MENS REA IN RELATION TO DRUG OFFENCES

J. M. Conradson, LL.M.*

The Narcotics Act 1965, which came into force on the 1st June 1966, raised some important questions on the scope and enforcement of the criminal law in this country.

For example the power of entry and search without warrant conferred on the police force by s. 12 (2) caused considerable protest on the basis that it was claimed to be an unwarranted infringement on the rights of the citizen. However, in this article it is proposed to examine the penal provisions of the enactment in relation to the requirement of mens rea. Some of the problems raised are of course merely illustrative of the general difficulty encountered by the courts for years in determining whether a particular statutory offence requires mens rea as an essential ingredient or is an offence of strict liability. Nevertheless the problem of the effective control, and in some cases prohibition of the use of drugs is a matter which faces most countries in the world today and is therefore a topical and comparatively new area into which the criminal law has moved.

It must be said at the outset that the use of drugs in a society involves sociological, moral and medical questions which are outside the scope of this article. Here it is intended to consider the application of mens rea in relation to the penal provisions relating to the control of drugs in New Zealand.

Firstly it is necessary to consider the relevant provisions of the Narcotics Act 1965. In s. 2 (1) the word "narcotic" is defined as meaning "any substance, preparation or mixture named or described in the First Schedule to this Act", and the schedule itself lists a large number of drugs, preparations and mixtures. Under s. 4 the Governor-General by Order in Council is empowered to add to or omit from or otherwise amend the Schedule so that it may not be easy in a given case for a person to ascertain quickly whether a particular substance is a narcotic under the Act.

Section 5 (1) of the Act reads as follows:

> Except pursuant to a licence under this Act, or as otherwise permitted by regulations made under this Act, no person shall—
>
> (a) Import into or export from New Zealand any substance, preparation, or mixture named or described in clauses 1 to 5 of the First Schedule to this Act; or
>
> (b) Produce, manufacture, or distribute any narcotic; or
>
> (c) Cultivate any prohibited plant; or
>
> (d) Sell, give, supply, or administer, or offer to sell, give, supply, or administer, any narcotic to any other person, or otherwise deal in any narcotic; or
>
> (e) Have any narcotic in his possession for any of the purposes set out in paragraph (d) of this subsection.

Section 6 of the Act reads as follows:

> (1) Except pursuant to a licence under this Act, or as otherwise permitted by regulations made under this Act, no person shall procure, receive, store, or have in his possession, or consume, smoke, or otherwise use, any narcotic.

* Part-time Lecturer in Criminal Law, University of Otago.

(2) Without prejudice to any liability under section 5 of this Act, any person who contravenes subsection (1) of this section commits an offence against this Act.
(3) This section shall not apply to the possession of a narcotic by any person in the service of the Crown for the purposes of the investigation of any offence or suspected offence or the prosecution of any person.

This is followed by s. 7 which reads:

(1) Every person commits an offence against this Act who—
(a) Permits any premises or vehicle to be used for the purpose of the commission of an offence against this Act; or
(b) Has in his possession any needle, syringe, pipe, or other utensil, for any such purpose; or
(c) Except as may be provided by regulations made under this Act, has in his possession the seed of any prohibited plant which he is not authorised under this Act to cultivate; or
(d) Without lawful excuse is on premises being used for the smoking of opium.

There are also ss. 9 and 10 which deal with false statements and obstruction of officers respectively and also section 17 which places the burden of proving possession of a licence on the defendant, where such a licence would absolve him from criminal liability.

Reference should be made to s. 20 Crime Act 1961 which preserves all matters of justification and excuse at common law in respect of a charge of any offence "whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment". Adams on *Criminal Law and Practice in New Zealand* (p. 71) states accordingly the common law doctrine of mens rea as it applies to crimes under the Crimes Act, or offences under any other Act:

Presumptions as to Mens Rea (1) It is presumed that mens rea is an essential ingredient of every statutory offence, unless the presumption is excluded in any particular case by either—
(a) the express words of the statute; or
(b) clear and necessary implication.
(2) Mens rea is absent when an accused person entertains an honest and reasonable belief in the existence of facts which, if true, would make the act or omission charged against him innocent.

Taking this statement as a starting point it is proposed to examine some of the cases and in particular to review some recent authorities on drug offences. There is, of course, voluminous case law on the general topic of mens rea in relation to statutory offences and it is possible in this article to deal with only some of the leading authorities.

First, in *Sherras* v. *De Rutzen*[1] Wright J. states the common law rule as follows:[2]

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 displayed wither by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.

He then goes on to deal with three classes of cases in which mens rea does not apply: First, he specifies "a class of acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under penalty". Examples given are offences under the Revenue Acts,

1 [1895] 1 Q.B. 918.
2 *ibid.* 921.

Adulteration Acts and Game Acts. Second, he refers to public nuisances (e.g. where a person may be vicariously liable). Third, he refers to cases in which although the proceeding is criminal in form, it is really only a summary mode of enforcing rights (e.g. trespass).

Clearly then the subject-matter with which the particular statute is concerned is relevant to the necessity of mens rea.

The well known New Zealand Court of Appeal decision in *R.* v. *Ewart*[3] dealt with the selling of a newspaper part of the contents of which were of an indecent, immoral and obscene nature, and the question for the Court was whether the accused's knowledge was relevant. The Court was divided, the Chief Justice and Cooper J. holding that the legislature showed a plain intention to rebut the presumption of mens rea, while the majority took the opposite view. After examining the authorities Williams J. stated:[4]

> In the present case, therefore, although the act is made an offence without qualification, yet, if the defendant can show honest ignorance of what he was doing, he is entitled to be acquitted unless the case comes within some class of exception similar to those mentioned by Wright J. in *Sherras* v. *De Rutzen,* or unless there is something in the scope of the enactment itself beyond the mere absence of qualification to make it an exception to the rule.

Edwards J., in an oft-quoted passage, stated:[5]

> There are, therefore, two classes of cases under the statute law: 1. Those in which, following the common law rule, a guilty mind must either be necessarily inferred from the nature of the act done or must be established by independent evidence; 2. Those in which, either from the language or the scope and object of the enactment to be construed, it is made plain that the legislature intended to prohibit the act absolutely, and the question of the existence of a guilty mind is only relevant for the purpose of determining the quantum of punishment following the offence. There is also a third class in which, although from the omission from the statute of the words "knowingly" or "wilfully" it is not necessary to aver in the indictment that the offence charged was "knowingly" or "wilfully" committed, or to prove a guilty mind, and the commission of the act in itself *prima facie* imports an offence, yet the person charged may still discharge himself by proving to the satisfaction of the tribunal which tries him that in fact he had not a guilty mind.

In *Fraser* v. *Beckett and Stirling Ltd.*[6] the New Zealand Court of Appeal had to consider the application of mens rea to an offence under the Customs Act dealing with the importing of an indecent document. Neither defendant knew that the book in question was indecent. In a dissenting judgment Gresson P. held that the lack of knowledge on the part of the defendants afforded them a good defence to the charge but the majority (North and McCarthy JJ.) held that the offence was one of strict liability having regard to the wording of the statute and the subject-matter of the charge. Some doubt was thrown on the strength of the common law presumption of mens rea and the decision was cited with approval in *Patel* v. *Controller of Customs*[7] and also in *Hellewell* v. *Minister of Customs.*[8]

However it did nonetheless just precede the decision of the Privy Council in *Lim Chin Aik* v. *R.*[9] which dealt with an appeal by an immigrant in Singapore who had been declared a prohibited immigrant by an Order which had not been published and of which he had no

3 (1906) 25 N.Z.L.R. 709.
4 *ibid.* 726.
5 *ibid.* 731.
6 [1963] N.Z.L.R. 480.
7 [1966] A.C. 356.
8 [1966] N.Z.L.R. 705.
9 [1963] A.C. 160.

knowledge. The judgment of the Court was delivered by Lord Evershed who stated:[10]

> 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.

The judgment continued by stating that the Court preferred this to the alternative view that strict liability follows simply from the nature of the subject matter and that a person whose conduct is not reprehensible can be given a merely nominal penalty. It points out further that this course cannot be presumed as being the general way in which the legislature intended the offender to be dealt with. Therefore it concludes that where the imposition of strict liability would have the result of convicting persons whose conduct is irrelevant to the observance of the law then such a consequence is not likely to be intended by Parliament even where it concerns a grave social evil. Accordingly it was held that mens rea applied and that the appellant's conviction and sentence could not stand.

Some of the authorities on drug offences must now be considered.

First in *Yeandel* v. *Fisher*[11] it was held that a charge under the Dangerous Drugs Act 1965 was one of strict liability, Parker L.C.J. stating:

> It is also a regulation for the public welfare. I mention that because the regulation of activities for the public welfare has always been treated as a category of cases in which provisions are more readily held to be absolute offence. I have in mind what was said by Lord Evershed in the Privy Council case of *Lim Chin* v. *R.* where he referred to the matter.

Similarly, in *Lockyer* v. *Gibb*[12] the appellant who was charged with being in possession of dangerous drugs claimed that they had been dumped on her and she did not know that they were dangerous drugs. Lord Parker L.J. held that mens rea was not applicable as the appellant knew she possessed some substance (and therefore was "in possession" under the Act) and the fact that she did not know it was a dangerous drug was no defence.

In *Warner* v. *Metropolitan Police Commissioner*[13] the House of Lords considered another "possession of drugs" case and affirmed the decision of the Court of Appeal but by the majority on a different ground. This decision is difficult to analyse because of the differences in the speeches of their Lordships. Lord Reid's speech contains a valuable discussion of strict liability in general. He held that the offence was not an absolute one so that a person should not be convicted of being in possession of dangerous drugs unless facts are proved from which it could properly be inferred that he knew he had prohibited drugs in his possession. Lord Morris held that the prosecution had to prove "possession" by establishing that the accused knowingly had in his possession something which was in fact a prohibited substance under circumstances in which he

10 *ibid.* 174.
11 [1966] 1 Q.B. 440.
12 [1967] 2 Q.B. 243.
13 [1969] 2 A.C. 256.

could have discovered or known its nature, but that it was not required to prove that he in fact knew the nature and quality of what he had. Lord Pearce similarly held 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." He further said that, in relation to possession of a package, there is an inference of possession of its contents but that this inference can be rebutted by the accused showing 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. Lord Guest held that the offence was one of strict liability and that lack of knowledge of the contents of a package is no defence. He said:[14]

> For my part I can see no halfway 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.

Lord Wilberforce also agreed with this.

A drug problem came before the House of Lords again in *Sweet* v. *Parsley*[15] in which the appellant appealed against her conviction on a charge of being concerned in the management of premises which were used for the purpose of smoking cannabis contrary to section 5 (b) of the Dangerous Drugs Act 1965. She had let rooms in a house leased by her outside the city in which she lived and had no knowledge of the activities of her subtenants.

Her appeal was unanimously allowed, their Lordships taking the view that it had to be shown that it was her purpose that the premises be used for smoking cannabis or at least (Lord Morris and Lord Pearce thought) that it had to be shown that she knew they were being used for this purpose. The decision, of course, turned on its own particular facts but the dicta in the judgments are important on the general problem.

Lord Reid, for example, commented that, in considering acts of a truly criminal character (as distinct from the merely quasi-criminal class), in addition to the subject matter with which the statute deals and its particular wording, regard must also be had to the stigma which follows a conviction and the effect on the public respect for the administration of justice. He said further that apart from the choice between either mens rea in the full sense or an absolute offence there were at least two other possibilities. First, Parliament could transfer the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that, on the balance of probabilities, he is innocent of any criminal intention. His Lordship said he found it a little surprising that more use had not been made of this method but that one of the unfortunate effects of *Woolmington* v. *D.P.P.*[16] may have been to discourage its use. Second, it would be possible to substitute in appropriate classes of gross negligence for mens rea in the full sense as the mental element necessary to constitute the crime.

14 *ibid.* 300.
15 [1969] 2 W.L.R. 470.
16 [1935] A.C. 462.

Similarly Lord Diplock commented that while *Woolmington's* case affirmed the principle that the onus lies on a prosecution in a criminal trial to prove all the elements of the offence it did not purport to lay down how that onus can be discharged with respect to any particular element of the offence. Thus a jury is entitled to presume that the accused acted with knowledge of the facts unless there is some evidence to the contrary. Of its nature this evidence would normally originate from the accused since he alone can know on what belief he acted and on what ground the belief, if mistaken, was held. His Lordship suggested that *Woolmington's* case decided that where there is any such evidence, the jury, after considering it and also any relevant evidence called by the prosecution on the issue of the existence of the alleged mistaken belief, should acquit the accused unless they feel sure that he did not hold the belief or that there were no reasonable grounds on which he could have done so.

Fortunately in New Zealand some of the difficulties have been clarified by the recent Court of Appeal decision in *R.* v. *Strawbridge* delivered on 4th May 1970 (as yet unreported). The appeal was by way of Case Stated and concerned the directions to a jury on charge under s. 5 (1) (c) Narcotics Act 1965. In the case on appeal it was argued on behalf of the appellant that, although the legislature was dealing with what was admittedly a grave social evil, it could never have been the intention of Parliament to create a new absolute offence for which the penalty on conviction could be as much as fourteen years' imprisonment.

The judgment of the Court was delivered by North P. who, after noting certain classes of offences of strict liability, went on to say:

> There is no doubt that in New Zealand we have accepted *Woolmington's* case as declaring the law that in all criminal cases, with the exception of pleas of insanity or where there is a statutory exception to the general rule, the burden of proof throughout the trial rests on the Crown who must discharge that burden to the satisfaction of the jury beyond any reasonable doubt before a person can properly be found guilty of a criminal offence. But in New Zealand we have never interpreted *Woolmington's* case as going any further than determining that the burden of proof at the end of, and on the whole of, the case lay on the Crown. With the exception of statutory offences of an absolute nature we have however distinguished between cases where the offence consists in "knowingly" doing an act and cases where the word "knowingly" has been omitted. In the former class of case the Crown must prove knowledge on the part of the accused before it can be said that a prima facie case has been made out. In the latter class of case on the other hand knowledge of the wrongful nature of the act will be presumed in the absence of any evidence to the contrary. While then it is clear that in the light of *Woolmington's* case *R.* v. *Ewart* went too far in holding that the burden of proof in the third class of case referred to by Edwards J. passed to the accused, nevertheless it is still true to say that it lies on the accused to point to some evidence which creates a reasonable doubt that he did not have a guilty mind.

His Honour then found that there is nothing in *Woolmington's* case to prevent a New Zealand court from adopting what Lord Pearce referred to in *Sweet* v. *Parsley* as a "sensible half-way house". He later states:

> In our opinion it is unthinkable that Parliament ever intended to expose citizens to a liability of up to fourteen years' imprisonment where the accused person dd not know that the plant he or she was cultivating was a prohibited plant.

Accordingly the question of law was answered by the court as follows:

> In order to present a prima facie case, it is not necessary for the Crown to establish knowledge on the part of the accused. In the absence of evidence to the contrary, knowledge on her part will be presumed, but if there is some evidence that the accused honestly believed on reasonable grounds that her act was innocent, then she is entitled to be acquitted unless the jury is satisfied beyond reasonable doubt that this was not so.

This ruling then clarifies the law in New Zealand with respect to mens rea drug offences, although it must be emphasised that each particular offence must be considered in relation to the wording, subject-matter and penalty.

It is interesting to note that in an article entitled "The Mental Element in Drug Offences" by D. R. Miers (Assistant Lecturer in Law, Queens University of Belfast) published in 20 *Northern Ireland Legal Quarterly* 370 the decisions in *Warner's* case and *Sweet* v. *Parsley* are analysed and four possible solutions to the problem are mooted (p. 386):

1. That Parliament should legislate definitively upon the requirement of mens rea in a given offence.
2. That strict liability should be based on negligence.
3. That the onus of proof should be transferred to the defendant to show lack of mens rea.
4. That the "defences" of mistake and accident should be employed to afford the defendant the opportunity of showing that his conduct was not blameworthy.

The writer, of course, was unable to consider *Strawbridge's* case but he concludes his article by saying:

> If strict liability is to be continued it is thought that it is essential that some formula such as that suggested by Lord Diplock in *Sweet* v. *Parsley* be adopted. This will not create a "drug-pedlars' charter" which was Lord Guest's fear in *Warner*, but will positively result in an intellectual and moral advance in the determination of criminal responsibility.

It is submitted that the decision in *Strawbridge's* case has gone a long way in achieving this result and has brought clarity to an area of the law in which too many difficulties had arisen.