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*256 Warner Appellant v Metropolitan Police Commissioner Respondent

Mixed Judicial Consideration

Court
House of Lords

Judgment Date
2 May 1968

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[1969] 2 A.C. 256

ICLR

House of Lords

Lord Reid , Lord Morris of Borth-Y-Gest , Lord Guest , Lord Pearce and Lord Wilberforce

1968 Feb. 13, 14, 15; 19, 20; May

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[On Appeal from Reg. v. Warner]

Crime—Drugs—Unauthorised "possession" of—Meaning—Defendant in possession of box which he knew to contain something —Whether defence that he did not know it contained drugs— Drugs (Prevention of Misuse) Act, 1964 (c. 64), s. 1 (1) . ***257***

The appellant was charged with having drugs in his possession without being duly authorised contrary to section 1 (1) of the Drugs (Prevention of Misuse) Act, 1964 . [1] There was evidence that a police officer had stopped the appellant who was driving a van in the back of which were found three cases, one of which contained scent bottles and another a plastic bag containing 20,000 amphetamine sulphate tablets. The appellant had been to a cafe where he was accustomed to collect scent from B., was told by the proprietor that a parcel from B. was under the counter, and had found two parcels there, namely the one containing scent and the other which was found to contain the drugs. He said that he had assumed that both contained scent. On the question of possession the chairman directed the jury that if he had control of the box which turned out to be full of amphetamine sulphate, the offence was committed and it was only mitigation that he did not know the contents.

On appeal against conviction on the ground that the chairman misdirected the jury as to "possession":-

Held:

(1) (Lord Reid dissenting) that the Act of 1964 came within the class of Acts in which the offence prescribed therein was absolute; that the Act forbade possession of certain scheduled drugs, and whether an accused possessed them with an innocent or guilty mind or for a laudable or improper purpose was immaterial since he was not allowed to possess them and if he

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did possess them without lawful authority he was guilty of an offence under the Act (post, pp. 295G, 296B-D, 301C-E, 306F-307A, 312F).

Per Lord Pearce. It would, I think, be an improvement of a difficult position if Parliament were to enact that when a person has ownership or physical possession of drugs he shall be guilty unless he proves on a balance of probabilities that he was unaware of their nature or had reasonable excuse for their possession (post, p. 307B).

Per Lord Wilberforce. No separate problem of the mental elements in criminal offences arises: the statute contains its own solution as to the kind of control penalised by the Act (post, p. 312F-G).

(2) But that (Lord Morris of Borth-y-Gest and Lord Guest dissenting), whilst, therefore, there was a very strong prima facie inference of fact that the appellant was in possession of the drugs where, as here, the prohibited drugs were contained in a parcel the prosecution had to prove not only that the accused possessed the parcel but also that he possessed its contents, for a person did not (within the meaning of the Act) possess things of whose existence he was unaware. A person who accepted possession of a parcel normally accepted possession of the contents, but that inference could be disproved or shaken by evidence that although a person was in possession of a parcel he was completely mistaken as to its contents and would not have accepted possession had he known what kind of thing the contents were. A mistake as to the quality of the contents, however, did not negative possession. If the accused knew that the contents were drugs or tablets he was in possession of them though he was mistaken as to their qualities. Again if, though unaware of the contents, he did not open them at the first opportunity to ascertain (as the appellant was entitled to do here) what they were, the proper inference was ***258** that he was accepting possession of them. (It would be otherwise if a person had no right to open the parcel.) Again, if a person suspected that there was anything wrong about the contents when he received the parcel, the proper inference was that he was accepting possession of the contents by not immediately verifying them (post, pp. 280F, 282G, 307C-308A, 311A).

Lockyer **v.** *Gibb [1967]* **2** *Q.B. 243; [1966] 3 W.L.R. 84; [1966]* **2** *All E.R. 653* , D.C. considered.

(3) (*Per* Lord Reid, Lord Pearce and Lord Wilberforce) that albeit the direction to the jury was defective here it was a case where on the facts a properly directed jury must have found the appellant guilty, and that, accordingly, applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907 , as amended by section 4 of the Criminal Appeal Act, 1966 , the appeal would be dismissed (post, pp. 282H-283A, 308C, 312G-H).

Decision of the Court of Appeal [1967] 1 W.L.R. 1209; [1967] 3 All E.R. 93 , C.A. reversed on the point of law.

The following cases are referred to in their Lordships' opinions:

Attorney-General **v.** *Lockwood (1842) 9 M. &; W. 378* .
Bank of New South Wales **v.** *Piper [1897]* **A.C.** *383, P.C.* .
Beaver **v.** *The Queen [1957] S.C.R. 531* .
Beswick **v.** *Beswick [1968]* **A.C.** *58; [1967] 3 W.L.R. 932; [1967]* **2** *All E.R. 1197* , **H.L.**(E.).
Blaker **v.** *Tillstone [1894] 1 Q.B. 345, D.C.* .
Brend **v.** *Wood (1946) 62 T.L.R. 462, D.C.* .
Bridges **v.** *Hawkesworth (1851) 21 L.J.Q.B. 75* .
Cartwright **v.** *Green (1802)* **2** *Leach 952* .
Chajutin **v.** *Whitehead [1938] 1 K.B. 506; [1938] 1 All E.R. 159, D.C.* .
Cundy **v.** *Le Cocq (1884) 13 Q.B.D. 207* .
Gaumont British Distributors Ltd. **v.** *Henry [1939]* **2** *K.B. 711; [1939]* **2** *All E.R. 808, D.C.* .
Harding **v.** *Price [1948] 1 K.B. 695; [1948] 1 All E.R. 283, D.C.* .
Hibbert **v.** *McKiernan [1948]* **2** *K.B. 142 ; [1948] 1 All E.R. 860, D.C.* .
Hobbs **v.** *Winchester Corporation [1910]* **2** *K.B. 471, C.A.* .
Lim Chin Aik **v.** *The Queen [1963]* **A.C.** *160 ; [1963]* **2** *W.L.R. 42; [1963] 1 All E.R. 223, P.C.* .
Lockyer **v.** *Gibb [1967]* **2** *Q.B. 243; [1966] 3 W.L.R. 84; [1966]* **2** *All E.R. 653, D.C.* .
Merry **v.** *Green (1841) 7 M. &; W. 623* .
Oliver **v.** *Goodger [1944]* **2** *All E.R. 481, D.C.* .
Pearks, Gunston & Tee Ltd. **v.** *Ward [1902]* **2** *K.B. 1, D.C.* .
Reg. **v.** *Ashwell (1885) 16 Q.B.D. 190* .

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Reg. **v.** *Bishop (1880) 5 Q.B.D. 259* .
Reg. **v.** *Carpenter [1960] Crim.L.R. 633* , *C.C.A.* .
Reg. **v.** *Cohen (1858) 8 Cox C.C. 41* .
Reg. **v.** *Gould [1968]* **2** *Q.B. 65; [1968]* **2** *W.L.R. 643; [1968] 1 All E.R. 849, C.A.* .
Reg. **v.** *Hallam [1957] 1 Q.B. 569; [1957]* **2** *W.L.R. 521; [1957] 1 All E.R. 665, C.C.A.* .
Reg. **v.** *Hehir [1895]* **2** *I.R. 709* .
Reg. **v.** *Jacobs (1872) 12 Cox C.C. 151* .
Reg. **v.** *Prince (1875) L.R.* **2** *C.C.R. 154* .
Reg. **v.** *Sleep (1861) Le. &; Ca. 44* .
Reg. **v.** *Tolson (1889) 23 Q.B.D. 168* .
Reg. **v.** *Wheat [1921]* **2** *K.B. 119, C.C.A.* .
Reg. **v.** *Willmett (1848) 3 Cox C.C. 281* . ***259**
Reg. **v.** *Woodrow (1846) 15 M. &; W. 404* .
Rex **v.** *Hudson [1943] K.B. 458; [1943] 1 All E.R. 642, C.C.A.* .
Rex **v.** *Langa [1936] S.A.L.R. (C.P.D.) 158* .
Rex **v.** *Leinster (Duke of) [1924] 1 K.B. 311; (1923) 17 Cr.App.R. 176* .
Reynolds **v.** *G. H. Austin & Sons Ltd. [1951]* **2** *K.B. 135; [1951] 1 All E.R. 606, D.C.* .
Roper **v.** *Taylor's Garages (Exeter) Ltd. [1951]* **2** *T.L.R. 284* .
Sambasivam **v.** *Public Prosecutor of Malaya [1950]* **A.C.** *458, P.C.* .
Sherras **v.** *De Rutzen [1895] 1 Q.B. 918, D.C.* .
South Staffordshire Water Co. **v.** *Sharman [1896]* **2** *Q.B. 44, D.C.* .
Thomas **v.** *The King (1937) 59 C.L.R.* **279** .
Towers & Co. Ltd. **v.** *Gray [1961]* **2** *Q.B. 351; [1961]* **2** *W.L.R. 553; [1961]* **2** *All E.R. 68, D.C.* .
United States of America and Republic of France **v.** *Dollfus Mieg et Cie. S.A. and Bank of England [1952]* **A.C.** *582; [1952] 1 All E.R. 572* , **H.L.**(E.).
Webb **v.** *Baker [1916]* **2** *K.B. 753, D.C.* .
Woolmington **v.** *Director of Public Prosecutions [1935]* **A.C.** *462* , **H.L.**
Yeandel **v.** *Fisher [1966] 1 Q.B. 440; [1965] 3 W.L.R. 1002; [1965] 3 All E.R. 158, D.C.* .

The following additional cases were cited in argument:

Comptroller of Customs **v.** *Western Lectric Co. Ltd. [1966]* **A.C.** *367; [1965] 3 W.L.R. 1229; [1965] 3 All E.R. 599, P.C.* .
Hannah **v.** *Peel [1945] K.B. 509; [1945]* **2** *All E.R. 288* .
Myers **v.** *Director of Public Prosecutions [1965]* **A.C.** *1001; [1964] 3 W.L.R. 145; [1964]* **2** *All E.R. 881* , **H.L.**
Patel **v.** *Comptroller of Customs [1966]* **A.C.** *356; [1965] 3 W.L.R. 1221; [1965] 3 All E.R. 593, P.C.* .
Reg. **v.** *Cavendish [1961] 1 W.L.R. 1083 ; [1961]* **2** *All E.R. 856, C.C.A.* .
Reg. **v.** *Churchill [1967]* **2** **A.C.** *224; [1967]* **2** *W.L.R. 682; [1967] 1 All E.R. 497* , **H.L.**
Reg. **v.** *Cugullere [1961] 1 W.L.R. 858; [1961]* **2** *All E.R. 343, C.C.A.* .
Reg. **v.** *Ewens [1967] 1 Q.B. 322; [1866]* **2** *W.L.R. 1372; [1966]* **2** *All E.R. 470, C.C.A.* .
Reg. **v.** *Flowers (1886) 16 Q.B.D. 643* .
Reg. **v.** *Hayward* (1844) 1 Car. &; Kir. 518.
Reg. **v.** *Larocque (No. 1) (1957) 25 W.W.R. 431* (Canada).
Reg. **v.** *Middleton (1873)* **2** *L.R.* **2** *C.C.R. 38; 12 Cox C.C. 260* , 417.
Reg. **v.** *Reed* (1854) Dears.C.C. 257.
Reg. **v.** *Riley* (1853) Dears. C.C. 149.
Reg. **v.** *Rowe (1859) Bell C.C. 93* .
Reg. **v.** *Smith [1966] Crim.L.R. 558, C.C.A.* .
Reg. **v.** *St. Margaret's Trust Ltd. [1958] 1 W.L.R. 522; [1958]* **2** *All E.R. 289, C.C.A.* .
Reg **v.** *Thompson (1869) 11 Cox C.C. 362* .
Reg. **v.** *Webley and Webley [1967] Crim.L.R. 300* .
Rex **v.** *Havard (1914) 11 Cr.App.R.* **2**, *C.C.A.* .
Rex **v.** *Higginbottom (1912) 8 Cr.App.R 79, C.C.A.* .
Rex **v.** *Maxwell and Clanchy (1909)* **2** *Cr.App.R. 26, C.C.A.* .
Rex **v.** *McNamee (1832) 1 Mood.C.C. 368* .
Rex **v.** *Mucklow (1827) 1 Mood.C.C. 160* .
Rex **v.** *Oster-Ritter (1948) 32 Cr.App.R. 191, C.C.A.* .
Rex **v.** *White (1912) 7 Cr.App.R. 266, C.C.A.* .

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Russell v. Smith [1958] 1 Q.B. 27; [1957] 3 W.L.R. 515; [1957] 2 All E.R. 796, D.C. .
Williams v. Phillips (1957) 41 Cr.App.R. 5, C.C.A. .
Zamora (No. 2), The [1921] 1 A.C. 801, P.C. .

APPEAL from the Court of Appeal (Criminal Division).

On February 3, 1967, at the Inner London Sessions, the appellant, Reginald Charles **Warner**, was charged on indictment that not being authorised he had in his possession on November 18, 1966, a substance specified in the Schedule to the Drugs (Prevention of Misuse) Act, 1964 , namely 20,000 tablets containing amphetamine sulphate.

On November 18 a **police** officer stopped the appellant, who was driving a van, and in the back he found, among other things, three cases which the appellant said contained rubbish. One of the cases contained scent bottles and another contained a plastic bag with 20,000 amphetamine sulphate tablets in it. The appellant said that they came from his address, but when the officer said that they looked like pep pills the appellant said that he did not know where they came from although the scent came from Bill. The evidence was that the appellant had been to a cafe where he used to collect scent from Bill, and was told by the proprietor that there was a parcel from Bill under the counter. He found two parcels. the one containing scent and the other that which turned out to contain the drugs, and he said that he had assumed that both contained scent. The chairman directed the jury on the question of possession that the prosecution had to prove that he had the tablets in the box in his possession, which meant under his control, and that if he had control of the box which in fact turned out to be full of amphetamine sulphate, the offence was committed and it was only mitigation that he did not know.

The appellant was convicted and sentenced to two years' imprisonment. He appealed against conviction on the grounds that the chairman erred in law in his direction to the jury on "possession," and that the chairman gave no or no sufficient direction to the jury on the burden of proof.

On June 30, 1967. the Court of Appeal (Diplock L.J., Brabin and Waller JJ.) dismissed the appeal.

On October 19, 1967, on a renewed application by the appellant the Court of Appeal (Edmund Davies L.J., John Stephenson and James JJ.) granted a certificate and granted leave to appeal to the House of Lords in that the following point of law of general public importance was involved in the decision to dismiss the appeal against conviction, namely:

> "Whether for the purposes of section 1 of the Drugs (Prevention of Misuse) Act, 1964 , a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature."

William Howard Q.C. and *J. G. Boal* for the appellant. This appeal involves consideration of the questions whether the concept of possession connotes an animus of some kind and, if it does, what is the degree of animus necessary to constitute "possession" for the purposes of the Drugs (Prevention of Misuse) Act, 1964 . ***261** *Possession*

Section 9 of the Act of 1964, the interpretation section, contains no reference to possession nor is there any regulation made pursuant to section 7 (1) which makes reference to a definition of possession. Contrast regulation 20 of the Dangerous Drugs (No. 2) Regulations, 1964 (made pursuant to the Dangerous Drugs Acts, 1951 and 1964), where there is a definition of possession that indicates the difficulties involved. In the absence of any definition when the word "possession" is used at common law or in a statute it might bear one of three meanings on the authorities: (a) physical possession, which is equivalent to custody or detention; (b) constructive possession, which may be equivalent to the power to possess; or (c) legal possession, which is not the same as lawful possession, but is the possession from which legal consequences flow.

Legal possession requires an animus. The animus is the intention to possess the object.

The authorities have never suggested that an article which is slipped into a person's pocket without his knowledge is thereupon in that person's possession.

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The authorities

In *Cartwright v. Green (1802) 2 Leach 952* , although the bureau was delivered to Green as bailee he was not in possession of the money in the secret drawer until he discovered and took it. This was a breaking of bulk case. Its importance lies in the fact that it draws a distinction between possession of a container and possession of the unexpected contents: contrast *Rex v. Mucklow (1827) 1 Mood.C.C. 160* .

Rex v. McNamee (1832) 1 Mood.C.C. 368 illustrates clearly the distinction between the master's possession and the drover's custody of the cattle. To put the servant into possession it does not suffice to give him bare custody of the goods. Knowledge and intention are vital factors in determining the difference between custody and possession. In *Merry v. Green (1841) 7 M. & W. 623* the facts were similar to *Cartwright v. Green, 2 Leach 952* except that the bureau had been sold to the defendant. In that case Parke B. said that though there was evidence of a delivery of the bureau to the defendant there was no delivery so as to give a lawful possession of the purse and money in the secret drawer.

Reg. v. Riley (1853) Dears.C.C. 149 is another case which exemplifies the distinction between custody and possession but the word "possession" is used, as in many of the cases, with more than one connotation. As to constructive possession, see *Reg. v. Hayward* (1844) 1 Car. & Kir. 518. In *Reg. v. Reed* (1854) Dears.C.C. 257 the servant, knowing of the coals and having custody of them, by putting them into his master's cart the master took legal possession of them and, accordingly, their subsequent appropriation by the servant constituted larceny.

Reg. v. Thompson (1869) 11 Cox C.C. 362 is the earliest reported decision where the problem of joint possession was considered. Knowledge was not canvassed and the possession of one was held to be the possession of all. [Reference was made to *Reg. v. Jacobs (1872) 12 Cox C.C. 151* .]

From the above authorities the principle emerges that if a person can see and is aware of the chattel that he is taking and he intends to take ***262*** possession thereof then in fact and in law he has possession of it. But if a donor hands over a sovereign in the dark in the belief that it is a halfpenny and the recipient believes that he is receiving a halfpenny can it be said that the donor has lost possession of the sovereign until he knows that he has handed it over in place of a halfpenny and until the recipient discovers that it is a sovereign that he has received? This problem was canvassed in *Reg. v. Middleton (1873) L.R. 2 C.C.R. 38* and was decided in the negative (albeit not conclusively) in *Reg. v. Ashwell (1885) 16 Q.B.D. 190* . See also *Reg. v. Flowers (1886) 16 Q.B.D. 643* and the Irish case, *Reg. v. Hehir [1895] 2 I.R. 709* where *Reg. v. Ashwell* was not followed.

South Staffordshire Water Co. v. Sharman [1896] 2 Q.B. 44 and the earlier case of *Reg. v. Rowe (1859) Bell C.C. 93* are of no assistance here for they concern the finding of a chattel on land in the possession of another. [Reference was made to *Rex v. White (1912) 7 Cr.App.R. 266* .]

Rex v. Higginbottom (1912) 8 Cr.App.R. 79 is of importance. There the prisoner was charged with receiving stolen property. The property was found in a house occupied by the prisoner and another, in a box belonging to the latter, which contained property of both of them and of which the prisoner had the key. It was held that there was no evidence of possession against the prisoner unless it were proved that he knew that the property was there.

It is emphasised that a person cannot have possession without knowledge. There can, of course, be knowledge without possession. Thus a man may have knowledge of the contents of his neighbour's house but he does not thereby possess them.

The South African case of *Rex v. Langa [1936] S.A.L.R. (C.P.D.) 158* was concerned primarily with the concept of *guilty* knowledge. In *Rex v. Hudson [1943] K.B. 458* the Court of Criminal Appeal approved, inter alia, the observations of Lord Coleridge C.J. in *Reg. v. Ashwell, 16 Q.B.D. 190* , that all acts, to carry legal consequences, must be acts of the mind.

As to *Hibbert v. McKiernan [1948] 2 K.B. 142* , it was in the contemplation of the golf club that there were golf balls lying about the course. In *Sambasivam v. Public Prosecutor, Federation of Malaya [1950] A.C. 458* , 459, 460, 469 the Privy Council agreed with the concession made by the Crown that the words of a statute providing that "any person who carries ... any firearm ... shall be guilty of an offence ..." meant "any person who carries to *his knowledge.* " Accordingly, there is obiter dicta of the Board to the effect that knowledge is a necessary element in possession.

In the Canadian case of *Beaver v. The Queen [1957] S.C.R. 531* the facts were akin to those here. The majority judgment of the Supreme Court was correct and should be followed. Reliance is also placed on the decision in *Reg. v. Cugullere [1961] 1 W.L.R.*

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858 where the phrase "has with him" in the Prevention of Crimes Act, 1953 , was held by the Court of Criminal Appeal to mean " *knowingly* has with him." This supports the appellant's contention for a person who merely has custody of a chattel has it "with him," a phrase which is wider than "possess," nevertheless it was held there that mens rea was necessary to constitute an offence against the provision in question.

Yeandel v. *Fisher [1966] 1 Q.B. 440* , a decision under the Dangerous Drugs Act, 1964 , is distinguishable on the grounds that the defendants, by ***263** the nature of their calling, owed a duty to the public to supervise strictly the premises they managed.

The Divisional Court in the present case followed *Lockyer* v. *Gibb [1967] 2 Q.B. 243* . That was a decision under the regulations made pursuant to the Dangerous Drugs Act, 1965 . The Divisional Court had there founded its judgment on the mischief of the Act and the absence of the word "knowingly" in the relevant regulation. The absence of the word "knowingly," however, is not indicative of the creation of an absolute offence. In construing a penal statute, if there is any ambiguity, that construction should be followed which is in favour of the subject. Further, it is not the function of the judicature to supply such words as are deemed necessary to enable a statute to combat the mischief at which it is aimed.

In the present case it was necessary for the prosecution to prove not only that the appellant was in "possession" of the box in question but that he was also in "possession" of its contents. If the statute creates absolute offences it is conceded that an offence would be committed under the Drugs (Prevention of Misuse) Act, 1964 , if it were shown that an accused knew that he had a package containing a substance that was likely to be a dangerous drug and it transpired that it was a drug specified in the schedule.

Whether section 1 of the Act of 1964 creates an absolute offence

On this question reliance is placed on the observations of Lord Evershed delivering the judgment of the Privy Council in *Lim Chin Aik* v. *The Queen [1963] A.C. 160* , 175, where the Board disapproved the

> "view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty ... Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended."

For earlier authorities relating to the question of the creation of absolute offences, see *Reg.* v. *Prince (1875) L.R. 2 C.C.R. 154* ; *Cundy* v. *Le Cocq (1884) 13 Q.B.D. 207* ; *Reg.* v. *Tolson (1889) 23 Q.B.D. 168* ; *Sherras* v. *De Rutzen [1895] 1 Q.B. 918* ; *Rex* v. *Wheat [1921] 2 K.B. 119* ; *Brend* v. *Wood (1946) 62 T.L.R. 462* ; *Harding* v. *Price [1948] 1 K.B. 695* ; *Reynolds* v. *Austin (G. H.) & Sons Ltd. [1951] 2 K.B. 135* ; *Reg.* v. *Churchill [1967] 2 A.C. 224* and *Reg.* v. *Gould [1968] 2 Q.B. 65* .

As to whether the requirement of proof of knowledge in respect of offences of the present nature would hamper the administration of justice, it is to be remembered that knowledge is an essential element in the crime of receiving: *Rex* v. *Havard (1914) 11 Cr.App.R. 2* , but in practice, in those cases where no knowledge is set up as a defence but the evidence shows that the accused deliberately refrained from inquiry into what he had received in suspicious circumstances, juries are not slow to infer knowledge.

The drugs specified in the Schedule to the Drugs (Prevention of Misuse) Act, 1964 , consist mainly of drugs which are issued on prescription. If the Crown's contention be right it would follow that if a woman, who had been ***264** given a scheduled drug under prescription, left her tablets at home on going on holiday and requested her husband to bring them to ha the husband would be guilty of an offence under the Act if he were stopped by the **police** on the journey and the tablets were found on him.

The above example is illustrative of the proposition that where a statute is aimed at the criminal but its language is such that the main body of law-abiding citizens could be at peril to fine and imprisonment, then it is of the utmost importance that the statute

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should be construed strictly in favour of the subject, otherwise terrifying power is put into the hands of the executive and the police. The House, as did the Privy Council in *Lim Chin Aik v. The Queen [1963] A.C. 160* , 175, should decline to follow the observations of Donovan J. in *Reg. v. St. Margaret's Trust Ltd. [1958] 1 W.L.R. 522* .

On the assumption that some knowledge is necessary to constitute possession the following would be a correct charge to the jury in a case such as the present (i) on the supposition that the offence charged was an absolute offence: "You the jury have to be satisfied beyond reasonable doubt (a) that the substance was a scheduled drug; (b) that the substance was in the control of the accused; and (c) that the accused knew that he had the substance in his control; the fact that he did not know that the substance was a scheduled drug is irrelevant." (ii) On the supposition (as contended for) that the offence was not an absolute offence: factors (a), (b) and (c) and, in addition (d): "but the accused knew that his possession was not innocent."

In conclusion, it would be wrong to construe penal legislation so as to exclude defences; penal statutes should be construed so as to *define* offences. The mischief in the present case is not such as to require this offence to be construed as an absolute offence in order to make the Act effective.

[Reference was also made to *Hannah v. Peel [1945] K.B. 509* ; *Williams v. Phillips (1957) 41 Cr.App.R. 5* ; *Reg. v. Hallam [1957] 1 Q.B. 569* ; *Russell v. Smith [1958] 1 Q.B. 27* ; *Reg. v. Carpenter [1960] Crim.L.R. 633* ; *Reg. v. Cavendish [1961] 1 W.L.R. 1083* ; *Reg. v. Smith [1966] Crim.L.R. 558* ; *Reg. v. Webley and Webley [1967] Crim.L.R. 300* .]

John Hazan and *A. C. L. Lewisohn* for the respondent. There are three questions for determination: (1) The meaning of possession. (2) The necessity of mens rea. (3) Whether there is a "half-way house" between the absolute offence contended for by the Crown and the intransigent attitude taken up by the appellant.

At the outset it is emphasised that the Drugs (Prevention of Misuse) Act, 1964 , is an Act penalising *possession* of specified drugs.

There are four propositions: 1. For the purposes of section 1 of the Act of 1964 a person is in possession of a prohibited substance when it is in his custody or in his control irrespective of his knowledge that the substance is a prohibited drug. 2. Section 1 creates an absolute offence in respect of the unauthorised possession of substances specified in the Schedule to the Act. 3. Alternatively, once the possession by an unauthorised person of the prohibited substance is proved by the Crown the burden of proof is then upon that person to show on the balance of probabilities that he neither knew or ought to have known that the substance in his possession was a prohibited drug. 4. If the points of law raised in the appeal are decided in the appellant's favour, this is a case where the ***265** proviso to section 4 (1) of the CriminalAppeal Act, 1907 , as amended by section 4 of the Criminal Appeal Act, 1966 , should be applied.

It is to be observed that this is not a case of a person who did not know that he had something with him; he knew, but thought (according to his evidence) that the parcel contained scent.

A sharp distinction is to be drawn between knowing that one has the res in issue and not knowing that one has anything at all. The distinction is important because knowledge is vital.

The principles to be applied in defining possession were laid down a century ago but the difficulty is in their application.

The principle of construction applicable here is that stated by Alderson B. in *Attorney-General v. Lockwood (1842) 9 M. & W. 378* , 398:

> "The rule of law, I take it, upon the construction of all statutes ... is, whether they be penal or remedial, to construe them according to the plain, literal and grammatical 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."

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In *Towers & Co. Ltd. v. Gray [1961] 2 Q.B. 351* , 361, Lord Parker C.J. adverted to the difficulties to which the term "possession" had given rise and concluded by stating that in each case its meaning must depend on the context in which it was used.

Under the title "possession" in the Concise Oxford Dictionary there is the following entry: "(law) visible power of exercising such control as attaches to (but may exist apart from) lawful ownership." In the Dictionary of English Law (Earl Jowitt) (1959), at p. 1367, "possession" is defined as follows:

> "POSSESSION, the visible possibility of exercising physical control over a thing coupled with the intention of doing so, either against all the world, or against all the world except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed. ..."

And at p. 1369 there is a reference to the fact that "in criminal law, possession is sometimes distinguished from custody."

If those principles are applied here, then the correct test of animus in respect of goods in a container is: It has to be shown that the person with the goods (i) had knowledge that there were some goods in the container; (ii) intended to exercise control over such goods, that is, the container and its contents. In the circumstances there may be a mistake in regard to what is in the container, that is, the quality of the contents. The above is a legal adaptation of possession for the purpose of this Act which is to prevent the carrying of and the trafficking in certain categories of goods.

The Crown concede that there will always be hard cases in which the ***266** morally innocent may be caught by the provisions of a statute that enacts an absolute offence. Thus on the Crown's construction of this Act an innocent carrier of a scheduled drug is guilty of an offence because the very object of the statute is to prevent the dissemination of dangerous drugs - a fact that is reinforced by the making of an order in 1966 (S.I. 1966 No. 1001) which added L.S.D. and the other hallucinatory drugs to the list of drugs in the Schedule.

On principle, *Lockyer v. Gibb [1967] 2 Q.B. 243* and the present case stand or fall together albeit there are slight differences in their facts.

As to those cases which have been cited relating to a mistake in the quality of the goods, it is to be remembered that although of assistance they are not in pari materia because they concern the provisions of the Larceny Acts and the violation of possession. Those Acts contain no definition of possession and the cases are concerned with trespass and the animus furandi and therefore with the point of time at which the taking of the goods took place. That is not a comparable situation to that here and accordingly those decisions are not conclusive of the present question.

The correct approach to the construction of this statute is that adopted in the minority judgment in *Beaver v. The Queen [1957] S.C.R. 531* , 549, 550, where the statute under consideration was in very similar terms to section 1 of the Act of 1964.

Whether an absolute offence created

In general, in order to determine a question of this nature it is necessary to consider the language of the statute to ascertain its purpose, scope and subject-matter and the mischief aimed at, and whether it is public welfare legislation or the like.

As to the Act of 1964 itself, it is pertinent to look at the title. The Act is obviously intended to prevent certain drugs falling into the wrong hands: see also the long title for its scope. The drugs specified in the Schedule are all of the stimulatory variety - "pep pills" - as modified by an order made in 1966 which, as previously mentioned, added L.S.D., mescalin and other drugs of a hallucinatory kind.

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Section 1 penalises the unauthorised possession of certain substances. The provisions are mandatory. Section 1 (2) lists the authorised exemptions from the mandatory provisions of subsection (1) . The word "possession" occurs in sections 3 and 4 . Prima facie it must bear the same meaning throughout the Act. The strange consequence would follow if the appellant be right that for there to be a lawful power of a search under section 3 a police officer must first be satisfied that scheduled drugs were suspected of being on a person or on his premises and that such person was aware of their presence. Such a prerequisite would stultify the power. Further the operation of section 4 would be stultified if drugs could only be seized and destroyed if a suspected person knew of their presence. It is plain from a perusal of the terms of this Act that its object is to prevent the possession of certain drugs except by a small group of exempted persons so that they may not be obtained by those who might misuse them. It applies to all this class of legislation: see *Yeandel* v. *Fisher [1966] 1 Q.B. 440* , 446.

Before the enactment of the Act of 1964 the police had no power over **267* the control of these drugs save the powers granted by the Pharmacy and poisons Act. 1933.

In determining whether a statute creates an absolute offence it is true that the absence of the word "knowingly" is not conclusive in favour of the absolute construction but its absence has been held to be a matter to be taken into consideration together with other general matters: see *Sherras* v. *De Rutzen [1895] 1 Q.B. 918* , 921.

Where an offence involves knowledge then this knowledge extends not only to the prohibited act but to the totality of the prohibition: *Gaumont British Distributors Ltd.* v. *Henry [1939] 2 K.B. 711* , 717.

As to when the courts will impute the requirement of knowledge, see *Harding* v. *Price [1948] 1 K.B. 695* , 702, 703. *Reg.* v. *Hallam [1957] 1 Q.B. 569* is plainly distinguishable from the present case for section 4 (1) of the Explosive Substances Act, 1883 , makes it an offence for a "person ... *knowingly* ..." to be in possession of any explosive substance and, accordingly, it was held that the accused must know not only that he had a parcel or substance in his possession but also that it was an explosive.

Reg v. *Cugullere [1961] 1 W.L.R. 858* is of little assistance for there the accused had no knowledge whatsoever of what was at the back of the van. Further, little reliance can be placed on *Sambasivam* v. *Public Prosecutor, Federation of Malaya [1950] A.C. 458* , 469 since it is difficult to ascertain the true facts of the case.

The great majority of absolute statutory offences are summary offences under various statutory provisions relating to food and drugs, weights and measures, licensing and under construction and use regulations relating to motor vehicles made pursuant to various Road Traffic Acts and the Factories Acts.

The following are serious absolute offences carrying imprisonment as a penalty upon conviction: abduction of an unmarried girl below the age of 16; the possession of a firearm without a certificate (section 1 of the Firearms Act, 1937 , as amended by section 7 of the Firearms Act, 1965); an undischarged bankrupt's obtaining credit for £10 or upwards, without disclosing that he is an undischarged bankrupt: section 155 of the Bankruptcy Act, 1914 (see *Rex* v. *Duke of Leinster [1924] 1 K.B. 311*); the making of a false statement to the customs authorities: section 301 of the Customs and Excise Act, 1952 (imprisonment in default of payment of fines); assaults upon a police officer: the Police Act, 1964 .

In the Crown's submission section 1 of the Firearms Act, 1937 , as amended by section 7 of the Firearms Act, 1965 , constitutes an offence in relation to possession precisely akin to that in the present case: see also section 5 of the Criminal Justice Act, 1967 .

Patel v. *Comptroller of Customs [1966] A.C. 356* and *Comptroller of Customs* v. *Western Lectric Co. Ltd. [1966] A.C. 367* are illustrations of offences which, if they were not absolute, it would be very difficult for the court to discover the truth.

Mens rea

Where there is an absolute prohibition against the commission of an act the absence of mens rea is immaterial, but where a statute requires a motive as an element of the crime charged the presence or absence of **268* mens rea becomes a vital factor. The absence of mens rea consists in "an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent": see *Bank of New South Wales* v. *Piper [1897] A.C. 383* , 389, 390.

It would appear to follow that, on the reported cases, there are two views in regard to mens rea and statutory offences: (i) It is a necessary element of such an offence unless the subject-matter of the Act or the language of the Act expressly exclude it: *Sambasivam* v. *Public Prosecutor, Federation of Malaya [1950] A.C. 458* ; (ii) in modern statutes with the growth of absolute

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offences there is no longer any presumption for the necessity of mens rea: *Hobbs v. Winchester Corporation [1910] 2 K.B. 471* , 483.

The Crown concede that it is now far too late on the authorities to contend that no consideration need be paid to the question of mens rea. It is still necessary in general to ascertain whether an accused had the requisite mens rea and there is a presumption that a statutory offence imports mens rea, but in the light of modern legislation it is not very difficult to rebut the presumption.

The authorities show that the following are the criteria in determining whether mens rea is a necessary ingredient of an offence: (i) The subject-matter, purpose and scope of the Act. (ii) The object of the prohibition. (iii) The mischief aimed at. (iv) Whether the statute relates to public health or public welfare. (v) The social evil involved. (vi) The nature and extent of the penalty. (vii) The ease of evasion of the prohibition if absence of mens rea were a defence.

The doctrine of absolute liability appears to have originated in the early years of the 19th century in respect of such prohibited activities as the sale of unadulterated tobacco, and the receiving of lunatics in unlicensed premises. One of the earliest cases is *Reg. v. Woodrow (1846) 15 M. & W. 404* , 412-414 (tobacco).

As to *Reg. v. Prince, L.R. 2 C.C.R. 154* , it is to be observed that although the statute refers to an unlawful taking, nevertheless it was held that the offence was absolute.

For a 19th century classification of absolute offences: see *Sherras v. De Rutzen [1895] 1 Q.B. 918* .

In *Rex v. Langa [1936] S.A.L.R. (C.P.D.) 158* the criterion adopted was that of ease of evasion if the offence were not absolute.

Reliance is placed on *Chajutin v. Whitehead [1938] 1 K.B. 506* where it was held that the accused had rightly been convicted of being in possession of an altered passport albeit that his possession was innocent in that he veritably believed he had a valid passport. This decision was relied on in the minority judgment in *Beaver v. The Queen [1957] S.C.R. 531* .

In fine on this branch of the argument, if the realities of the situation are considered, it is plain that a great burden would be placed upon the Crown if the prosecution had to prove that the accused had knowledge that he possessed a prohibited drug. If the seven tests put forward by the Crown are taken in their totality and are applied to the provisions of the Drugs (Prevention of Misuse) Act, 1964 , the inference should be drawn ***269** in view of the grave social evil at stake here that Parliament intended the possession of prohibited drugs to be an absolute offence.

There remains for consideration whether there is a "half-way house" between the opposing positions taken up by the parties here on the construction of this Act.

On this doctrine the mere physical possession of drugs would cast upon the accused the onus of proving his innocence. Where the burden is so cast upon the defence the test to be adopted is always the balance of probabilities. As to imputed knowledge: see *The Zamora (No. 2) [1921] 1 A.C. 801* , 812.

The first case in which this suggested construction of a statutory offence was put forward was in a dictum of Day J. in *Sherras v. De Rutzen [1895] 1 Q.B. 918* who based his view on the absence of the word "knowingly" in the provision in question. Humphreys J. in *Gaumont British Distributors Ltd. v. Henry [1939] 2 K.B. 711* approved of this approach and some support for it is to be found in the judgment of Singleton J. in *Harding v. Price [1948] 1 K.B. 695* , 704; see also *Reynolds v. Austin (G. H.) & Sons Ltd. [1951] 2 K.B. 135* . In *Roper v. Taylor's Central Garages (Exeter) Ltd. [1951] 2 T.L.R. 284* , 288, however, Devlin J. put forward reasons against adopting this concept. Further, in *Lim Chin Aik v. The Queen [1963] A.C. 160* , 173 the Privy Council expressed a view against it. The only reported decision where it seems to have been applied is the Canadian case of *Reg. v. Larocque (No. 1) (1957) 25 W.W.R 431* .

It is interesting to observe that in none of the above cases subsequent to *Sherras v. De Rutzen [1895] 1 Q.B. 918* is any reference made in either the arguments or judgments to the decision of this House in *Woolmington v. Director of Public Prosecutions [1935] A.C. 462* . The dictum of Day J. cannot be reconciled with the speech of Lord Sankey L.C. The "half-way house" doctrine could only really be supported if the famous passage in the Lord Chancellor's speech (at p. 469) had read as follows: "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to matters as to the defence of insanity and subject also to any statutory exception and judicial interpretation in these cases where the word 'knowingly' has been left out of the statutory provision in question."

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[Reference was also made to *Rex* v. *Maxwell and Clanchy (1909) 2 Cr.App.R. 26* ; *Reg.* v. *St. Margaret's Trust Ltd. [1958] 1 W.L.R. 522* ; *Reg.* v. *Ewens [1967] 1 Q.B. 322* .]

A. C. L. Lewisohn following. Careful consideration has been given to the question whether the Crown should apply for the application of the proviso here, if the appellant should succeed on the question of principle raised by the appeal, in view of the nature of the chairman's summing-up on the facts to the jury, and his direction on the law, which had the consequence that there was no final speech by the defence. But in the Crown's submission no speech by the defence, however skilful, would have resulted in a different verdict. There was not merely a strong case against the appellant but an overwhelming case. The test to be followed in determining whether to apply the proviso was adverted to in *Reg.* v. *Hallam [1957] 1 Q.B. 569* , 572. For an example of its ***270*** application in a case where the defence was withdrawn from the jury: see *Rex* v. *Oster-Ritter (1948) 32 Cr.App.R. 191* .

As to whether it would be proper for this House to apply the proviso in view of the fact that the evidence given at the trial is not before the House and was not before the Court of Appeal, see *Myers* v. *Director of Public Prosecutions [1965] A.C. 1001* where it was held that the material before their Lordships was such as to lead to the inevitable conclusion that the jury, even if properly directed, must have convicted the accused.

Howard Q.C. in reply. It is the foundation of the argument for the appellant that there cannot be possession without knowledge. Reliance is placed on *Reg.* v. *Ashwell, 16 Q.B.D. 190* . The accused to be knowingly in possession must be aware of the nature of that which he has. The Crown, therefore, in the present class of case must prove that the accused had this knowledge and also that he had no honest belief that he was entitled to have possession.

The test case for determining whether this Act requires mens rea is to be found in the provisions of section 2 (4) (g) . Thus, suppose a person is in possession of drugs which he has received from one whom he believed was a registered veterinary practitioner. The practitioner himself believed that he was properly registered, but in fact he was not. It is difficult to believe that Parliament intended by this Act to deprive a person in possession of drugs in the above circumstances of the defence that he had no guilty intent.

There is a mischief in so construing a statute as to do away with the necessity for mens rea, for it tends to bring the law into disrepute with the great majority of the public when it is found that persons are being convicted by the courts who are morally innocent.

It is to be observed that in the overwhelming number of cases where a statute has been held to prescribe an absolute offence the offence has been of a quasi-criminal nature relating to matters of public health or public welfare: see *Patel* v. *Comptroller of Customs [1966] A.C. 356* , 362. The first reported decision of a proper criminal offence that was held to be an absolute offence appears to be *Chajutin* v. *Whitehead [1938] 1 K.B. 506* .

It is said that the Act of 1964 concerns so serious a crime that a transgression of its provisions must be held to constitute an absolute offence. But see the very limited powers of arrest under section 2 of the Act. This provision militates greatly against the Crown's submission.

As to the proviso, in the circumstances this appellant was convicted without being heard. There was here no trial at all. Defence counsel had no opportunity of cross-examining the **police** officer or of assisting the jury. An accused is entitled to have the evidence reviewed from his point of view to the jury. It would be wrong to apply the proviso in this case on the facts which emerged from the summing-up. By reason of the chairman's direction on the law it is plain that the jury never addressed its mind to the question of possession at all.

[Reference was also made to *Reg.* v. *Carpenter [1960] Crim.L.R. 633* ; *Lim Chin Aik* v. *The Queen [1963] A.C. 160* ; *Reg.* v. *Churchill [1967] 2 A.C. 224* .] ***271***

Their Lordships took time for consideration.

May 2, 1968. LORD REID.

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My Lords, the appellant was tried at Inner London Quarter Sessions on February 3, 1967, on a charge that on November 18, 1966, he had in his possession a substance specified in the Schedule to the Drugs (Prevention of Misuse) Act, 1964 , namely, 20,000 tablets containing amphetamine sulphate. When stopped by the **police** he had in his car, inter alia, two packages. His defence was that he believed that both packages contained scent. In fact when they were opened in his presence one was found to contain scent and the other to contain these tablets. I shall not deal further with the facts at this point. His defence may not have been credible: it may be that no reasonable jury would have believed it. But the learned chairman directed the jury that this was no defence. He said that those tablets were under the control of the appellant: that "possession" meant that he had control; and the statute says you must not have such drugs in your possession in any circumstances whatever - there is absolute prohibition in law unless you have lawful authority. The jury returned a verdict of guilty after three minutes and the appellant was sentenced to two years' imprisonment. The Court of Appeal dismissed his appeal on authority of *Lockyer* **v.** *Gibb [1967] 2 Q.B. 243* , holding that this was an absolute offence for which mens rea was not necessary.

I understand that this is the first case in which this House has had to consider whether a statutory offence is an absolute offence in the sense that the belief, intention, or state of mind of the accused is immaterial and irrelevant. It appears from the authorities that the law on this matter is in some confusion, there being at least two schools of thought. So I think it necessary to begin by making some observations of a general character.

There is no doubt that for centuries mens rea has been an essential element in every common law crime or offence. Equally there is no doubt that Parliament, being sovereign, can create absolute offences if so minded. But we were referred to no instance where Parliament in giving statutory form to an old common law crime has or has been held to have excluded the necessity to prove mens rea. There are a number of statutes going back for over a century where Parliament in creating a new offence has transferred the onus of proof so that, once the facts necessary to constitute the crime have been proved, the accused will be held to be guilty unless he can prove that he had no mens rea. But we were not referred to any except quite recent cases in which it was held that it was no defence to a charge of a serious and truly criminal statutory offence to prove absence of mens rea.

On the other hand there is a long line of cases in which it has been held with regard to less serious offences that absence of mens rea was no defence. Typical examples are offences under public health, licensing and industrial legislation. If a person sets up as say a butcher, a publican, or a manufacturer and exposes unsound meat for sale, or sells drink to a drunk man, or certain parts of his factory are unsafe, it is no defence that he could not by the exercise of reasonable care have known or discovered that the meat was unsound, or that the man was drunk or that his premises were unsafe. He must take the risk and when it is found **272* that the statutory prohibition or requirement has been infringed he must pay the penalty. This may well seem unjust but it is a comparatively minor injustice, and there is good reason for it as affording some protection to his customers or servants or to the public at large. Although this man might be able to show that he did his best, a more skilful or diligent man in his position might have done better, and when we are dealing with minor penalties which do not involve the disgrace of criminality it may be in the public interest to have a hard and fast rule. Strictly speaking there ought perhaps to be a defence that the defect was truly latent so that no one could have discovered it. But the law has not developed in that way, and one can see the difficulty if such a defence were allowed in a summary prosecution These are only quasi-criminal offences and it does not really offend the ordinary man's sense of justice that moral guilt is not of the essence of the offence.

Reg. **v.** *Woodrow (1846,) 15 M. & W. 404* was an early case. A statute [5 & 6 Vict. c. 93, s. 3] provided that "every ... retailer of tobacco who shall receive or take 'into or have in his possession' any adulterated tobacco shall forfeit £200." The accused had 54 pounds of tobacco in his possession which had been adulterated by the manufacturer, but he did not know that. He had bought it as genuine tobacco believing it to be such and he had no reason to suspect that it was not. But he had to pay the penalty. Rolfe B. pointed out, at p. 413, in the course of the argument that another section empowered the **Commissioners** of Excise to forbear to prosecute if satisfied that a penalty was incurred "without any intention of fraud or of offending 'against this Act '." But the **commissioners** did prosecute.

Pollock C.B. said, at p. 415:

> "It is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality."

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and later he said, at p. 416:

> "In reality, a prudent man who conducts this business, will take care to guard against the injury he complains of. ... If he examines the article, he may reject it, and not keep it in his possession; or if he is incompetent to do that, he may take a guarantee that shall render the person with whom he is dealing responsible for all the consequences of a prosecution."

I need not deal with other early cases because the whole question was dealt with by R. S. Wright J. in a judgment in *Sherras v. De Rutzen [1895] 1 Q.B. 918* which has frequently been approved - in particular by the Privy Council in *Lim Chin Aik v. The Queen [1963] A.C. 160* . Wright J. said *[1895] 1 Q.B. 918* , 921:

> "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." ***273**

Then he mentioned two cases and continued, at pp. 921, 922:

> "Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush J. in *Davies v. Harvey (1874) L.R. 9 Q.B. 433* are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty."

Then he gave examples and continued *[1895] 1 Q.B. 918* , 921, 922:

> "Another class comprehends some, and perhaps all, public nuisances. ... Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right."

Down to that time there appears to have been no case of an absolute offence where the punishment could be imprisonment or the offence was truly of a criminal character.

One of the "isolated and extreme cases" mentioned by Wright J. was *Reg. v. Prince (1875) L.R. 2 C.C.R. 154* . The offence was taking an unmarried girl, being under the age of sixteen, out of the possession of her father. The accused did knowingly take a girl out of the possession of her father but the jury found that he believed that she was eighteen and that his belief was

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reasonable. That was held not to be a defence. Blackburn J. with whom nine judges concurred dealt with the matter briefly; he said, at p. 171:

> "We are of opinion that the intention of the legislature sufficiently appears to have been to punish the abduction, unless the girl, in fact, was of such an age as to make her consent an excuse."

Bramwell B., with whom seven judges concurred, dealt with the point at greater length. He said, at p. 174:

> "The act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong ..." Again, at p. 175: "The legislature has enacted that if anyone does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the mens rea. If the taker believed he had the father's consent, though wrongly, he would have no mens rea; so if he did not know she was in anyone's possession ... In those cases he would not know he was doing the *act* forbidden by the statute ..."

In a subsequent passage he said:

> "The same principle applies in other cases. A man was held liable for assaulting a **police** officer in the execution of his duty, though he did not know he was a **police** officer. Why? Because the act was wrong in itself."

That case is no authority for construing a statute so that a member of the public who genuinely believes that he is doing something lawful and innocent can be found guilty of a criminal offence.

The other extreme case was bigamy but there the law has been altered and mens rea is now of the essence of the offence. In a very recent case, *Reg. v. Gould [1968] 2 Q.B. 65* the Court of Appeal refused to follow ***274** *Rex v. Wheat [1921] 2 K.B. 119* and, in my view rightly, cited (at pp. 73, 74) with approval a judgment of Sir Owen Dixon than whom there is no greater authority on questions of legal principle:

> "The truth appears to be that a reluctance on the part of courts has repeatedly appeared to allow a prisoner to avail himself of a defence depending simply on his own state of knowledge and belief The reluctance is due in great measure, if not entirely, to a mistrust of the tribunal of fact - the jury. Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too readily escape by deposing to conditions of mind and describing sources of information, matters upon which their evidence cannot be adequately tested and contradicted, judges have been misled into a failure steadily to adhere to principle. It is not difficult to understand such tendencies, but a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code." *(Thomas v. The King (1937) 59 C.L.R. **279** ,* 309.)

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Before coming to the more recent cases I must examine *Hobbs v. Winchester Corporation [1910] 2 K.B. 471* because the judgment of Kennedy L.J. has been much relied on. It was held that a butcher sold unsound meat at his peril. Kennedy L.J. said, at p. 483:

> "I think there is a clear balance of authority that in construing a modern statute this presumption as to mens rea does not exist. I think with great respect to my brother Channell that he has applied to the construction of this modern statute a maxim which is recognised as applicable to offences at common law, and it may be, as Stephen J. suggests in *Cundy v. Le Cocq (1884) 13 Q.B.D. 207* also to offences under the common law."

I do not think that the distinction depends on the date of the statute: it depends on the nature of the offence. Kennedy L.J. said later (*[1910] 2 K.B. 471* , 484, 485):

> "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. ... He has chosen to engage in that which on the face of it may be a dangerous business and he must do so at his own risk."

The learned judge's words were very wide but again they must be read in their context. No instance is given of any truly criminal offence under any statute where absence of mens rea was not a defence. and that is not surprising because, when counsel for the respondent in this case was invited in the course of his able argument to cite any Act of or before that period which made a truly criminal offence an absolute offence though the accused had done what he reasonably believed was innocent and lawful, he was unable to cite any with the possible exception of a bankrupt obtaining credit without informing the creditor of his bankruptcy *(Rex v. Duke of Leinster (1923) 17 Cr.App.R. 176*). ***275**

A valuable discussion of the matter is to be found in the judgment of Wills J. in *Reg. v. Tolson (1889) 23 Q.B.D. 168* where he refers to numerous cases where similar language in two statutes has led to different results. He says, at p. 175:

> "there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offence entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognised as a matter fairly to be taken into account."

Next, I must refer to *Chajutin v. Whitehead [1938] 1 K.B. 506* where the appellant had been convicted of having in his possession an altered passport, was fined £40 and recommended for deportation, although it was found as a fact that he did not know that it had been altered and honestly believed on reasonable grounds that it had been issued to him in the ordinary course by the proper authority in Budapest. The offence was not against an Act of Parliament but against an Order - the Aliens Order, 1920 . I would have thought that the first question ought to have been whether the terms of the Act of Parliament were such as to authorise the Secretary of State to create an absolute offence but that point was not taken. If Parliament chooses to create an absolute offence it can do so, but I would be very hesitant to hold that a general authority to make regulations or orders entitles a Minister to do

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that. In the vast majority of cases he could without hampering enforcement make it a defence for the accused to prove that he did not know and had no reasonable grounds for suspecting that the document had been altered - or whatever the offence might be. It is one thing to say that Parliament has been in the habit of making persons who engage in trades absolutely liable for certain offences. It seems to me to be quite another thing to say that Parliament has intended to authorise a Minister to deprive an ordinary member of the public of such a defence whenever he may think that desirable.

The next important case is *Harding* v. *Price [1948], 1 K.B. 695* . There a trailer attached to a lorry had damaged a stationary vehicle when passing it and the driver was charged with failing to stop or report the accident. He was acquitted because it was held that he did not know there had been an accident. The words of the Act were clear and imperative - the driver of a motor vehicle shall stop, and he shall report the accident. There was no question of this being in the class of serious crimes and a more alert driver would almost certainly have realised that there had been an accident. But Lord Goddard C.J. thought it proper to say, at pp. 700, 701:

> "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.' In these days when offences are multiplied by ***276*** various regulations and orders to an extent which makes it difficult for the most law abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever to adhere to this principle."

But then Lord Goddard went on to say (*[1948] 1 K.B. 695* , 701) that -

> "there is all the difference between prohibiting an act and imposing a duty to do something on the happening of a certain event. Unless a man knows that the event has happened, how can he carry out the duty imposed?"

I am bound to say I find that distinction very unsatisfactory. Take the passport case, *Chajutin* v. *Whitehead [1938] 1 K.B. 506* . So far as the man knew or could know, he was doing something perfectly innocent which many people constantly do - carrying a proper and valid passport. A passage often quoted from the judgment of the Privy Council in *Bank of New South Wales* v. *Piper [1897] A.C. 383* , 389, 390 is that "the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent." I can see no real difference between the lorry driver who does not know there has been an accident and the carrier of the passport who does not know there is anything wrong with it. Neither has any mens rea as explained in the above quotation. Both in ignorance do something which is forbidden - the one carries an altered passport, the other drives on after an accident. But for some reason which escapes me every man who carries a passport acts at his peril but the man who drives on does not. Both do forbidden acts but one is guilty and the other is not. We seem to be in a very technical region far removed from the principle stated by Lord Goddard or from anything that any reasonable Parliament could possibly be supposed to have intended. I think that the explanation of this case must be that the court, disliking some of the older authorities but being unable to overrule them, seized on an insubstantial distinction to prevent any extension of the doctrine of absolute liability.

I observe the same tendency in the next case, *Reynolds* v. *Austin (G. H.) & Sons Ltd. [1951] 2 K.B. 135* . There it was a condition of a licence to carry a party of people that the journey "must be made without previous advertisement to the public." But some of the passengers did make a previous advertisement without the knowledge of the coach owner. He was prosecuted but held to be not guilty. It was argued that this was an absolute prohibition, but Lord Goddard C.J. said, at p. 144:

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> "Unless compelled by the words of the statute so to hold, no court shall give effect to a proposition which is so repugnant to all the principles of criminal law in this kingdom."

Devlin J. in a long judgment dealt with the question of principle. He quoted, at p. 149, from Dean Roscoe Pound ["The Spirit of the Common Law," p. 52] who said with regard to statutes creating absolute liability -

> "Such statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals." *277

Then he said:

> "I am not willing to conclude that Parliament can intend what would seem to the ordinary man (as plainly it seemed to the justices in this case) to be the useless and unjust infliction of a penalty."

In *Sambasivam v. Public Prosecutor of Malaya [1950] A.C. 458* the Privy Council had to deal with emergency regulations - "a drastic code designed to meet a state of grave disorder" (p. 470). The words were that any "any person who carries ... any firearm not being a firearm which he is duly licensed to carry ... shall be guilty of an offence. ..." But Lord MacDermott said, at p. 469:

> "It was conceded on behalf of the Crown - and rightly, in their Lordships' opinion - that 'carries' here means 'carries to his knowledge,' and that the carrying of a firearm by a person who did not know what he carried would not constitute an offence under this provision."

No doubt this expression of opinion by the Board was obiter but it is significant that even in an enactment dealing with so grave a menace to public safety the Board did not think that words which apparently created an absolute offence ought to be so interpreted. No doubt one reason was the drastic penalty. It is much easier to infer an intention to exclude mens rea when the penalty is only pecuniary.

I would also refer to a passage in the judgment of the Privy Council in *Lim Chin Aik v. The Queen [1963] A.C. 160* , 174:

> "But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to enquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

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In *Yeandel v. Fisher [1966] 1 Q.B. 440* an innkeeper and his wife were charged that they were persons concerned in the management of premises - the inn - used for the purposes of smoking and dealing in cannabis. It was not proved that they knew that this was being done on the premises, but an appeal against their conviction was dismissed. This case falls within the well-established class of case where persons who carry on some particular activity must do or refrain from doing a particular thing at their peril, if, but only if, this is limited to persons engaged in the day-to-day management: then it is reasonable to suppose that if they were alert they would at least notice something suspicious. Lord Parker pointed out, at p. 447, the difference between this provision and that which makes the occupier liable if he "permits" these things. He may well have no knowledge of what is going on, but someone who is or ought to be there constantly ought to be aware of it. ***278**

The only thing that makes me hesitate about this case is the severity of the penalty and the fact that this would be regarded as a truly criminal and disgraceful offence so that a stigma would attach to a person convicted of it. Applicants for employment, permits or other advantages are often asked whether they have been convicted of any offence. Admission of a conviction of an ordinary offence of this class ought not to be too seriously regarded - and the conviction might be of the man's company and not of the man himself. But a man who had to admit a conviction with regard to dangerous drugs might be at a grave disadvantage, and this might not be removed by an explanation that he had only suffered a small penalty: he might even be dismissed by his employer. This makes me hesitate to impute to Parliament an intention to deprive persons accused of these offences of the defence that they had no mens rea: I would think it difficult to convince Parliament that there was any real need to convict a man who could prove that he had neither knowledge of what was being done nor any grounds for suspecting that there was anything wrong.

I dissent emphatically from the view that Parliament can be supposed to have been of the opinion that it could be left to the discretion of the **police** not to prosecute, or that if there was a prosecution justice would be served by only a nominal penalty being imposed.

I agree with the view of the Privy Council in *Lim Chin Aik [1963] A.C. 160* , 174, 175, where their Lordships disapproved

> "the alternative view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty. This latter view can perhaps be supported to some extent by the dicta of Kennedy L.J. in *Hobbs v. Winchester Corporation [1910] 2 K.B. 471* , and of Donovan J. in *Reg. v. St. Margaret's Trust Ltd. [1958] 1 W.L.R. 522* . But though a nominal penalty may be appropriate in an individual case where exceptional lenience is called for, their Lordships cannot, with respect, suppose that it is envisaged by the legislature as a way of dealing with offenders generally. Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended."

One or other House of Parliament has been asked on more than one occasion in recent years to approve of some change in the law which would increase the chance of convicting offenders but has refused because it would or might also imperil the innocent. Although I would not entirely agree, I think the general view still is that it is better that ten guilty men should escape than that one innocent man should be convicted.

I shall deal more fully later with the decision in *Lockyer v. Gibb [1967] 2 Q.B. 243* because the main point seems to me to have been what is meant by "possession." But Lord Parker did regard the case as analogous to *Yeandel v. Fisher [1966] 1 Q.B. 440* . I do not think it is. *Yeandel v. Fisher* was a case where a person engaged in a certain occupation - being concerned in the management of premises - was held to do so at his peril. ***279** But there is no limitation of the class of persons to whom regulations made under the Dangerous Drugs Act, 1965 , may apply. These regulations purport to make any ordinary member

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of the public guilty of a very serious offence if a drug within the meaning of the Act is "in his actual custody." Any person may, and most people do, from time to time take into their custody an apparently innocent package without ascertaining what it contains, without having the slightest reason to suspect that it may contain anything out of the ordinary, and indeed without having any right to open the package and see what is in it. If every person who takes such a package into his custody must do so at his peril, then this goes immensely farther than any enactment imposing absolute liability has yet been held to go, and I refuse to believe that Parliament can ever have intended such an oppressive result.

Normally the plain, ordinary, grammatical meaning of the words of an enactment affords the best guide. But in cases of this kind the question is not what the words mean but whether there are sufficient grounds for inferring that Parliament intended to exclude the general rule that mens rea is an essential element in every offence. and the authorities show that it is generally necessary to go behind the words of the enactment and take other factors into consideration. That being so the layman may well wonder why we do not consult the Parliamentary Debates, for we are much more likely to find the intention of Parliament there than anywhere else. The rule is firmly established that we may not look at Hansard and in general I agree with it, for reasons which I gave last year in *Beswick* v. *Beswick [1968] A.C. 58* , 74. This is not a suitable case in which to reopen the matter but I am bound to say that this case seems to show that there is room for an exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other. Members of both Houses are particularly interested in the liberty of the subject and if it were intended by those promoting a Bill to extend the old but limited class of cases in which absence of mens rea is no defence I would certainly expect Parliament to be so informed. Then, if Parliament acquiesced, those who dislike this kind of legislation would know whom to blame. But if the words of the Act are not crystal clear and Parliament has not been told of this intention, I would hold without hesitation that it would be wrong to impute to Parliament an intention to depart from its known desire to prevent innocent persons from being convicted.

As things are we must do our best with the material available to us. The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession: it would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. and it is a commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That ***280** would not lead to an unreasonable result. In a case like this Parliament, if consulted, might think it right to transfer the onus of proof so that an accused would have to prove that he neither knew nor had any reason to suspect that he had a prohibited drug in his possession. But I am unable to find sufficient grounds for imputing to Parliament an intention to deprive the accused of all right to show that he had no knowledge or reason to suspect that any prohibited drug was in his premises or in a container which was in his possession.

It was suggested in argument that it may always be a defence, even to an absolute offence, to prove absence of mens rea. There are some dicta to that effect but I do not think that your Lordships could introduce such a far-reaching doctrine without statutory authority. When we are dealing with the original type of absolute offence - a person engaging in a business where he does certain things at the peril of a pecuniary penalty - it is clearly established that absence of mens rea is no defence. and a right to prove absence of mens rea would sometimes go too far. Mens rea or its absence is a subjective test, and any attempt to substitute an objective test for serious crime has been successfully resisted. But if there is to be a half-way house between the common law doctrine and absolute liability, there could be an objective test: not whether the accused knew, but whether a reasonable man in his shoes would have known or have had reason to suspect that there was something wrong. I would not support an objective test where the ordinary member of the public is concerned but it is not unreasonable to say that if a person engages in some particular business he must behave as, and have the capacity of, the ordinary reasonable man.

Lord Parker referred to a decision of the Supreme Court of Canada, *Beaver* v. *The Queen [1957] S.C.R. 531* , where it was held by a majority that the offence created by legislation against the possession of drugs in terms almost identical with the British Act was not an absolute offence. He said that he preferred the view of the minority. I do not. Fauteux J. for the minority founded on *Chajutin* v. *Whitehead [1938] 1 K.B. 506* . But I have already given my reasons for thinking that this decision is out of line with the other authorities.

It is possible to reach the same result in the present case on a narrower ground. The Act provides that "it shall not be lawful for a person to have in his possession" any of the specified substances unless in specified circumstances. So we have to determine what is meant by having a thing in one's possession. The problem here is whether the possessor of a house or box or package is necessarily in possession of everything found in it, or, if not, what mental element is necessary before he can be held to be in

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possession of the contents. This problem has given rise to a great deal of legal discussion and the numerous authorities are not at all easy to reconcile. I shall not attempt that task. I think the best approach to this case is to suppose that an innkeeper is handed in ordinary course a box or package by a guest for safe keeping. He has no right to open the box - it may be locked. If he is told truthfully what is in it, it may be right to say that he is in possession of the contents. But what if he is told nothing or is told that it contains jewellery and it contains prohibited drugs? It may contain nothing but drugs or it may contain both jewellery and drugs or it **281* may be an antique trinket apparently empty but containing drugs hidden in a small secret recess. It would in my opinion be irrational to draw distinctions and say that in one such case he is in possession of the drugs and therefore guilty of an offence, but not in another. It is for that reason that I cannot agree with the contention that if the possessor of a box genuinely believes that there is nothing in the box then he is not in possession of the contents, but that on the other hand if he knows there is something in it he is in possession of the contents though they may turn out to be something quite unexpected. and in any case this contention does not seem to me to take account of the case where the possessor of the box believes that it does contain jewellery and in fact it does contain jewellery but it contains drugs as well. It would, I think, be absurd to say that the innkeeper is not guilty if he genuinely believes that the box is empty and it has some drugs secreted in it, but that he is guilty of an offence under the Act if he truly believes that it contains jewellery but it also contains some drugs secreted in it. and if he is not guilty in the case where the box contains jewellery as well as drugs, on what rational ground can he become guilty if there is no jewellery in the box but only drugs?

In considering what is the proper construction of a provision in any Act of Parliament which is ambiguous one ought to reject that construction which leads to an unreasonable result. As a legal term "possession" is ambiguous at least to this extent: there is no clear rule as to the nature of the mental element required. All are agreed that there must be some mental element in possession but there is no agreement as to what precisely it must be. Indeed the view which prevailed in *Reg* **v**. *Ashwell (1885) 16 Q.B.D. 190* and was approved in *Rex* **v**. *Hudson [1943] K.B. 458* went so far that a person who received a sovereign thinking it to be a shilling was held not to possess the sovereign until he discovered the mistake.

There it was argued that "possession" in this context should be given a popular and not a legal meaning. But even if that were a legitimate way to construe a well-known legal term, I think that it would lead to the same ambiguity. If the ordinary reasonable man were asked what he thought "possession" meant in this context he would probably say that is a puzzle for the lawyers, and if he ventured his own opinion he might say it meant control. But if asked whether the innkeeper controls the contents of a box handed to him for safekeeping I think that he would most probably say No.

Lockyer **v**. *Gibb [1967]* **2** *Q.B. 243* was relied on by the Court of Appeal as the case most nearly in point. There the accused had been in a cafe with some people when the **police** came in. A man, whom apparently she did not know, gave her a bottle containing tablets "to look after for him." She put them at the bottom of her shopping bag and when she went out she was stopped by the **police**. She was prosecuted under a regulation made under the Dangerous Drugs Act, 1965 , for being in possession of a scheduled drug. The magistrate held that there was a possibility that she did not know that the tablets contained any of the scheduled drugs. She may have been a very stupid woman for I would think that any normal person being given a bottle of tablets in such circumstances would know perfectly well that the tablets must contain **282* prohibited drugs which the man did not want the **police** to find in his possession.

With regard to possession Lord Parker C.J. said, at p. 248:

> "In my judgment it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, for example, in her handbag, in her room, or in some other place over which she has control. That I should have thought is elementary; if something were slipped into your basket and you had not the vaguest notion it was there at all, you could not possibly be said to be in possession of it."

I entirely agree. But that destroys any contention that mere physical control or custody without any mental element is sufficient to constitute possession under that enactment. If something is slipped into my bag I have as much physical control over it as I have over anything else in my bag. I can carry it where I will and I can transfer the whole contents of my bag to some other person without ever realising that this particular thing is included.

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But then Lord Parker went on to say, at p. 249:

> "in my judgment, under this provision, while it is necessary to show that the defendant knew she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug or a drug of a particular character."

With that I cannot agree for reasons which I have already given. I do not think that this distinction will bear critical examination and I do not know what the result would be on this view if in the present case both the scent and the drugs had been in the same parcel. The accused, if his story were accepted, would have rightly believed that the parcel contained scent, but would have been ignorant of the fact that drugs had been slipped in with the scent. Could it be right that if the accused had taken possession of the parcel of scent and thereafter the drugs had been slipped in without his knowledge he would be innocent (which is Lord Parker's view) but that if the drugs had been slipped in without his knowledge before he took possession then he would be guilty? That seems to me to be quite unreasonable and it seems to me to be equally unreasonable that the fact that there were two parcels and not one should make all the difference between guilt and innocence.

If this case is to be decided on this narrower ground I accept the view of my noble and learned friends, Lord Pearce and Lord Wilberforce. It enables justice to be done in all cases which resemble this case. But it still leaves subject to injustice persons who in innocent circumstances take into their possession what they genuinely and reasonably believe to be an ordinary medicine, if in fact the substance turns out to be a prohibited drug. Nevertheless this ground is sufficient to show that the learned trial judge must be held to have misdirected the jury in the present case.

So it remains to consider whether this is a proper case for the application of the proviso as amended by section 4 of the Criminal Appeal Act, 1966 . Taking into account the prevarications of the accused before he produced his final story and the whole circumstances, I cannot believe that any ***283** reasonable jury would accept that story. If they did not they would be certain to return a verdict of guilty. So in my judgment there has been no miscarriage of justice and I would therefore dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST.

My Lords, the charge which was brought against the appellant was that he was in unlawful possession of 20,000 tablets which, as was proved at the trial, contained amphetamine sulphate. This was a substance specified in the Schedule to the Drugs (Prevention of Misuse) Act, 1964 . It was not lawful for him to have the tablets in his possession unless he came within one of the groups or classes of people in the case of whom possession is not prohibited. He did not, and there was no suggestion that he did.

The charge was laid under section 1 of the Drugs (Prevention of Misuse) Act, 1964 . That is an Act, as its long title proclaims, "to penalise the possession, and restrict the importation of drugs of certain kinds." Section 1 (1) provides that subject to any exemptions for which provision may be made by regulations made by the Secretary of State and to the provisions of the section which follows

> "it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act unless - (a) it is in his possession by virtue of the issue of a prescription by a duly qualified medical practitioner or a registered dental practitioner for its administration by way of treatment to him, or to a person under his care; or (b) it is in his possession by virtue of the issue of a prescription by a registered veterinary surgeon or a registered veterinary practitioner for its administration by way of treatment to an animal under his care; or (c) he is registered in a register kept for the purposes of this paragraph by the Secretary of State as a manufacturer of, or a dealer in bulk in, substances for the time being specified in that Schedule."

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A person "who has a substance in his possession in contravention of the foregoing provision" is liable to a fine or to imprisonment or to both as set out in the section.

In subsection (**2**) it is provided that subsection (1) shall not be taken to prohibit possession by a person of any one of twelve specified "kinds" (such, for example, as a duly qualified medical practitioner or an authorised seller of poisons) provided that it is in his possession for the purpose of his acting in the capacity of a person of that kind. Other exemptions are provided for by the terms of subsections (3) and (4) . Pursuant to the power given him by section 1 (1) of the Act the Secretary of State on September 17, 1964, made regulations (the Drugs, (Prevention of Misuse) Exemptions Regulations, 1964 (S.I. 1964 No. 1528)) under which exemptions, subject to stated conditions, were given so that prohibition of possession would not apply, inter alia, to carriers or to those concerned, in the performance of their duty, in the transmission of postal packets by post or in certain specified circumstances to the owner or master of certain ships.

It appears therefore to be clear that unless a person comes within the exclusions and exemptions which are specified and precise it is not lawful ***284*** for him "to have in his possession" any one of the substances specified in the Schedule to the Act.

It was for the prosecution to prove that the appellant had the tablets in his possession: if he did so have them, then his possession was in contravention of section 1 of the Act. The appellant was convicted. He appealed to the Court of Appeal. One of the grounds of his appeal was that there had been misdirection as to "possession." On June 30, 1967, the Court of Appeal gave judgment dismissing the appeal. On July 28, 1967, the appellant (who was on that occasion unrepresented) applied to the Court of Appeal for leave to appeal. The court adjourned the application but said that while in their view there was a point of law of general public importance they did not consider, having regard to the particular facts of the case, that they ought to give leave to appeal. On a renewal of the application on October 9, 1967, leave to appeal was refused. Upon further consideration on October 19, 1967, leave was granted. The point of law of general public importance was stated by the Court of Appeal to be:

> "Whether for the purposes of section 1 of the Drugs (Prevention of Misuse) Act, 1964 , a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature."

It will be seen that there is a certain ambiguity in this formulation.

Your Lordships were not supplied with a transcript of the evidence but were invited to take the facts as recounted or summarised in the summing-up. It appears that on the morning of November 18, 1966, the appellant was driving a Mini van. He was stopped by a **police** officer. The **police** officer questioned him as to the contents of his van. In the van there were three cases. Being asked what was in them the appellant said that it was rubbish. Being further asked separately as to each one of the three cases the appellant said that each only contained rubbish which it was his intention to dump. In the words of the summing-up - "Eventually there emerged two packages." They were then opened by the **police**. One contained bottles of scent. The other contained 20,000 tablets containing amphetamine sulphate. The evidence as to what was said at the time was conflicting. The appellant said that the **police** officer did not ask him where he got the pills but had said that they looked like "pep pills" and that he (the appellant) had said: "I don't know how they got there." The **police** officer said that he did ask the appellant where he got the pills and that the appellant's explanation was that they came from his address.

Evidence for the defence was given at the trial by the appellant, by the owner of a certain cafe and by a friend of the appellant. The effect of this evidence was that the appellant (who is by occupation a floor-layer) had by arrangement with his friend been selling scent as a side-line. The owner of the cafe sometimes allowed customers to leave goods to be called for. The friend called at the cafe on the morning of November 18, and by permission left a package for the appellant. The cafe owner put it (one package) under the shelf under the counter. Some ten minutes later the appellant called at the café. He learned that his friend had been but ***285*** had gone: he inquired whether his friend had left anything for him and was told by the cafe proprietor: "Yes, it is under the counter." The evidence of the appellant, according to the summing-up, was that he then looked under the counter: "there were two boxes; one was the big box which in fact had the scent in it and on top was the smaller box: I didn't look inside it: I assumed it was scent, so I collected it up and I drove off."

On the state of the evidence as summarised above the question arises as to the extent of the burden of proof which lay upon the prosecution. It was for the prosecution to prove that the prohibited substance was in the possession of the appellant. They

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undoubtedly proved that the tablets which were inside the package which he had were tablets which contained prohibited substances. They had to prove that the appellant had the tablets in his possession. Did this involve that the prosecution had to establish not only that the appellant had the package in question but also had to establish positively that he knew that the contents of his package were tablets containing amphetamine sulphate? Stated otherwise, if the appellant says: "I had the package and I knew that it had certain contents but I thought that the contents were bottles of scent," is the onus cast upon the prosecution to prove that he knew that the contents were not bottles of scent but were prohibited substances?

If these burdens rested upon the prosecution then the summing-up was defective. The jury were directed in these terms:

> "Now then, members of the jury, it was under control because 'possession' means that you have control. This man quite clearly had, and does not deny he had, control of these pills, and if he had and it is a matter for you to make up your minds about because you are the judges of facts - if you think the evidence is, he does not dispute it, that he had control of that box which in fact turned out to be full of amphetamine sulphate, that creates the original offence; it is only mitigation that he did not know."

The first question which arises relates to the meaning of the words "to have in his possession" in section 1. Let the case be supposed that in a man's pocket there is to his knowledge a package having contents, which contents are in fact prohibited substances which it is not lawful for him to have in his possession, and that when the package is produced from his pocket he says, "I thought they were sweets," is the onus cast upon the prosecution to prove that he knew that they were not sweets? It is submitted on behalf of the respondent that if a man chooses to have upon him a package with contents he takes the risk, if he has not examined what he has, that he may be in possession of that which it is not lawful for him to have.

It is submitted that if in some particular circumstances it is found that the contents of a package which someone deliberately has in his possession are contents which it is not lawful for him to have, but if it appears that by some series of mischances he was under a complete misapprehension as to what he had, there could be good reasons to invite a court to exercise the ample powers it possesses where mitigating circumstances are compelling.

As the Drugs (Prevention of Misuse) Act, 1964 , does not contain a definition of the word "possession" it must be given a sensible and ***286** reasonable meaning in its context in an Act designed to penalise the possession of drugs. The word "possession" is much to be found in the vocabulary of the law and it cannot always be given the same meaning in all its divers contexts. But the notion of being in possession of drugs is not one which as a rule should present difficulty in comprehending. A useful start in considering an Act of Parliament is to take the plain literal and grammatical meaning of the words used. In *Attorney-General v. Lockwood (1842) 9 M. & W. 378* , 398, Alderson B. said:

> "The rule of law, I take it, upon the construction of all statutes ... is, whether they be penal or remedial, to construe them according to the plain, literal and grammatical 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."

On this basis I think that the notion of having something in one's possession involves a mental element. It involves in the first place that you know that you have something in your possession. It does not, however, involve that you know precisely what it is that you have got.

I agree with what Lord Parker C.J. said in *Lockyer v. Gibb [1967] 2 Q.B. 243* , 248:

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> "In my judgment it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, for example, in her handbag, in her room, or in some other place over which she has control. That I should have thought is elementary; if something were slipped into your basket and you had not the vaguest notion it was there at all, you could not possibly be said to be in possession of it."

In this connection reference may usefully be made to the case of *Reg. v. Woodrow, 15 M. & W. 404* . In that case (in 1846) a dealer in tobacco was held liable to the monetary penalty imposed by section 3 of 5 & 6 Vict. c. 93 . There was a provision "that every ... dealer in or retailer of tobacco who shall ... have in his possession" any adulterated tobacco should forfeit £200. The dealer had purchased the tobacco as genuine and had no knowledge or cause to suspect that it was not so. The section did not contain the word "knowingly." Pollock C.B. said, at p. 415, that section 3 applied to the case "whether the party knows it or not." Parke B. said, at p. 417:

> "With respect to the offence itself, I have not the least doubt that the ordinary grammatical construction of this clause is the true one. It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so. The legislature have made a stringent provision for the purpose of protecting the revenue, and have used very plain words. If a man is in possession of an article as the defendant was in this case, and that article falls within the terms mentioned in the statute, there is no question but that the offence is proved." ***287**

Alderson B. said, at p. 418:

> "... the words of the Act, though they are no doubt very stringent, are nevertheless very clear, and any retailer of tobacco who has an adulterated article in his possession is liable to the penalty. I cannot say that this man had not the tobacco in his possession, because he clearly knew it. He did not know it was in an adulterated state, but he knew he had it in his possession; and the question of 'knowingly,' it appears to me, is involved in the word *possession.* That is, a man has not in his possession that which he does not know to be about him. I am not in possession of anything which a person has put into my stable without my knowledge. It is clear, therefore, that possession includes a knowledge of the facts as far as the possession of the article is concerned."

In the present case there is no suggestion that any package got inadvertently or surreptitiously into the appellant's hands. There may be situations in which on particular facts a jury would have to determine whether some parcel or package was in a man's pocket or bag or house or motor-car without any knowledge on his part that it was there. No such question arises in this case.

If a package or parcel is in a house which is occupied by several people then there may be facts calling for the consideration of a jury as to whether it has been proved that the package or parcel was in the possession of some one person. But whatever view a jury might in the present case have formed as to the origin and movements of the package in which were the 20,000 tablets, the appellant was in my opinion on his own admissions in possession of those tablets. He expected to receive a package. He

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says that he found a second package. We were told that the second package, though smaller than the one containing scent, was of the size of about a cubic foot. He took both packages away. He put them in his van. He intended to exercise complete control over both of them. He could have left the second parcel. Presumably he could have opened it. On his story he assumed that it had been left for him. Though we have not seen the transcript of the evidence it is to be assumed that his friend said that he only left one package (a package containing scent). But taking the appellant's evidence at its face value, if he assumed that his friend had left two packages for him and if he assumed that both contained scent, when he took both packages and put them in his van and drove away with them he was taking the packages and their contents into his possession. If, in having the tablets in his possession, he became guilty of an offence under section 1, then if a court considered that in truth he believed that he had scent and not tablets it would be for the court to decide as to the weight of and the effect to give to such mitigating circumstance.

Reference was made in argument to cases in which the question arose whether, if a man received from another a coin of a different denomination from that which it had been intended to hand over, there could be a conviction of larceny. Thus in *Reg. v. Ashwell, 16 Q.B. 190* , A asked K for a loan of one shilling. K by mistake, intending to hand a shilling ***288** coin to A, in fact handed him a sovereign. Could A be convicted of larceny of the sovereign? Had K parted with the possession of the sovereign to A so that A was lawfully in possession of it? The case gave rise to considerable divergence of judicial opinion. A somewhat similar question arose in *Reg. v. Jacobs (1872) 12 Cox C.C. 151* , where a half sovereign was by mistake handed over instead of a sixpence. The crime of larceny needed proof of an animus furandi. But it was also necessary to prove that the accused had taken the chattel from the possession of its possessor. Larceny was an offence against possession. If the possessor K had given A possession of the sovereign, then A was not guilty of larceny. If the possessor (K) had handed over the chattel by mistake, did the accused (A) acquire possession? I do not propose to consider these cases or to examine their precise facts for, in my view, they have no bearing on the present problem. There is no suggestion in the present case that the appellant took possession by mistake of the package which contained the tablets. It is difficult to know what are the true facts, but, if for present purposes, it is assumed that some person (other than one of those who gave evidence) placed a package on the top of the one left by the friend, it would seem likely that possession of that package was not being retained by that person. It would seem probable that the package was left by someone so that the appellant would take it. Conceivably, however, the package could have been left by someone so that someone other than the appellant would take it. Conceivably, also, someone could have just placed the package down while having the intention shortly thereafter himself to take it up again. Even though there are these possibilities no question of the law of larceny is here involved. It does not seem to me that it can be said that the appellant took the package itself by mistake. He took it quite deliberately. He intended to take it. He did not open it or examine it. He took it away. Acting freely and consciously he intended to take it and its contents away. He placed the package in his van and drove away. If his evidence warranted credence it would not mean that he took possession by mistake: it would mean that by mischance or lack of care in investigation he found that the contents which he took into his possession were different from what he thought that they were.

The section (section 1) does not contain any definition of the word "possession." Unless one of the exemptions applies it is not "lawful" for a person "to have in his possession" one of the scheduled substances, and a person who "has a substance in his possession" in contravention of the provision is liable to certain penalties either on summary conviction or on conviction on indictment. The problem presented in this case is, in my view, purely one of construction and interpretation. The intention of Parliament is to be ascertained. Parliament uses words to express its intention. The words that are employed must be considered in their context and in the setting of the purpose which Parliament has proclaimed. What, then, does "possession" mean? Does "possession" involve that someone must knowingly have control over some thing. Does "possession" further involve that there must be knowledge, either in general or with precision, as to what the thing is? In relation to the present case the practical problem that arises is whether it was necessary for the ***289** prosecution to prove that the appellant knew that what he had was one of the substances named in the Act or at least to prove that he knew that what he had was a parcel of tablets? Though the decision in *Lockyer v. Gibb [1967] 2 Q.B. 243* was not a decision in regard to the 1964 Act but related to the 1965 Act and to a regulation which in defining possession had a "deeming" provision, the question now raised concerns the validity or the applicability of the reasoning which was thus expressed in the judgment in that case, at p. 249:

> "While it is necessary to show that the defendant knew she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug or a drug of a particular character."

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In my view, the approach denoted by those words is applicable in the present case. The question resolves itself into one as to the nature and extent of the mental element which is involved in "possession" as that word is used in the section now being considered. In my view, in order to establish possession the prosecution must prove that an accused was knowingly in control of something in circumstances which showed that he was assenting to being in control of it: they need not prove that in fact he had actual knowledge of the nature of that which he had. In *Lockyer v. Gibb* Lord Parker, at p. 248, gave the illustration of something being slipped into a person's basket. While the person was unaware of what had happened there would be no possession. But in such circumstances, on becoming aware of the presence of the newly discovered article, there would be opportunity to see what the article was: whether the opportunity was availed of or not, if the article was deliberately retained there would be possession of it. So also in the illustration given by Alderson B. in 1846 in *Reg. v. Woodrow, 15 M. & W. 404* , 418. Something is placed in a man's stable without his knowledge. He is not in possession of it. If he goes to his stable and sees the unexpected presence of the article, then, according to the particular circumstances, he might with knowledge so act as to assume control of it. He would then be in possession of the article.

On the admitted facts in the present case the appellant was, in my view, in possession of the tablets. Though the summing-up was inadequate in its references to the conception of possession, on the admitted facts of this particular case the omissions in the summing-up do not vitiate the conviction. In other cases, however, it would be necessary to give a more complete and careful direction to a jury as to what the prosecution must prove in regard to possession. A jury must not convict unless they are satisfied that possession in an accused has been proved. There can be no rigid formula to be used in directing a jury. Varying sets of facts and circumstances will call for guidance on particular matters. The conception to be explained, however, will be that of being knowingly in control of a thing in circumstances which have involved an opportunity (whether availed of or not) to learn or to discover, at least in a general way, what the thing is. The same result might follow if it was a matter of indifference whether there was such opportunity or not. If there is assent to the control of the thing, either after having the means of knowledge of what ***290*** the thing contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains - then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box, but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents or if he had made a wrong surmise as to them it seems to me that he would nevertheless be in possession of them. Similarly, if he wrongly surmised that a box was empty which in fact had things in it, possession of the box (if established in the way which I have outlined) would involve possession of the contents. But for the purposes of the present Act I do not consider that in order to prove possession of a prohibited substance it is necessary to prove knowledge that the thing possessed was in fact a prohibited substance.

It is to be observed that in *Lockyer v. Gibb [1967] 2 Q.B. 243* the appellant did not assert that the prosecution had to prove that she knew that she had a particular drug or even a dangerous drug, but it was submitted that at least it had to be proved that she knew that what she had was a drug. In a similar way it has not been contended on behalf of the appellant in the present case that the prosecution had to prove that the appellant knew that the substance which he had was a substance specified in the Schedule to the Act. What was contended was that the prosecution had to prove that the appellant knew that he had some substance other than scent and that he did not believe that he had lawful authority to have what he had: or, stated otherwise, that the prosecution had to prove that the appellant did not believe that he had an innocent purpose in having what he had.My Lords, I find this not only vague and imprecise and unworkable but also illogical. Accepting that the words "to have in his possession a substance" carry with them an involvement of knowledge I could have understood a submission that in a prosecution under section 1 the prosecution must both prove that someone with knowledge has possession of a thing and must also prove that he knew what was the quality of the thing, i.e., that the thing was or contained a substance specified in the Schedule to the Act. But I can see no reason for, and I know of no authority for, the contention advanced on behalf of the appellant.

The present case concerns wording which is different from that which was considered in *Reg. v. Hallam [1957] 1 Q.B. 569* . That case required a construction of the words in section 4 (1) of the Explosives Substances Act, 1883 , which were:

> "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 ***291*** can show that he ... had it in his possession ... for a lawful object, be guilty of felony ..."

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Lord Goddard C.J., in giving the judgment of the court, said that the point raised was purely a matter of construction of the sentence. He said, at p. 572:

> "The whole question is whether the word 'knowingly' means that he must know, not only that he has a parcel or a substance in his possession but also that it is an explosive. The words, I repeat, are 'knowingly has in his possession any explosive substance.' Having given the best consideration that we can to this case, we think that the words must mean that he must know that it is an explosive substance."

Inasmuch as this case depends upon the interpretation of section 1 of the Act now in question I doubt whether it would be profitable, even if it were practicable, to attempt to refer to or to review all the very numerous cases in which courts have held that in particular legislation Parliament has used words which exclude wholly or partially the requirement of mens rea. That Parliament may so legislate admits, of course, of no doubt.

I think that it is important to recognise and to affirm that it is a general principle of our law that to commit an offence a man must have a guilty mind. Generally speaking, a statute will be applied as though that principle was incorporated into the enactment. I think, however, that it may be too sweeping to say that if Parliament introduces the word "knowingly" it merely states what would be implied. The presence or absence of the word "knowingly" may in some cases be of great importance in construing particular words in a particular enactment.

In *Reg. v. Sleep (1861) Le. & Ca. 44* , in 1861, the accused was charged under a legislative enactment, 9 & 10 Will. 3, c. 41, which was designed for the protection of government property which would be marked with broad arrows. The accused had dispatched certain copper: it was proved that some of the copper had broad arrow marks. The relevant statutory words were: "in whose possession ... goods ... marked as aforesaid shall be found." At the trial a question was left to the jury: "Whether the prisoner knew that the copper or any part of it was so marked?" The answer of the jury was: "We have not sufficient evidence before us to show that he knew it." It was held in the Court for Crown Cases Reserved that he ought not to have been convicted. In giving judgment Cockburn C.J. used these words, at p. 54:

> "It has been contended that mere possession constitutes the offence provided against by the 9 & 10 Will. 3, c. 41; but I am unable to adopt that view. 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, as has already been laid down in *Reg. v. Cohen (1858) 8 Cox C.C. 41* , although the Act itself does not in terms make a guilty mind necessary to the commission of the offence. Cases of innocent possession might be put in which it would be clear that the possessor had not that guilty mind. The authorities which have been cited may be reconciled in this way, viz., that it is a fair ***292*** presumption, where a man is found in possession of marked articles, that he knew them to be marked; but that presumption may be rebutted by the circumstances of the case. Here it is manifest, if the prisoner's statement is to be believed, that he was ignorant of the fact that the copper was marked; and the ordinary presumption is rebutted. The jury might, indeed, have come to the opposite conclusion; and, in my opinion, they ought to have done so. They have not done so; but have taken the prisoner's statement as true."

The decision was in accord with two earlier cases: *Reg. v. Willmett (1848) 3 Cox C.C. 281* and *Reg. v. Cohen, 8 Cox C.C. 41* .

I refer to just a few other cases merely by way of illustration of the problems that have confronted courts in reference to other Acts. I do not think it necessary to venture any opinion as to the correctness or otherwise of these cases. Thus in 1880 in *Reg. v.*

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Bishop (1880) 5 Q.B.D. 259 the defendant was convicted under 8 & 9 Vict. c. 100, s. 44, of receiving two or more lunatics into her house, not being a registered asylum or hospital, or a house licensed under the Act or any previous Act, though the jury who convicted found specially that though the persons so received were lunatic, the defendant honestly, and on reasonable grounds, believed that they were not lunatic. It was held by the Court for Crown Cases Reserved that such belief was immaterial and that the conviction was right. In the case of *Blaker v. Tillstone [1894] 1 Q.B. 345* there was a summons under section 117 of the Public Health Act, 1875 , charging a person with having had meat in his possession and deposited on his premises for the purpose of preparation for sale and intended for the food of man, which meat was unsound and unfit for the food of man. It was held that it was not necessary to show that the accused had personal knowledge of the condition of the meat. Lord Coleridge C.J. said (at p. 348) that the decisions under the Act of Will. 3 (to which I have referred above - see *Reg. v. Sleep,* Le. & Ca. 44) were not in point, being decisions under a statute having a different object - i.e., the protection of the Queen's stores. He said, at p. 348:

> "The question for us is whether the magistrate is bound to insist on direct proof of knowledge on the part of the seller of the bad condition of the stuff sold. Perhaps it might be an answer to this contention to say that the Act of Parliament would be nugatory if such proof were insisted on, for it would then always be open to the defendant to say that he was not aware of the condition of the article sold, and that it was not his duty under the statute to make any inquiries on the point, with the obvious result that a man might in practice go on selling meat which was positively injurious without the possibility of getting a conviction against him. The Act would thus be made nugatory; but that would be no answer if its meaning were clear, though it would be a reason for holding, (if it were open to us to do so) that that could not be the meaning of the Act."

The cases show, in my view, that what always has to be decided is the meaning of the particular statutory enactment. While recognising that mens rea is a prerequisite of a criminal conviction the question always is whether Parliament in a particular instance has enacted that on proof of ***293*** certain facts strict or absolute liability is to follow. Whether the subject-matter of the legislation is such that a conviction would be regarded as involving serious stigma or whether the subject-matter is such that a conviction would be regarded as involving minimal stigma cannot affect the question as to what Parliament has in fact enacted. It is to the words used by Parliament that attention has to be directed.

Some of the decisions seem to be in conflict with others. *Cundy v. Le Cocq. 13 Q.B.D. 207* , was a case under section 13 of the Licensing Act, 1872. The keeper of licensed premises was held guilty of having sold intoxicating liquor to a drunken person even though the latter had given no indication of intoxication and even though there was no awareness on the part of the publican or his servants. It was held that the prohibition was absolute and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. Stephen J. said. at p. 209:

> "I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a bona fide mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head 'offences against public order.'"

He proceeded to point out that in some sections, but not in the section in question, there was the word "knowingly." In reference to the maxim that in every criminal offence there must be a guilty mind Stephen J. said at p. 210:

> "In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is

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> impossible now, as illustrated by the cases of *Reg. v. Prince, L.R. 2 C.C.R. 154* and *Reg. v. Bishop, 5 Q.B.D. 259* , to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created."

In contrast to *Cundy v. Le Cocq, 13 Q.B.D. 207* was the decision in *Sherras v. De Rutzen [1895] 1 Q.B. 918* where it was held that section 16 (2) of the Licensing Act, 1872, which prohibits the supplying by a licensed person of liquor to a constable on duty, did not apply where the licensed person bona fide believed that the constable was off duty. Wright J. said, at p. 921:

> "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: *Nichols v. Hall (1873) L.R. 8 C.P. 322* ." ***294**

In his judgment Wright J. noted certain groups or classes of cases which he felt could be regarded as exceptions to the general rub that mens rea is an essential ingredient in an offence.

Cases which have required decisions in regard to particular words in particular enactments may be of value in recording lines of approach. I would cite some words of Lord Goddard C.J. when in *Brend v. Wood, 62 T.L.R. 462* , 463 he said:

> "It should first be observed that at common law there must always be mens rea to constitute a crime: if a person can show that he acted without mens rea that is a defence to a criminal prosecution. There are statutes and regulations in which Parliament has seen fit to create offences and make people responsible before criminal courts although there is an absence of mens rea, but it is certainly not the court's duty to be acute to find that mens rea is not a constituent part of a crime. 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."

In *Harding v. Price [1948] 1 K.B. 695* , 700 Lord Goddard reaffirmed the principle which he had expressed and pointed to the great importance of adhering to it in days when offences are multiplied to an extent which makes it difficult for the most law-abiding subjects in some way or at some time to avoid offending against the law. He expressed the view, at p. 701:

> "If, apart from authority, one seeks to find a principle applicable to this matter it may be thus stated: if a statute contains an absolute prohibition against the doing of some act, as a general rule mens rea is not a constituent of the offence; but there is all the difference between prohibiting an act and imposing a duty to do something on the happening of a certain event. Unless a man knows that the event has happened, how can he carry out the duty imposed?"

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I pass, then, to a consideration of the Act of 1964 with which alone is this case concerned. I proceed on the basis that, unless a statute otherwise provides, there should be no conviction if there is no mens rea. A statute may by express provision enact that in certain circumstances there will be what is often called strict or absolute liability. Parliament may consider that it is so important to prevent some particular act from being committed that it absolutely forbids it to be done: see *per* Channell J. in *Pearks, Gunston and Tee Ltd. v. Ward [1902] 2 K.B. 1* , 11.

It is important to consider what is meant when it is said that before there can be a conviction under section 1 of this Act there must be "mens rea." When it was enacted that "a person who has a substance in his possession" in contravention of the provision in the early part of section 1 should be liable to punishment did Parliament intend that a person should only be so liable if he knowingly had such a substance in his possession and knowingly had it with a guilty mind? The word "knowingly" is not used. Should it be implied as being ordinarily a requirement in a criminal ***295*** prosecution? Must the prosecution prove that an accused had a guilty mind?

In considering these questions the wording in the Act must be regarded. It is a declared purpose of the Act to prevent the misuse of drugs. If actual possession of particular substances which are regarded as potentially damaging is not controlled there will be danger of the misuse of them by those who possess them. They might be harmfully used: they might be sold in most undesirable ways. Parliament set out therefore to "penalise" possession. That was a strong thing to do. Parliament proceeded to define and limit the classes and descriptions of people who alone could possess. All the indications are that save in the case of such persons Parliament decided to forbid possession absolutely.

It might well happen that a **police** constable acting in the course of his duty would come into possession of a prohibited substance. He might come into possession after being armed with a search warrant to search some premises. He would know what he had but no one could say that he would have a guilty mind. Yet Parliament found it necessary to make express provision to withdraw the prohibition in such a case. It is enacted in subsection (4) of section 1 :

> "Subsection (1) above shall not be taken to prohibit the possession of a substance by any servant of Her Majesty or constable acting in the course of his duty as such."

Servants of Her Majesty acting in the course of their duty would certainly not have a guilty mind.

If a prohibited substance was put in a sealed package and sent by post the postmen who, in the performance of their duty, handled the package would neither know of the contents of the package nor would they have guilty minds. They are, however, given immunity by the regulation which was made on September 17, 1964, and laid before Parliament on September 24, 1964.

In the same way carriers and those employed by carriers when acting as such might be in possession of prohibited substances without having knowledge of what it was they possessed: they would not have guilty minds. They also have the protection given them by the regulation to which I have referred.

In my view, the wording of section 1 is clear and emphatic. Unless a person has justification as specifically laid down "it shall not be lawful" for him to have a prohibited substance in his possession. For the reasons that I have earlier given I think that before the prosecution can succeed they must prove that a person knowingly had in his possession something which in fact was a prohibited substance. In my view, the prosecution discharged that onus in this case. Was it, however, for the prosecution to prove that the appellant knew the nature and quality of that which he had? In my view, it was not. The evidence proved that what the appellant had in his possession was B-aminopropylbenzine or a salt of that substance. I cannot think, and indeed it could hardly be suggested, that the intention of Parliament as shown by the words of the enactment was that it had to be proved by the prosecution that the appellant, being ***296*** consciously in possession of something, was in fact consciously in possession of what he knew to be a salt of B-aminopropylbenzine.

Though the appellant shrank from asserting that such obligation of proof rested on the prosecution, I find it difficult to see that there is any justification for a suggestion of a sort of half-way obligation upon the prosecution, i.e., of proving that the appellant did not believe that he had lawful authority to have what he had.

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For reasons which I have set out I conclude, therefore, that the appellant was shown "to have in his possession a substance for the time being specified in the Schedule" to the Act. What follows? The words of section 1 are quite clear. "It shall not be lawful for a person to have in his possession" such a substance. If the appellant did have such possession it was not lawful. The lawfulness or unlawfulness of his possession cannot depend upon whether or not he knew the provisions of the Act. Ignorantia juris non excusat. If he had possession and if none of the exceptions or exemptions or permissions applied, then it was unlawful possession. The Act so proclaimed. Unauthorised possession of a scheduled substance is strictly prohibited and is unlawful. It cannot become lawful because a possessor does not know of the Act of Parliament. Nor can it become lawful because the possessor does not know or realise that what he in fact possesses is a scheduled substance. All possession of a scheduled substance is unlawful unless it is authorised possession, and "a person who has a substance in his possession in contravention of the foregoing provision shall be liable" to certain penalties.

The intention of Parliament is revealed by the words used in their context in an Act which, with the object of preventing the misuse of certain drugs, penalises their very possession except in strictly limited and carefully defined cases. If there is possession which is unlawful there is a liability to certain penalties. No exemptions are made. Once possession is established, with such mental element as is involved in the proof of possession, then (if it is unauthorised) a liability to certain penalties up to certain maxima, according as to whether there is a summary conviction or conviction on indictment, inevitably arises.

I think that in criminal matters it is important to have clarity and certainty. I have endeavoured to set out my view as to what the Act denotes by the words "to have in his possession." So far as summary is possible my conclusion is that in a prosecution under section 1 it is for the prosecution to prove (a) that the accused was knowingly in control of some article or thing or substance or package or container in circumstances which had enabled him to know or to discover (or could have enabled him, had he so wished, to know or to discover) what it was that he had before assuming control of it or continuing to be in control of it, and (b) that, whether the accused knew this or not, the article or thing or substance or package or container that he had, consisted of, or contained, a prohibited substance.

I would dismiss the appeal.

LORD GUEST.

My Lords, the appellant was convicted at the Inner London Quarter Sessions on a charge that he on November 18, 1966, not being authorised, had in his possession a substance specified in the Schedule ***297** to the Drugs (Prevention of Misuse) Act, 1964 , namely, 20,000 tablets containing amphetamine sulphate. He appealed to the Court of Appeal (Criminal Division), inter alia, on the ground that the learned chairman had misdirected the jury in law. The alleged misdirection was contained in the following passages from the summing-up:

> "There is absolute prohibition in law unless you have lawful authority, that is to say, medical prescription or something of the kind; it is absolute prohibition for anybody to have ... Now you have just listened to an argument going on. There are statutes in law which charge matters relating to possession, but they use the word '"knowingly" had in your possession.' This statute does not. This statute says you must not have in your possession in any circumstances whatsoever, unless you have got a lawful excuse ... Now then, members of the jury, it was under control because 'possession' means that you have control. This man quite clearly had, and does not deny he had, control of these pills, and if he had, and it is a matter for you to make up your minds about because you are the judges of facts - if you think the evidence is, he does not dispute it, that he had control of that box which in fact turned out to be full of amphetamine sulphate, that creates the original offence; it is only mitigation that he did not know."

His appeal was dismissed, but the court granted him leave to appeal to the House of Lords on the following certificate:

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> "Whether for the purposes of section 1 of the Drugs (Prevention of Misuse) Act, 1964 , a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature."

Section 1 (1) of the Drugs (Prevention of Misuse) Act, 1964 , is in the following terms:

> "1. - (1) Subject to any exemptions for which provision may be made by regulations made by the Secretary of State and to the following provisions of this section, it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act unless - (a) it is in his possession by virtue of the issue of a prescription by a duly qualified medical practitioner or a registered dental practitioner for its administration by way of treatment to him, or to a person under his care; or (b) it is in his possession by virtue of the issue of a prescription by a registered veterinary surgeon or a registered veterinary practitioner for its administration by way of treatment to an animal under his care; or (c) he is registered in a register kept for the purposes of this paragraph by the Secretary of State as a manufacturer of, or a dealer in bulk in, substances for the time being specified in that Schedule. ..."

The facts of the case are not entirely clear and can only be derived from the chairman's summing-up to the jury. On November 18, 1966, the ***298*** appellant, who was driving a Mini van, was stopped by a policeman and questioned as to the contents of the van, There were three cases in the van and in answer to the policeman's questions he said it was rubbish which he was intending to dump. The packages were opened by the **police**; in one of them was scent and in the other a package of 20,000 tablets of amphetamine sulphate. The accused in evidence gave this description of the origin of the package. He said he was selling the scent as a side-line and that he had arranged to meet a friend in a cafe in Walthamstow. When he went there, the proprietor told him that his friend had been in but had gone away and had left something for him under the counter. The accused looked under the counter and found two boxes, both of which he assumed contained scent. He collected them and drove away. The accused said he took the box containing the pills by accident, that he had no idea what was in the box or how they got there. The proprietor of the cafe said that a man came in and left one parcel which he, the proprietor, put under the counter. When he put it there, there was only one box. He could give no account of how the second box came to be there.

The first issue which is raised very sharply is whether the court below were correct in their interpretation of section 1 of the Act, Is it right to say that the accused is in possession of a prohibited substance when he knows he is physically in possession of the substance but is unaware of its true nature? A great number of authorities were referred to in which the meaning of "possession" has been considered. The burden of these cases is that there must be knowledge before there can be possession. There is no possession by a man until he knows what he has got. This, however, leaves the question of what is meant by "what."

In the case of *Reg. v. Ashwell, 16 Q.B.D. 190* , the accused asked for the loan of a shilling. The prosecutor gave him a sovereign, both believing it was a shilling; subsequently the accused discovered that the coin was a sovereign. A court of 14 judges were equally divided as to whether he was guilty of larceny at common law when he fraudulently appropriated the sovereign to his own use. A much-quoted passage is that of Cave J., at p. 201:

> "If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not possession of that of the existence of which he is unaware. A man cannot without his consent be made to incur the responsibilities towards the real owner which arise even from the simple possession of a chattel without further title, and if a chattel has, without his knowledge, been placed in his custody,

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> his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel, and has assented to the possession of it."

and also by Lord Coleridge C.J., at p. 225:

> "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." ***299**

Thereafter the decisions are difficult to reconcile: compare *Cundy v. Le Cocq, 13 Q.B.D. 207* , with *Sherras v. De Rutzen [1895] 1 Q.B. 918* .

While these cases were mainly decided in relation to the crime of larceny, they do illustrate the principle that there must, in relation to possession, be some conscious mental element present. The sleeper who has a packet put into his hand during sleep has not got possession of it during sleep, but if when he wakes up he grasps the article, it is then in his possession. If someone surreptitiously puts something into my pocket, I am not in possession of it until I know it is there. The remarks of Alderson B. in *Reg. v. Woodrow, 15 M. & W. 404* , 418, are to this effect:

> "... the words of the Act, though they are no doubt very stringent, are nevertheless very clear, and any retailer of tobacco who has an adulterated article in his possession is liable to the penalty. I cannot say that this man had not the tobacco in his possession, because he clearly knew it. He did not know it was in an adulterated state, but he knew he had it in his possession; and the question of 'knowingly,' it appears to me, is involved in the word possession. That is, a man has not in his possession that which he does not know to be about him. I am not in possession of anything which a person has put into my stable without my knowledge. It is clear, therefore, that possession includes a knowledge of the facts as far as the possession of the article is concerned."

This would seem to accord with common sense. In the Dictionary of English Law (Earl Jowitt) (1959), at p. 1367, "possession" is defined as follows:

> "POSSESSION, the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world, or against all the world except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed; ..."

In the end of all, however, the meaning of "possession" must depend upon the context. *Lockyer v. Gibb [1967] 2 Q.B. 243* was a case under regulation 9 of the Dangerous Drugs (No. 2) Regulations, 1964 [S.I. 1964 No. 1811] , which is in similar terms to section 1 of the Drugs (Prevention of Misuse) Act, 1964 . Regulation 20 defines "possession" for the purposes of these regulations in the following way:

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> "For the purposes of these regulations a person shall be deemed to be in possession of a drug if it is in his actual custody or is held by some other person subject to his control or for him and on his behalf."

In that case Lord Parker C.J. said, at p. 248:

> "In my judgment, before one comes to consider the necessity for mens rea or, as it is sometimes said, whether the regulation imposed ***300*** an absolute liability, it is of course necessary to consider possession itself. In my judgment it is quite clear that a person cannot be said the be in possession of some article which he or she does not realise is, for example, in her handbag, in her room, or in some other place over which she has control. That I should have thought is elementary; if something were slipped into your basket and you had not the vaguest notion it was there at all, you could not possibly be said to be in possession of it."

Later he said, at p. 249:

> "... in my judgment, under this provision, while it is necessary to show that the defendant knew that she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug or a drug of a particular character."

In my view this is the correct connotation of "possession" in the context of the 1964 Act.

It is said, however, that to constitute an offence under section 1 (1) of the Act mens rea is necessary. To the extent that there must be knowledge that the accused has possession of the package or bottle which contains the drugs I agree. But the appellant's argument went further, to the extent that this is not an absolute offence but requires knowledge not only of the existence of the package but also of the substance itself, although not of its precise nature. For my part I can see no half-way house between the offence being absolute in the sense that mere possession of the container constitutes the offence and the offence being only constituted by knowledge in the full sense. If knowledge is necessary this must mean that "knowingly" must precede in section 1 (1) the words "to have in his possession." Which construction is to be preferred must depend upon the language of the section.

In construing the section certain considerations have to be borne in mind. The title of the Act is " Drugs (Prevention of Misuse) Act, 1964 " and the long title is "An Act to penalise the possession, and restrict the importation, of drugs of certain kinds." The title thus indicates that the evil is the misuse of drugs and that their possession is to be penalised. The actual words of section 1 (1) "it shall not be lawful for a person to have in his possession" a prohibited substance could not make it clearer that subject to certain exemptions the possession of prohibited drugs is an offence. With respect to those who hold that this is not an absolute offence I cannot conceive of any words which could make the offence more absolute. It is as absolute as it can be. I am not inclined to place much weight on whether there is or is not a presumption that mens rea is a necessary ingredient in a statutory offence, but if there was, the presumption has to some extent been whittled down in recent years (see *Harding v. Price [1968] 1 K.B. 695* , 701) and in any event the language of section 1 in my view is sufficient to rebut any such presumption. The very doing of the act, as has been said, imputes mens rea. other factors which are relevant to be taken into account are the mischief aimed at and the object of the prohibition. The mischief is clearly the unauthorised possession of the drugs which are injurious to health unless administered under prescription. The social evil of the trafficking of drugs is clearly struck at. ***301***

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Last, but by no means least, there must be consideration of the case of evasion of the offence if mens rea is required. The very nature of the drug, namely, small pills, makes secretion easy and detection difficult. If the correct interpretation of section 1 is that the prosecution are required to prove knowledge by the accused of the existence of the substance this will be, in my view, a drug pedlar's charter in which a successful prosecution will be well-nigh impossible in the case of the trafficker who conceals the drugs and on questioning remains silent or at any rate refuses to disclose the origin of the drug. If the offence involves knowledge, this knowledge must extend not only to the prohibited act but to the totality of the prohibition (see *Gaumont British Distributors Ltd. v. Henry [1939] 2 K.B. 711*). If, therefore, this is not an absolute offence the prosecution will, in my view, require to establish knowledge by the accused not only of possession of the actual substance but also knowledge of the nature of the substance, namely, that it is a prohibited drug under the Act. This would, in my view, lead to wide-scale evasion of the Act. The test has sometimes been put as to which interpretation would best assist in achieving the object of the Act (see *Lim Chin Aik v. The Queen [1963] A.C. 160* , 174, *per* Lord Evershed). To this question I unhesitatingly answer that the offence is absolute. In fact, I would go further and say that to require mens rea would very largely defeat the purpose and object of the Act.

A further indication that an absolute offence was intended is, in my view, that certain exemptions are provided in the Act and the Secretary of State is empowered to grant further exemptions which he has done in relation to public carriers and the Post Office (The Drugs (Prevention of Misuse) Exemptions Regulations, 1964).

The precise question arose in the Canadian case of *Beaver v. The Queen [1957] S.C.R. 531* where a court of five judges were divided three and two and held that it was not an absolute offence. The arguments pro et con are clearly set out in the judgment of the majority given by Cartwright J. and of the minority by Fauteux J. I prefer the minority judgment.

Absolute offences are by no means unknown to our law and have been created, inter alia, in relation to firearms (Firearms Act, 1937), and shotguns (Criminal Justice Act, 1967, s. 85) which Acts create serious offences. A common feature of these Acts and the Drugs Act is that they all deal with dangerous substances where the object is to prevent unauthorised possession and illegal trafficking in these articles.

In *Chajutin v. Whitehead [1938] 1 K.B. 506* it was an offence under the Aliens Order, 1920, to be in possession of an altered passport without lawful authority. The court held that if a person is in possession of an altered passport, it is not necessary for the prosecution to prove guilty knowledge of the alteration. In the earlier case of *Reg. v. Woodrow, 15 M. & W. 404* a dealer in and retailer of tobacco was convicted of having in his possession adulterated tobacco, although he had purchased it as genuine and had no knowledge or cause to suspect that it was not so. These cases bear a strong resemblance to the present.

The argument for the appellant, which has found favour with some of your Lordships is that where knowledge of possession of the article is proved, if there is absence of knowledge of the quality of the article then ***302*** that is possession under the Act. But if there is knowledge of the existence of the package but no knowledge of the contents of the package, that is not possession. With great respect to those who hold this view I am unable to see how, if I know that I have a parcel in my possession I am not also in possession of its contents. The argument seems to be a metaphysical distinction which Parliament could not have intended to enter into the construction of this Act of Parliament, the express purpose of which is to penalise the possession of prohibited drugs. This construction of the Act moreover will not prevent the conviction of a so-called "innocent possessor" of drugs who knows what they are but has them in his possession for a perfectly legitimate though not authorised purpose. It will, however, assist in the acquittal of the pedlar who has drugs concealed in a package. To take a concrete example, however innocent the purpose for which a person has a drug openly in his possession, provided he is not an exempt person he will be guilty, but if he conceals the drug he will not be convicted, unless there are circumstances from which knowledge can be inferred. This construction is to import the element of mens rea into the offence because it requires knowledge of the existence of the very thing or res which is the subject of the charge. I may ask: "Why stop there? Why not require also knowledge of the quality of the substance because it is the possession of the prohibited substance that is the offence under the Act?"

In my opinion, the Court of Appeal (Criminal Division) were right and the appeal should be dismissed.

LORD PEARCE.

My Lords, the illicit drug traffic is a very serious evil. Parliament intended by the 1964 Act to prevent it so far as possible by penalising the unauthorised possession of certain drugs. There are three methods, broadly speaking, by which Parliament may have intended to achieve its purpose.

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The first (for which the appellant contends) is this. Parliament, it is said, intended that the word "possession" should connote some knowledge of the thing possessed and of its quality. It also intended that a defendant should only be convicted if he had a guilty mind. The extent of the knowledge and the exact nature of the guilty mind are problems which obviously overlap.

The second possible view (for which the Crown contend) is that Parliament intended that the defendant, even if innocent of any knowledge of the nature of the drug or any guilty knowledge, must be convicted when once it was shown that he had to his knowledge physical control of a thing which (whether he knows it or not) is or contains an unlawful drug.

Thirdly, Parliament may have intended what was described as a "halfway house" in the full and able argument by counsel on both sides. Each acknowledged its possibility and certain obvious advantages, but neither felt able to give it any very solid support. By this method the mere physical possession of drugs would be enough to throw on a defendant the onus of establishing his innocence, and unless he did so (on a balance of probabilities) he would be convicted. The Explosive Substances Act, 1883 , produces this fair and sensible result but it does so by express words ("Unless he can show that he had it in his possession ***303** for a lawful object"). Support for such a result is to be found in the dictum of Day J. in*Sherras* ***v.*** *de Rutzen [1895] 1 Q.B. 918* where he founds his view on the absence of the word "knowingly." Again, there is some support for this view in *Harding* ***v.*** *Price [1948] 1 K.B. 695* (see the judgment of Singleton J., at p. 704). But in *Roper* ***v.*** *Taylor's Central Garages (Exeter) Ltd. [1951]* ***2*** *T.L.R. 284* , 288 Devlin J. puts forward cogent reasons against it. and again in *Lim Chin Aik* ***v.*** *The Queen [1963]* ***A.C.*** *160* , 173 the Judicial Committee expresses a view against it. Unfortunately I do not find the half-way house reconcilable with the speech of Viscount Sankey L.C. in *Woolmington's case [1935]* ***A.C.*** *462* , 481. Reluctantly, therefore, I am compelled to the decision that it is not maintainable. Ultimately the burden of proof is always on the prosecution unless it has been shifted by any statutory provision. If, therefore, there is initially in the crime an element of knowledge or guilty mind, the jury must at the end of the case acquit, if they are left in doubt.

Thus, one is left with a choice between two alternatives to each of which there are objections. If this is an absolute offence, without an element of knowledge, people with no intention to break the law may find themselves with no defence, because they innocently have unlawful drugs in their physical possession. and various circumstances which could produce this result have been envisaged in argument. If, on the other hand, knowledge or guilty mind must be proved this is difficult for the prosecution to prove and it is much easier for the drug pedlar to escape by some story which is just plausible enough to raise some doubt.

These considerations are well set out, together with the various authorities, in the conflicting judgments in *Beaver* ***v.*** *The Queen [1957] S.C.R. 531* in the Supreme Court of Canada, a case concerned with "being in possession of a drug" under the Canadian Opium and Narcotic Act of 1952 .

The express words of the Drugs (Prevention of Misuse) Act, 1964 , "have in his possession" admittedly connote knowledge of some sort. It is conceded by the Crown that these words do not include goods slipped into a man's pocket without his knowledge. In *Lockyer* ***v.*** *Gibb [1967]* ***2*** *Q.B. 243* an offence under the Dangerous Drugs Act, 1964 (and regulations made thereunder), was held to be absolute. But the learned Lord Chief Justice there rightly said, at p. 248:

> "In my judgment it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, for example, in her handbag, in her room, or in some other place over which she has control. That I should have thought is elementary; if something were slipped into your basket and you had not the vaguest notion it was there at all, you could not possibly be said to be in possession of it."

The difficulty comes when a "possessor" knows that he has something, but is either unaware what it is or is completely mistaken as to its qualities, e.g., thinks that the package contains scent (as was suggested here) or thinks that the tablets are innocent aspirin when really they are guilty heroin. On the Crown's contention it is enough if a man knows that he ***304** physically possesses a thing even though he does not know its nature or is mistaken in its qualities.

For the purposes of the crime of larceny there are many intricate authorities dealing with possession. In *Reg* ***v.*** *Ashwell, 16 Q.B.D. 190* a full court of 14 judges was evenly divided. The main point of the dispute was whether for the purposes of larceny

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the recipient of a coin which both he and the giver thought to be a shilling but which the recipient later found to be a sovereign took possession of the coin at the earlier time when he first received it in ignorance of its true nature, or at the later time when he discovered that it was a sovereign. Cave J., after referring to earlier authorities said, at p. 201: "If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not possession of that of the existence of which he is unaware." But when a man knows that he physically has an article in his possession, how far does a mistake as to its essential attributes nullify the apparent possession? It would be, for instance, quite unreal (and particularly in such a context as one is here considering) to say that a man who bought and kept a so-called authentic Rembrandt for years, never had it in his possession because he later found by X-ray examination that it was a skilful fake. When once one draws a distinction between a thing and its qualities, one gets involved in philosophic intricacies which are not very appropriate to a blunt Act of Parliament intended to curb the drug traffic. *Reg. v. Ashwell, 16 Q.B.D. 190* was concerned with the transfer of ownership and no relevant deductions can be drawn from it in the present case. I agree with my noble and learned friend, Lord Wilberforce, in his analysis of the concept of possession and, indeed, with the whole of his opinion in this matter.

Viscount Reading C.J. in *Webb v. Baker [1916] 2 K.B. 753* , 759 said that the word "possession" should be given a popular and not a narrow construction for the purpose of the provision there in question (Public Health Act, 1875, s. 117). and Viscount Caldecote C.J. in *Oliver v. Goodger [1944] 2 All E.R. 481* , 482 remarked that it was not a term of art. Again Lord Parker C.J. in *Towers & Co. Ltd. v. Gray [1961] 2 Q.B. 351* , 361 after observing that the term "possession" is always giving rise to trouble, and after considering various cases there cited, concluded, rightly as I think, that in each case its meaning must depend on the context in which it was used.

One must, therefore, attempt from the apparent intention of the Act itself to reach a construction of the word "possession" which is not so narrow as to stultify the practical efficacy of the Act or so broad that it creates absurdity or injustice.

Parliament was clearly intending to prevent or curtail the drug traffic. Having defined a series of persons who may lawfully possess the drugs, it makes possession by all others unlawful, thus putting the drugs out of the reach of unauthorised persons. It was not merely forbidding them to possess drugs for unlawful or guilty objects It was forbidding them to possess the drugs at all. Thus it would block up all unauthorised channels through which drugs might flow and would thereby establish a strict control of their dissemination. It was forbidding unauthorised possession even for worthy motives, e.g., by the person who, though not authorised, volunteers ***305*** to carry them from the chemist (who is entitled to sell them) to the patient (who is entitled to consume them). This is made clear by the exemption (in section 1 (4)) of "any servant of Her Majesty or constable acting in the course of his duty as such." There is an assumption that the Act was intending to penalise those with no guilty intentions, since otherwise such an exemption would be unnecessary and absurd. As soon as everyone who has a good motive may with impunity possess them, the efficacy of the control is injured. For that reason it cannot, I think, have been intended that it should be a defence for an unauthorised person to show that he may have possessed the drugs for a laudable object or with no guilty intentions. For the unauthorised person is simply not allowed to have them for any object whatever.

For the same reason I do not think that possession was intended to be limited by legal technicalities to one of two alternatives, namely, either to mere physical possession or to mere legal possession. Both are forbidden. A man may not lawfully own the drugs of which his servant or his bailee has physical possession or control. Nor may he lawfully have physical possession or control as servant or bailee of drugs which are owned by others. By physical possession or control I include things in his pocket, in his car, in his room and so forth. That seems to me to accord with the general popular wide meaning of the word "possession" and to be in accordance with the intention of the Act.

On the other hand, I do not think Parliament intended to make a man guilty of possessing something when he did not know that he had the thing at all. and it is there that the real difficulties begin.

Lord Parker C.J. (*[1967] 2 Q.B. 243* , 248) was right (and this is conceded by both sides) in taking the view that a person did not have possession of something which had been "slipped into his" bag without his knowledge. One may, therefore, exclude from the "possession" intended by the Act the physical control of articles which have been "planted" on him without his knowledge. But how much further is one to go? If one goes to the extreme length of requiring the prosecution to prove that "possession" implies a full knowledge of the name and nature of the drug concerned, the efficacy of the Act is seriously impaired, since many drug pedlars may in truth be unaware of this. I think that the term "possession" is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse. This would comply with the general understanding of the word "possess." Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. This would be so I think even if I believed them to be sweets. It would be otherwise if I believed them to be something of a wholly different nature. At this point a question of degree arises

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as to when a difference in qualities amounts to a difference in kind. That is a matter for a jury who would probably decide it sensibly in favour of the genuinely innocent but against the guilty.

The situation with regard to containers presents further problems. If a man is in possession of the contents of a package, prima facie his possession of the package leads to the strong inference that he is in possession of its contents. But can this be rebutted by evidence that he was mistaken as **306* to its contents? As in the case of goods that have been "planted" in his pocket without his knowledge, so I do not think that he is in possession of contents which are quite different in kind from what he believed. Thus the prima facie assumption is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it *and* no reason to suspect that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had had no reasonable opportunity since receiving the package of acquainting himself with its actual contents. For a man takes over a package or suitcase at risk as to its contents being unlawful if he does not immediately examine it (if he is entitled to do so). As soon as may be he should examine it and if he finds the contents suspicious reject possession by either throwing them away or by taking immediate sensible steps for their disposal.

So to read the Act would, I think, accord with what Parliament intended and would give it a sense which would accord with the practical views of a jury, although I realise that a deeper investigation of the legal implications of possession might support various differing views. It would leave some unfortunate victims of circumstances who move innocently but rashly in shady surroundings and who carry packages or tablets for strangers or unreliable friends. But I think even they would have an opportunity of ventilating their story and in some cases, if innocent of any knowledge and bad motives, obtaining an acquittal. Some of the persons in some of the rather far-fetched circumstances which have been envisaged in argument would still be left in difficulties. But I do not think that Parliament intended to cater for them in its efforts to stop a serious evil.

Lockyer v. *Gibb [1967] 2 Q.B. 243* held that a similar offence under the Dangerous Drugs Act, 1965 , was an absolute offence. The fact that in that case there was a regulation made under the Act with regard to the meaning of the word "possession" cannot affect the question whether the Act was creating an absolute offence. and in other respects the arguments as to whether an absolute offence was intended are the same under both Acts. I think under both Acts an absolute offence was intended.

Had there been a minimum penalty imposed, as under the Canadian Act considered in *Beaver* v. *The Queen [1957] S.C.R. 531* , that would have been a strong argument in favour of the offence not being absolute. But here there is no minimum penalty. In an appropriate case the judge may inflict no penalty.

Again, if the meaning of the words "unlawful possession" included articles which had been "planted" on a man, or insinuated into his possession without his knowledge, that would be a very strong argument indeed against the offence being absolute. But since there is, in my opinion, some limited element of knowledge in the word "possession" the force of that argument is lessened.

The gravity of the evil which the Act is seeking to prevent and the dangers which are presented by the passing of drugs through informal or unauthorised channels, even where some of the unauthorised persons have no improper motives or are merely careless or indifferent, indicate the importance of closing them altogether. The Act forbids them. It expressly **307* exempts certain persons who would obviously have no mens rea. The further exemption from the Act of all those who cannot be shown to have a guilty intention would seriously impair its effectiveness and the express exemptions show that this was not intended. While appreciating the force of the arguments which have been put against it, I am of opinion that the Act comes within the class of Acts referred to by Wright J. in *Sherras* v. *De Rutzen [1895] 1 Q.B. 918* , 921, 922 in which the offence is absolute.

It would, I think, be an improvement of a difficult position if Parliament were to enact that when a person has ownership or physical possession of drugs he shall be guilty unless he proves on a balance of probabilities that he was unaware of their nature or had reasonable excuse for their possession.

In the present case, therefore, there was a very strong prima facie inference of fact that the accused was in possession of the drugs. But he was entitled to try to rebut (or raise a doubt as to) that inference by putting before the jury his defence that, although the package itself was clearly in his possession, the contents were not. He could have sought to persuade them in spite of his lies and evasions that he received the contents innocently, that he genuinely believed the package to contain scent, and that he had no reasonable opportunity of examining its contents. The learned chairman, however, told the jury:

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> "If you think the evidence is, he does not dispute it, that he had control of that box which in fact turned out to be full of amphetamine sulphate, that creates the original offence; it is only mitigation that he did not know."

The direction to which the accused was entitled would, in my opinion, be approximately as follows. The Act forbids possession of these drugs. Whether he possessed them with an innocent or guilty mind or for a laudable or improper purpose is immaterial since he is not allowed to possess them. If he possessed them he is guilty. If a man has physical control or possession of a thing that is sufficient possession under the Act provided that he knows that he has the thing. But you do not (within the meaning of the Act) possess things of whose existence you are unaware. The prosecution have here proved that he possessed the parcel, but have they proved that he possessed its contents also? There is a very strong inference of fact in any normal case that a man who possesses a parcel also possesses its contents, an inference on which a jury would in a normal case be justified in finding possession. A man who accepts possession of a parcel normally accepts possession of the contents.

But that inference can be disproved or shaken by evidence that, although a man was in possession of a parcel, he was completely mistaken as to its contents and would not have accepted possession had he known what kind of thing the contents were. A mistake as to the qualities of the contents, however, does not negative possession. Many people possess things of whose exact qualities they are unaware. If the accused knew that the contents were drugs or were tablets, he was in possession of them, though he was mistaken as to their qualities. Again if, though unaware of the contents, he did not open them at the first opportunity to ascertain (as he was entitled to do in his case) what they were, the proper inference ***308** is that he was accepting possession of them. (It would be otherwise if he had no right to open the parcel.) Again, if he suspected that there was anything wrong about the contents when he received the parcel, the proper inference is that he was accepting possession of the contents by not immediately verifying them. (This would, in my opinion, apply also to a bailee.)

In the present case you may think that the difference between scent and tablets is a sufficient difference in kind to entitle the accused to an acquittal if on the whole of the evidence it appears that he may have genuinely believed that the parcel contained scent, and that he may not have had any suspicions that there was anything illicit in the parcel, and that he had no opportunity of verifying its contents. For in that case it is not proved that he was in possession of the contents of the parcel.

The accused has, therefore, been deprived of the chance of putting before the jury a defence which was in theory open to him on the facts of this case. But the evidence against him was so strong that no jury properly directed would have acquitted him. In my opinion, therefore, the proviso should be applied and I would dismiss the appeal.

LORD WILBERFORCE.

My Lords, the appellant was charged with an offence under section 1 of the Drugs (Prevention of Misuse) Act, 1964 . This section provides that:

> "(1) Subject to any exemptions for which provision may be made by regulations made by the Secretary of State and to the following provisions of this section, it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act unless ..."

There follow conditions as to possession by virtue of a medical prescription.

Subsection (2) gives a considerable list of exempted persons, possession by whom is not prohibited, and more exemptions are stated in subsections (3) and (4). The Secretary of State has exercised his power of further exemption under subsection (1) by statutory instrument.

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The question certified as fit for the decision of this House is:

> "Whether for the purposes of section 1 of the Drugs (Prevention of Misuse) Act, 1964 , a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is physically in possession of the substance but is unaware of its true nature."

I take this as raising the general question as to the nature and extent of knowledge, or awareness, which must be shown against an accused person found in actual control of a prohibited substance, in order that the section may apply.

When a person is found, as was the appellant, having control of a prohibited drug (I use control to describe a purely physical situation, including that of having control of a container or package in which the drug may be discovered), the question whether, in order to found a charge under the section, any degree of knowledge that he had the drug must be shown, may be raised in two ways. It may be asked whether, in order to ***309*** constitute possession, some intention or knowledge must be shown in addition to the fact of control, or the question may be whether, in order that the statutory offence may be committed, some guilty intention or knowledge, or mens rea, must be proved. It is obvious that these two questions are related. For if one comes to the conclusion that knowledge is required for possession, then, in proving possession, a sufficient mens rea is likely to have been established, and no second stage is needed. Conversely if one believes that mens rea is necessary in order to constitute an offence, then it cannot be said that mere ignorant control would satisfy the section. In my opinion, rather than split up the section into two separate parts, it should be regarded as a whole and one single question should be asked - what kind of control with what mental element does the Act intend to prohibit?

I can say at once that I am strongly disinclined, unless compelled to do so, to place a meaning upon this Act which would involve the conviction of a person consequent upon mere physical control, without consideration, or the opportunity for consideration, of any mental element. The offence created by the Act is a serious one and even though nominal sentences, or conditional discharges, may meet some cases, there may be others of entirely innocent control where anything less than acquittal would be unjust. This legislation against a social evil is intended to be strict, even severe, but there is no reason why it should not at the same time be substantially just. One may venture to regret that Parliament has not, in defining this and other offences relating to the possession of drugs, been more specific - as it has, for example, in relation to explosives - as to the facts required to be proved to show guilt or innocence.

The Act refers to possession, a concept which is both central in many areas of our legal system, and also lacking in definition. As Earl Jowitt has said of it, "the English law has never worked out a completely logical and exhaustive definition of possession" *(United States of America and Republic of France v. Dollfus Mieg Et Cie S.A. and Bank of England [1952] A.C. 582* , 605). In relation to it we find English law, as so often, working by description rather than by definition. Ideally, a possessor of a thing has complete physical control over it; he has knowledge of its existence, its situation and its qualities: he has received it from a person who intends to confer possession of it and he has himself the intention to possess it exclusively of others. But these elements are seldom all present in situations with which the courts have to deal, and where one or more of them is lacking, or incompletely present, it has to be decided whether the given approximation is such that possession may be held sufficiently established to satisfy the relevant rule of law. As it is put by Pollock and Wright, possession "is defined by modes or events in which it commences or ceases and by the legal incidents attached to it" (Possession in the Common Law (1888), p. 119 - *per* R. S. Wright).

Naturally this has led to a number of distinctions and even inconsistencies in borderline cases, such as where a person receives something without knowledge of either the existence or character of other things contained in it, or where he receives one thing thinking that it is something else, or that it has a different value or a different character from what it really has. It is not surprising that this has led to differences of opinion: ***310*** so we find varying solutions adopted according to whether the question to be solved is one of dishonest intent, as in the larceny cases *(Reg. v. Ashwell, 16 Q.B.D. 190* ; *Reg. v. Hehir [1895] 2 I.R. 709*), intention to pass property, as in the secret drawer cases *(Cartwright v. Green (1802) 2 Leach 952* ; *Merry v. Green (1841) 7 M. & W. 623*), intention to control property, as in cases about finders of goods on premises *(Bridges v. Hawkesworth (1851) 21 L.J.Q.B. 75* ; *South Staffordshire Water Co. v. Sharman [1896] 2 Q.B. 44* ; *Hibbert v. McKiernan [1948] 2 K.B. 142*), or in relation to sovereign immunity *(United States of America and Republic of France v. Dollfus Mieg Et Cie S.A. and Bank*

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of England [1952] A.C. 582). That the solution adopted ultimately depends upon the need justly and adequately to meet the requirements of the relevant legal rule is well shown in the words of Wills J. in a case about finding on premises - "a contrary decision would ... be a great and most unwise encouragement to dishonesty" *(South Staffordshire Water Co. v. Sharman [1896] 2 Q.B. 44* , 48). We are in that field here; for too close an insistence that all the ideal constituents of possession should be present would encourage the distribution of drugs: correspondingly, we must reckon that too great a departure from them might lead to the conviction of the patently innocent.

The Act (The Drugs (Prevention of Misuse) Act, 1964), penalises the "possession" of drugs; it makes it unlawful to "have in possession" a specified substance. Significantly, it provides, both through a comprehensive list, and through the mechanism of regulations which may be made, for exemptions designed to preserve from penalty many obvious cases of innocent possession, for example under prescription. The effect of this is to reduce the area within which the statutory prohibition of possession is to apply. It still leaves an area, which includes, in effect, the ordinary members of the public, within which the critical question arises.

What is prohibited is possession - a term which is inconclusive as to the final shades of mental intention needed, leaving these to be fixed in relation to the legal context in which the term is used. How should the determination be made? If room is to be found, as in my opinion it should, in legislation of this degree of severity, for acquittal of persons in whose case there is not present a minimum of the mental element, a line must be drawn which juries can distinguish. The question, to which an answer is required, and in the end a jury must answer it, is whether in the circumstances the accused should be held to have possession of the substance, rather than mere control. In order to decide between these two, the jury should, in my opinion, be invited to consider all the circumstances - to use again the words of Pollock & Wright [Possession in the Common Law, p. 119] - the "modes or events" by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to ***311** physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance. I see no difficulty in making clear to the jury what is required in order to establish possession and on this point I desire to associate myself with the observations of my noble and learned friend Lord Pearce.

To illustrate by some examples. There is no difficulty in the case of wholly ignorant control, put by Lord Parker C.J. in *Lockyer v. Gibb [1967] 2 Q.B. 243* where something is slipped into a person's custody without his knowing it is there. This is the classic case of the money in the sacks of Joseph's brethren brought into the law by Gibson J. in *Reg. v. Hehir [1895] 2 I.R. 709* , 724. In the same category, in my opinion, would be a case such as that put by Cartwright J. in the Canadian appeal of *Beaver v. The Queen [1957] S.C.R. 531* , 536 where a man asks for a harmless remedy and is given by mistake a package containing a prohibited substance: this should not be possession under the Act at least until he knew or possibly had the opportunity of knowing what he had received.

On this same basis, the actual decision of the Court of Criminal Appeal in *Lockyer v. Gibb [1967] 2 Q.B. 243* , was, I think, correct: for there the accused had and knew she had control of the tablets but possibly did not know what they were; she was held to be in possession of them. One can only hold this decision to be wrong if the view is taken that to constitute possession under this legislation knowledge not merely of the presence of the thing is required but also knowledge of its attributes or qualities. But (except perhaps under the old law of larceny) no definition or theory of possession requires so much, nor does the language or scheme of the Act postulate that such a degree of knowledge should exist. I think the line was drawn here at the right point. On the same lines is the South African decision of *Rex v. Langa [1936] S.A.L.R. (C.P.D.) 158* . There the drug ("dagga") was contained in a suitcase: the court held that mere physical control of it was not enough: but it was the opinion of Watermeyer J. that the necessary knowledge - viz. guilty knowledge - might have been inferred from the fact that the accused took the suitcase to a witness by night and asked him to keep it, and that on arrest he told an implausible story about the suitcase and later in the box denied all knowledge of it. The Canadian case of *Beaver v. The Queen [1957] S.C.R. 531* was another package case, and, as here, the question for the court was whether mere custody (control) was sufficient. The accused's story was that he believed the package to contain an innocent substance. The majority of the Supreme Court, with whose judgment I agree, held that mere custody (control) was not sufficient and it was clearly their view that if the accused had proved that he honestly believed the contents of the package to be innocent, he should have been acquitted of the charge of possession.

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I would also agree with the decision (so far as comprehensible from the brief report) of the Court of Criminal Appeal in *Reg. v. Carpenter [1960] Crim.L.R. 633* . The terminology ascribed to the court is perhaps not scientific, but the distinction between possession in a strictly legal sense (i.e. control) and "conscious possession" or "positive possession" appears to correspond with that drawn ir the other authorities I have cited. ***312**

Other typical package cases can be similarly resolved. A package is handed to a bailee whose business it is to receive and hold it for reward: possession is certainly taken of the package, but the bailee has no right to open it and would commit a wrong if he did so: no possession of the contents should be imputed to him. A package is handed over by an unknown man, at an unusual rendezvous, with no, or no satisfactory explanation and for no explained purpose: the inference may well be drawn either that it was accepted with whatever it contained, or that it was handed over so that the holder had the right to possess himself of the contents. In either case possession might be found.

In all such cases, the starting point will be that the accused had physical control of something - a package, a bottle, a container - found to contain the substance. This is evidence - generally strong evidence - of possession. It calls for an explanation: the explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession. Of course it would not be right, or consistent with the terms of the Act, to say that the onus of showing innocent custody rests upon the accused. The prosecution must prove the offence, and establish its ingredients. But one starts from the point that the Act itself has exempted the great majority of cases of innocent possession so that once the prosecution has proved the fact of physical control in circumstances not covered by an exemption and something of the circumstances in which this was acquired or held, this, in the absence of explanation, may be sufficient to enable a finding of possession to be made. On the other hand, the duty to submit the question of possession to the jury in this way does give the opportunity of acquittal to innocent carriers and custodians, who can put forward an explanation of the physical fact which a jury accepts.

If this analysis is right, two things follow. First, in my opinion, there is no need, and no room, for an inquiry whether any separate requirement of mens rea is to be imported into the statutory offence. We have a statute, absolute in its terms, exempting a large number of "innocent" cases, prohibiting and penalising cases which remain for a possession which involves to the extent I have endeavoured to describe knowledge or means of knowledge, or guilty knowledge. No separate problem of the mental element in criminal offences in my opinion arises: the statute contains its own solution as to the kind of control penalised by the Act.

Secondly, it follows that the direction to the jury in the present case was not correct, for they were told in effect that possession meant control, that control was shown and not denied, and that they need not inquire any further. If this was the basis on which they were asked to decide - and they may well have thought so - it was insufficient, and the verdict would not be sustainable. But the summing-up did in fact, in addition, put before them, as, in my view it should have done, the circumstances in which the package was received by the accused and found in his custody and the unsatisfactory explanations which he offered to the **police**: these were just what the jury should have been asked to consider on the question of possession. If the direction was defective the facts were such, in my ***313** opinion, that a properly directed jury must have found the accused guilty and I would apply the proviso.

On this basis I would dismiss the appeal.

Representation

Solicitors: Sampson & Co., Solicitor, **Metropolitan Police** .

Appeal dismissed. (J. A. G.)

Footnotes

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1 Drugs (Prevention of Misuse) Act, 1964, s. 1 : "(1) ... it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act unless ..."