the unlawful traffic in narcotic drugs and cope effectively with the unusual difficulties standing in the way of the realization of the object of the statute. Substantive and procedural principles generally prevailing under the *Criminal Code* in favour of the subject are being restricted or excepted. The power to search by day or by night, either premises or the person, is largely extended under s. 19. Special writs of assistance are provided for under s. 22. The consideration of the provisions of ss. 4 and 17 being deferred for the moment, the burden of proof is either alleviated or shifted to persons charged with violations under ss. 6, 11, 13, 16 and 18. Minimum sentences are provided or are made mandatory, under ss. 4 and 6. Deportation of aliens found guilty is also mandatory and this notwithstanding the provisions of the *Immigration Act* or any other Act, under s. 26. And the application of the *Identification of Criminals Act*, ordinarily limited to the case of indictable offences, is, by s. 27, extended to any offence under the Act.

All of these provisions are indicative of the will of Parliament to give the most efficient protection to public health against the danger attending the uncontrolled use of drugs as well as against the social evils incidental thereto, by measures generally centred and directed to possession itself of the drugs covered by the Act. The subject-matter, the purpose and the scope of the Act are such that to subject its provisions to the narrow construction suggested on behalf of appellant would defeat the very object of the Act. Such narrow construction is repugnant to the clear terms of s. 15 of the *Interpretation Act*, R.S.C. 1952, c. 158. In *Chajutin v. Whitehead* (1), Lord Hewart C.J., referring to the provisions of art. 18 of

(1) [1938] 1 K.B. 506, [1938] 1 All E.R. 159.

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para. 4(*d*) of the Aliens' Order, 1920, which made an offence of the possession, without lawful authority, of a forged passport, said, at p. 509:

> In my opinion the Order—the circumstances giving rise to which are sufficiently familiar—would be reduced almost to waste paper if the offence could not be established unless the prosecution proved that the person having in his possession the forged passport had guilty knowledge of the fact that it had been forged. It is not easy to see how that knowledge, except in rare circumstances, could be directly proved; but not only, in my opinion, is there nothing in this part of the article to put any such burden upon the prosecution, but the words of the article negative the view that the prosecution is required to carry such a burden.

In that case, the appeal committee found, as a fact, that the appellant did not know that the passport had been altered, and honestly believed, on reasonable grounds, that it had been issued to him in the ordinary course, by the proper authority. The language of art. 18, para. 4(*d*), of the Order was as follows:

> Any person shall be guilty of an . . . offence if . . . he . . .
> (*d*) without lawful authority uses or has in his possession any forged, altered or irregular certificate, passport, or other document, or any passport or document on which any visa or endorsement has been altered or forged.

It was none the less decided that it was neither necessary for the prosecution to prove guilty knowledge of the alteration, nor open to the defendant to secure acquittal by proof that he did not know and had no reason to suspect that the passport was altered. This case, amongst others, such as *Rex v. Wheat*; *Rex v. Stocks* (1), is a clear authority supporting the proposition that the presumption that *mens rea* is an ingredient of an offence, as well as the defence flowing from an honest belief as to the existence of a state of facts may, by reason of the subject-matter of the Act or of the language of its provisions, or of both, cease to obtain. The *Opium and Narcotic Drug Act* comes, in my view, within these classes of Acts referred to by Wright J. in *Sherras v. De Rutzen, supra.*

With these considerations related to the subject-matter of the Act, it is appropriate now to turn to the language of the provisions of the statute directly related to the offence of possession.

(1) [1921] 2 K.B. 119.

The main provisions to consider are those of s. 4(1)(*d*), reading as follows:

> 4. (1) Every person who . . .
> (*d*) has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority; . . .
> is guilty of an offence, and is liable . . .

On the plain, literal and grammatical meaning of the words of this section, there is an absolute prohibition to be in possession of drugs, whatever be the various meanings of which the word possession may be susceptible, unless the possession is under the authority of a licence from the Minister first had and obtained, or under other lawful authority. As to the meaning of these provisions, I am in respectful agreement with and content to refer to the reasoning of Laidlaw J.A., speaking for the Court of Appeal for Ontario, in *Rex v. Lawrence* (1).

The language of the section and the subject-matter of the Act in which it is found, both considered in the light of the provisions of s. 15 of the *Interpretation Act*, cannot justify the narrow meaning of the word possession which is contended for by counsel for the appellant. I find no reason which would render inapplicable to this case what was said by Lord Hewart C.J. in the case of *Chajutin v. Whitehead, supra.* The question is not what is the meaning ascribed to the word possession in civil or in criminal cases, at common law or under statutory laws, but what is the meaning of the word under the Act and the provisions here considered. The case of *Regina v. Ashwell* (2) is, I think, of no application in the matter. The question there considered was possession in relation to the offence of larceny. Larceny is an offence involving the violation of possession; it is an offence against a possessor. This is not the type of possession with which this Act is concerned.

In *The Attorney-General v. Lockwood* (3), Alderson B. said at p. 398:

> The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain, literal and gramma-

(1) [1952] O.R. 149, 102 C.C.C. 121 at 123 *et seq.*, 13 C.R. 425.
(2) (1885), 16 Q.B.D. 190.
(3) (1842), 9 M. & W. 378, 152 E.R. 160.

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tical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the act, or to some palpable and evident absurdity.

The interpretation of s. 4(1)(*d*), as made particularly in *Rex v. Lawrence, supra,* cannot, I think, be said to lead "to a plain and clear contradiction of the apparent purpose of the Act". On the contrary, of the construction suggested by the appellant and the one submitted by the respondent, the latter appears to be the only one really consistent with the apparent purpose of the Act. Nor, in my respectful view, can this latter construction be said to lead "to some palpable and evident absurdity". Such a view was not the one reached by Lord Hewart C.J. in *Chajutin v. Whitehead, supra,* where the provision of the law creating the offence was couched in language substantially similar to the one here examined. Indeed, and when the provisions of s. 4(1)(*d*) are further considered in the light of those of s. 17, it would seem to me that the construction suggested on behalf of the appellant would, as it will appear, bring an astonishing result.

Section 17 reads:

17. Without limiting the generality of paragraph (*d*) of subsection (1) of section 4, any person who occupies, controls, or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug or any article mentioned in section 11 is found, shall, if charged with having such drug or article in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug or article was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof.

The language of the section is clear. Parliament has provided: (i) that either one of these three facts, *i.e.*, occupation, or control, or possession, of any place in or upon which a drug covered by the Act is found, makes without more one who occupies, controls or has in his possession such a place, a possessor of drug without lawful authority, and (ii) that the occupier of such a place "*shall,* if charged with having such drug or article in possession without lawful authority, *be deemed to have been so in possession unless* he prove that the drug or article was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof". In the circumstances described in this section, knowledge in any sense is not an essential ingredient of the offence; but

lack of knowledge, if proved, is a defence. Yet, on the submission of appellant, if a drug is found on the very person of the accused, knowledge as to the nature of the substance would be an essential ingredient of the offence and would, therefore, have to be proved as part of the case for the prosecution of a charge laid under s. 4(1)(*d*). The essential ingredients of unlawful possession, under the Act, are the same under s. 4(1)(*d*) and under s. 17; the opening words of the latter section forbid us to construe the offence in a manner varying from one section to the other. This, however, is the result flowing from the appellant's submission. Furthermore, and if it is argued that knowledge is of the essence of unlawful possession under both s. 4(1)(*d*) and s. 17, then one is at a loss to understand why Parliament should have, in the latter section, provided for a defence resting on the proof of lack of knowledge. A like interpretation of s. 17 strips this exculpatory provision of any meaning and effect. The language of the two sections can only be rationalized, I think, by interpreting s. 4(1)(*d*) as meaning what it says, *i.e.*, as creating an absolute prohibition, and by interpreting s. 17 as extending the meaning of s. 4(1)(*d*), *i.e.*, this absolute prohibition, to the circumstances described in s. 17, with, however, and only in such circumstances, a defence resting on the proof of lack of knowledge.

This is the first occasion which this Court has to consider this submission of appellant which, ever since the decision rendered in 1932 in *Morelli v. The King* (1), the judges of the provincial Courts of Appeal have, with a few exceptions, refused to accept. The majority judgment rendered in 1948 in *Rex v. Hess* (2) stands as the first expression of judicial opinion contrary to these views. In the majority of judgments rendered subsequently to the *Hess* case, the views therein expressed were not followed. This decision has no reference to the *Morelli* case and it rests principally on a concept of possession which, in my respectful view, the subject-matter, purpose and scope of the Act and the language of s. 4(1)(*d*) and s. 17 do not warrant.

(1) 58 C.C.C. 128, [1932] 3 D.L.R. 620.

(2) [1949] 1 W.W.R. 577, 94 C.C.C. 48, 8 C.R. 42.

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The more recent reported case, where a similar question was considered by the English Court of Criminal Appeal, is that of *Regina v. Hallam* (1). The provision considered was s. 4(1) of the *Explosive Substances Act,* 1883, the relevant part of which reads:

> Any person who . . . knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . does not have it in his possession or under his control for a lawful object, shall, unless he can show that he . . . had it in his possession or under his control for a lawful object, be guilty of felony . . . .

On this language, it was decided that knowledge that the substance was an explosive was an essential ingredient of the offence. Arguments such as the one related to the concept of possession, which feature the reasoning in the *Hess* case, *supra,* are foreign to this decision, which indeed was reached because the word possession was there qualified by the word "knowingly". Such a word, as noted by Laidlaw J.A. in the *Lawrence* case, *supra,* is absent from s. 4(1)(*d*). Furthermore, while possession of explosive substances is not, under the English Act of 1883, subject to a licence first had and obtained or other lawful authority, the contrary is the case with respect to the possession of drugs under the *Opium and Narcotic Drug Act.* Finally, the existence of "such circumstances as to give rise to a reasonable suspicion" that possession is for an unlawful object is an essential ingredient of the offence under the *Explosive Substances Act*; this ingredient does not appear under s. 4(1)(*d*). Reading the reasons for judgment in the *Hallam* case, one reaches the view that had the provisions therein considered been worded as are those of s. 4(1)(*d*) and as were also those of the section considered in *Chajutin v. Whitehead, supra,* a decision similar to the one rendered in the latter case would have been made.

As interpreted by most of the members of the Canadian Courts of Appeal since 1932, the provisions of s. 4(1)(*d*) are, like many other provisions of the Act, undoubtedly severe. The duty of the Courts is to give effect to the language of Parliament. And notwithstanding that the views expressed in *Morelli* and *Lawrence,* in particular, had been prevailing ever since 1932 and are still prevailing, Parliament has not seen fit to intervene. For all these

(1) (1957), 41 Cr. App. R. 111.

reasons, I find it impossible to accede to the proposition that knowledge of the nature of the substance is of the essence of the offence of unlawful possession under the Act.

Even assuming the correctness of this view of the law, argues counsel for the appellant, the latter could not be found guilty of either possession under s. 4(1)(*d*) or sale under s. 4(1)(*f*).

As to possession: Contrary to what is admittedly the fact in the case of Max Beaver, it is said, Louis Beaver the appellant did not have physical possession. The application of the relevant provisions of s. 5 of the 1927 *Criminal Code* in like matters has never been doubted. As stated by the Court of Appeal for British Columbia in *Rex v. Colvin and Gladue* (1), there is joint possession where one has a right to exercise some measure of control over the thing in the possession of another. On the admitted facts of this case, there is no doubt that the appellant was, to say the least, in full command and control of all the operations.

As to sale: Though the substance delivered to and paid for by Tassie was a drug, as admittedly it was represented and held out to be by appellant, it is said that the latter could not be guilty of the offence of sale under s. 4(1)(*f*) because, on his story, he intended and thought the substance sold to be sugar of milk. To this submission, the provisions of s. 4(1)(*f*) afford, I think, a complete answer:

> 4. (1) Every one who . . .
>
> (*f*) . . . sells, . . . any drug, *or any substance represented* or *held out by such person to be a drug,* to any person without first obtaining a licence from the Minister, or without other lawful authority; . . .

In the case of any sale made without first obtaining a licence from the Minister or without other lawful authority, the accuracy or inaccuracy of the representation made by the seller to the purchaser as to the nature of the substance sold and the honesty or dishonesty attending the representation, if inaccurate, are quite immaterial if the substance sold is represented or held out to be a drug by the seller to the purchaser. The relevant count of the indictment does not in terms say that appellant did sell a substance represented or held out by him to Tassie to be a drug, but that "he did sell a drug, to wit, diacetyl-

(1) 58 B.C.R. 204, [1942] 3 W.W.R. 465, 78 C.C.C. 282, [1943] 1 D.L.R. 20.

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morphine"; in this language, however, is necessarily implied the allegation of the fact that appellant represented or held out the substance sold, delivered and paid for, to be a drug. Hence appellant's version of the facts brings this case within the provisions of s. 4(1)(*f*) and, if believed, would leave no alternative to a reasonable jury acting according to law but to return a verdict of guilty. Section 4(1)(*f*), as well as those previously referred to in the analysis of the Act, is indicative of the intent of Parliament to deal adequately with the methods, which are used in the unlawful traffic of drugs to defeat the purpose of the Act, ingenious as they may be. That the enforcement of the provisions of the Act may, in exceptional cases, lead to some injustice, is not an impossibility. But, to forestall this result as to such possible cases, there are remedies under the law, such as a stay of proceedings by the Attorney General or a free pardon under the royal prerogative.

I would dismiss the appeal against the unanimous judgment of the Court of Appeal for Ontario affirming the conviction on the primary charges and, in view of this result, the unanimous judgment of the Court of Appeal, affirming the decision that appellant is an habitual criminal, remains undisturbed.

Appeal allowed in part, FAUTEUX *and* ABBOTT JJ. *dissenting.*

Solicitors for the appellant: Kimber & Dubin, Toronto.