[HIGH COURT OF AUSTRALIA.]

PROUDMAN . . . . . APPLICANT;
RESPONDENT,

AND

DAYMAN . . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1941.

ADELAIDE, *Sept.* 16, 22.

Rich A.C.J., Dixon and McTiernan JJ.

Vehicles and Traffic—Permitting unlicensed person to drive motor vehicle—Mens rea—Defence of honest mistake on reasonable grounds—Road Traffic Act 1934-1939 (*S.A.*) (*No.* 2183 *of* 1934—*No.* 45 *of* 1939), *s.* 30.*

On a charge under s. 30 of the *Road Traffic Act* 1934-1939 (S.A.) of permitting an unlicensed person to drive a motor vehicle on a road proof that the defendant knew that the driver was unlicensed is unnecessary. *Per Rich* and *Dixon* JJ.: Even if an honest belief on reasonable grounds that the driver was licensed is a defence to a charge under the section (and, *per Dixon* J., *semble* it is) the defendant had failed, on the evidence, to establish such a defence. *Per McTiernan* J.: Guilt does not depend on whether the defendant knew or believed on reasonable grounds that the driver was not the holder of a licence; *mens rea* justifying the conviction consists in the intent to do an act prohibited by the section, that is, to give permission to an unlicensed person to drive.

Special leave to appeal from the Supreme Court of South Australia (Full Court): *Dayman* v. *Proudman*, (1941) S.A.S.R. 87, refused.

APPLICATION for special leave to appeal from the Supreme Court of South Australia.

Annie Dorothy Proudman was convicted in a Court of Summary Jurisdiction of South Australia on a complaint by Irvine Dayman that she did permit one Hawke to drive a motor car on the South Road, he not then being the holder of a licence for the time being in force, contrary to s. 30 of the *Road Traffic Act* 1934-1939 (S.A.).

* Section 30 of the *Road Traffic Act* 1934-1939 (S.A.) provides as follows:—"Any person who . . . drives a motor vehicle on any road without being the holder of a licence for the time being in force, or employs or permits any person not being the holder of such a licence to drive a motor vehicle on any road shall be guilty of an offence."

On an appeal by Mrs. Proudman to the Supreme Court of South Australia *Cleland* J. set aside the conviction, on the ground that the evidence established that she believed the driver held a licence which was in force and that she had reasonable grounds for her belief.

Dayman appealed to the Full Court of the Supreme Court of South Australia, which allowed the appeal and restored the conviction. *Murray* C.J. was of opinion that the prohibition in s. 30 of the *Road Traffic Act* 1934-1939 (S.A.) was absolute and independent of any knowledge on the part of the owner; *Angas Parsons* and *Napier* JJ. were of opinion that it was not incumbent on the prosecutor to prove that the defendant knew or should have known that the driver was unlicensed, but that an honest belief on reasonable grounds that the driver was licensed was a defence to a charge under the section. The Court, however, agreed that, on the evidence, Mrs. Proudman had no reasonable grounds for believing the driver to be licensed: *Dayman* v. *Proudman* (1).

Mrs. Proudman applied for special leave to appeal to the High Court from that decision.

Abbott, for the applicant. "Permit" connotes, and has in many instances been held to connote, knowledge (*Somerset* v. *Hart* (2); *Somerset* v. *Wade* (3); *Massey* v. *Morriss* (4); *Kelly* v. *Wigzell* (5); *Ferrier* v. *Wilson* (6))—See also *Adelaide Corporation* v. *Australasian Performing Right Association Ltd.* (7); *Miller* v. *Hilton* (8). The word was so interpreted in *Sherras* v. *De Rutzen* (9), where difficulty was raised by the use of the words "knowingly permit": See the report (10)—Cf. *Licensing Act* 1932-1936 (S.A.), s. 178. *Cundy* v. *Le Cocq* (11) is not opposed to this view, for the magistrate had distinguished between "selling" and "permitting to sell." This distinction, and the true meaning of "permit," are made quite clear by *Newell* v. *Cross* (12). When the legislature uses the word "permit" it uses it in its ordinary acceptance, and the offence of "permitting" cannot be absolute *ex vi termini*. Cases such as *Hobbs* v. *Winchester Corporation* (13) and *Cundy* v. *Le Cocq* (11) deal with provisions which, in their terms, are absolute and import no element of knowledge. Once this distinction is realized all the cases can be reconciled. Further, the public is protected, for, in

(1) (1941) S.A.S.R. 87.
(2) (1884) 12 Q.B.D. 360, at pp. 362, 364.
(3) (1894) 1 Q.B. 574, at pp. 576, 577.
(4) (1894) 2 Q.B. 412.
(5) (1907) 5 C.L.R. 126.
(6) (1906) 4 C.L.R. 785, at pp. 790, 792, 794, 800, 801.
(7) (1928) 40 C.L.R. 481.
(8) (1937) 57 C.L.R. 400, at pp. 413, 415, 416, 417.
(9) (1895) 1 Q.B. 918.
(10) (1895) 1 Q.B., at p. 921.
(11) (1884) 13 Q.B.D. 207.
(12) (1936) 2 K.B. 632.
(13) (1910) 2 K.B. 471.

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the case at Bar, the unlicensed driver could be, and in fact was, convicted. Where the offence created is "permitting," the defendant is not guilty unless he assents to something he knows of, and his knowledge must be proved. This view harmonizes with sections such as 13 (4), 42c and 67d, which exempt a defendant in cases of want of knowledge or accident. Section 7 (3) is an illustration of vicarious liability imposed in absolute terms, but even there the owner is protected against suffering for the offence of the driver of which the owner is ignorant.

Hannan K.C., for the respondent.

Cur. adv. vult.

Sept. 22.

The following written judgments were delivered :—

RICH A.C.J. We took time to consider this application for special leave in deference to the full and clear argument addressed to us by Mr. *Abbott*, who brought to our attention a number of cases, representing, in the chaotic army of authorities upon *mens rea*, those ranking on the side of the necessity of moral guilt. Mr. *Hannan* on the part of the Crown came uninvited, not, as we gathered, to oppose the granting of special leave at all hazards, but with a divided mind, fearing lest the Court might grant leave and pronounce a ruling more favourable to Mr. *Abbott* than that contained in the decision below, but nevertheless fondly hoping that out of a grant of special leave there might come a decision still more favourable to the Crown, under which the task of prosecuting would be complete after proof of a few observed facts and the chance excluded of a defendant exculpating himself by reference to his intention, knowledge or belief. Notwithstanding Mr. *Hannan's* not unnatural desire to have ruled out subjective tests I think we should refuse special leave.

There is nothing special in the circumstances of this case, and, even if there were, I am not disposed to disagree with the conclusion of the Full Court. Upon the facts I cannot agree that the appellant was misled reasonably into a belief in a set of facts or circumstances which, if true, would have made her permission innocent. The only argument possessing a factual foundation is that it was not affirmatively shown that she positively knew that the driver was unlicensed. In answer to this it is enough to say, first, that affirmative proof is unnecessary and, secondly, that it is not a case of mistake upon reasonable grounds. If she did not know she did not inquire, and a fair inference is that she did not care. In this view the case has nothing to do with such a question as was raised in this Court in

Thomas v. *The King* (1), viz., whether an honest and responsible belief, although erroneous, in a set of facts which if true would take the accused outside the definition of the offence charged affords a good defence. It is simply a case where a person showing complete indifference to the fulfilment of the duty laid on her by the legislature says: "I didn't know." In relation to a British provision *in pari materia*, Lord *Wright* in *McLeod* v. *Buchanan* (2) says:— "The section is imperative, and precisely specifies the act or default constituting the offence, which is sufficiently established by proof of the matters specified. Intention to commit a breach of the statute need not be shown. The breach in fact is enough."

Special leave should be refused.

DIXON J. The applicant was convicted summarily of an offence against s. 30 of the *Road Traffic Act* 1934-1939 (S.A.). The charge was that she permitted a person, not being the holder of a licence for the time being in force, to drive a motor vehicle on a road. She appealed against that conviction to the Supreme Court. *Cleland* J., who heard her appeal, set aside the conviction on the ground that she believed that the driver in question held a licence which was in force and that she had reasonable grounds for her belief. His Honour appears further to have considered that she could not be said to have permitted him, as a person not holding such a licence, to drive the motor vehicle unless she knew that he was unlicensed, quite independently of the question of the reasonableness of her belief to the contrary.

The Full Court of the Supreme Court, consisting of *Murray C.J.*, *Angas Parsons* and *Napier* JJ., allowed the appeal and restored the conviction. Their Honours were all of the opinion that the applicant had not made out in fact any defence of mistake on reasonable grounds and that under the provisions of s. 30 it was not incumbent upon the prosecution to establish that the applicant knew that a licence for the time being in force was not held by the person whom she permitted to drive the motor vehicle.

Murray C.J. went further and decided that under s. 30 mistake would not afford a defence, that is to say, it would not amount to an answer to the charge of permitting if a defendant proved that on reasonable grounds he honestly believed that the person he permitted to drive his car held a licence then in force.

From the decision of the Full Court the applicant now seeks special leave to appeal to this Court.

A consideration of the provisions of the statute and of the authorities cited in a somewhat full argument has not disclosed any reason

(1) (1937) 59 C.L.R. 279. (2) (1940) 2 All E.R. 179, at p. 186.

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for doubting the correctness of the conclusion of the Full Court. It is not necessary to go as far as *Murray* C.J. and hold that a defence of honest mistake on reasonable grounds cannot be available under s. 30.

It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.

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 such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one.

Indeed, there has been a marked and growing tendency to treat the prima facie rule as excluded or rebutted in the case of summary offences created by modern statutes, particularly those dealing with social and industrial regulation. But, although it has been said that in construing a modern statute a presumption as to *mens rea* does not exist (per *Kennedy* L.J., *Hobbs* v. *Winchester Corporation* (1)), it is probably still true that, unless from the words, context, subject matter, or general nature of the enactment some reason to the contrary appears, you are to treat honest and reasonable mistake as a ground of exculpation, even from a summary offence.

There may be no longer any presumption that *mens rea*, in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute; but to concede that the weakening of the older understanding of the rule of interpretation has left us with no prima facie presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule

(1) (1910) 2 K.B. 471, at p. 483.

that honest and reasonable mistake is prima facie admissible as an exculpation has lost its application also.

Doubtless over a wide description of legislation the presumption in favour of its application is but a weak one : See *Maher* v. *Musson* (1) ; *Thomas* v. *The King* (2), and three papers referred to in that report (3). But it still remains a presumption, and in relation to s. 30 there appears to be no sufficient reason for treating it as rebutted.

The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe. The burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt. But, in the present case, the applicant assigned reasons for her alleged belief which neither the magistrate nor the Full Court found convincing or sufficient. Indeed, it may be doubted if she thought at all upon the question whether the person she permitted to drive her car did or did not hold a subsisting licence.

Agreeing as we all do in the view of the Full Court on this question of fact, it is enough to say that there is no support in the circumstances of the case for the defence of honest and reasonable mistake.

The applicant contended, however, that, upon a charge under s. 30 of permitting a person not being the holder of a licence for the time being in force to drive a motor vehicle on any road, it must be shown, not merely that the driver was unlicensed, but also that the defendant knew it or at all events was indifferent to the question whether he was licensed or not.

This contention was based upon the ground that the very idea of permission connotes knowledge of or advertence to the act or thing permitted. In other words, you cannot permit without consenting and consent involves a consciousness or understanding of the act or conduct to which it is directed. Be it so. Nevertheless the contention fails in its application to the actual terms of the provision. The material words of s. 30 are : " employs or permits any person not being the holder of such a licence to drive a motor vehicle on any road." It may be conceded that unless a defendant meant to consent to the three conditions involved in the words (1) drive, (2) a motor vehicle, (3) on a road, he could not be said to have permitted the doing of that thing. But it is to that act that the permission must be directed, not to the absence of a licence. The words

(1) (1934) 52 C.L.R. 100. (2) (1937) 59 C.L.R. 279.
(3) (1937) 59 C.L.R., at p. 305.

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"not being the holder of such a licence" do not form part of the act permitted. They are a negative qualification upon the word "person", and operate to exclude persons so licensed from the class who may not be permitted to drive. There is nothing in the language of the section to suggest that the consent must be directed to the failure of the driver to hold a licence, and the form in which the section is cast indicates the contrary. It is the driving which must not be permitted, that is, unless the driver holds a licence.

The application should be refused.

McTIERNAN J. I agree. In my opinion the defendant was rightly convicted.

The application is for special leave to appeal. The circumstances, therefore, must be special to justify an order granting the application (*Power* v. *The King* (1)).

The substance of the applicant's contention is that *mens rea* is an ingredient of the offence with which the defendant was charged and the applicant therefore had a good common law defence, that is, the defence of a mistake of fact made in good faith, the mistake being that she believed the driver was the holder of a licence to drive the car. The Full Court thought that the evidence failed to support the defence.

But, in any case, I agree that the defence would not meet the charge. The defence is based on the contention, which, to state it more fully, is that the natural operation of the words of s. 30 is restricted by the maxim *actus non facit reum nisi mens sit rea.* But is this maxim applicable to the construction of s. 30 ? The maxim is not of general application to modern statutes : See *Cundy* v. *Le Cocq* (2) ; *Hobbs* v. *Winchester Corporation* (3).

It cannot be presumed that the legislature has not stated with precision what are the elements of the offence created by s. 30. The intention of the section (I refer to the material part) is to make it an offence for any person to permit another person who is in a forbidden class, that is, persons who do not hold licences to drive a car. It need not be doubted that the word "permit" is used in the ordinary meaning, but I cannot infer from the words of s. 30 that the offence, which is created, is to permit a person, whom the defendant knows is not the holder of a licence or has no reasonable ground for believing to be the holder of a licence, to drive a car. The case of *McLeod* v. *Buchanan* (4) is *in pari materia* and supports this construction of s. 30.

(1) (1941) 15 A.L.J. 100.
(2) (1884) 13 Q.B.D., at p. 210.
(3) (1910) 2 K.B., at p. 483.
(4) (1940) 2 All E.R. 179.

We have the advantage of a very full review of the provisions of the Act by the Chief Justice of South Australia. It is one of the plain objects of the Act to prevent any person but the holder of a licence from driving a motor car on a road. The prohibition is imposed in the interests of persons using the roads. The object of s. 30 is to prevent the driving of cars by any persons except licensed drivers. It is with that object that the section makes it an offence for the person who controls the car to drive it unless he is licensed, and also makes it an offence to permit any person who is in fact not licensed to drive the car. If the section also made it an offence for the owner of a car to permit an unskilled driver to drive his car it could hardly be contended that there was an implied qualification on the owner's liability that he would not be guilty of an offence if he believed that a person whom he permitted to drive was a skilled driver, but he was in fact quite unskilled. The only intention which is to be found in the section and which is the mental element requisite to a conviction is the intention to permit a person who is not in fact licensed to drive, to drive the car on a road.

This Court had a similar question of construction in the case of *Francis* v. *Rowan* (1). In recent times the presumption of *mens rea* in statutory offences has suffered such an eclipse that a learned writer has warned legislators to be very circumspect to see that the necessary words are inserted in statutes creating offences if they wish to limit the numbers of potential law-breakers.

In my opinion the defendant was rightly convicted because upon the true construction of the section her guilt did not depend on the question whether she knew or believed on reasonable grounds that the driver was not the holder of a licence. She was guilty because it was proved that he was not the holder of a licence and that she did permit him to drive the car on a road.

The *mens rea* justifying the conviction consisted of the intent to do an act which is prohibited by s. 30, that is, to give permission to a person who was not the holder of a licence to drive the car on the road.

Special leave to appeal refused.

Solicitors for the applicant, *Lempriere, Abbott & Cornish.*

Solicitor for the respondent, *A. J. Hannan*, K.C., Crown Solicitor for South Australia.

C. C. B.

(1) (1941) 64 C.L.R. 196.