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R. v. Racimore**Regina v. Racimore**

Ontario Supreme Court (High Court of Justice)

Grange, J.

Judgment: July 7, 1975

Docket: None given.

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Counsel: A.M. Sokolsky, for accused, appellant

D.C. Hunt, for the Crown, respondent

Subject: Criminal; Criminal

Criminal law --- Offences — Failing to stop at scene of accident — Elements — Awareness of involvement in accident

Leaving scene of accident — Accused not knowing of contact with other car — Mens rea not required — Ignorance of fact of contact defence to charge — Highway Traffic Act, R.S.O. 1970, c. 202, s. 140(1)(a).

Grange, J.:

1 This is an appeal by way of stated case from the conviction of the accused of failing to remain at the scene of an accident, contrary to s. 140(1)(a) of the *Highway Traffic Act*, R.S.O. 1970, c. 202, which conviction was made by Justice of the Peace G. Santacono on February 19, 1974.

2 Section 140(1)(a) reads as follows:

140(1) Where an accident occurs on a highway, every person in charge of a vehicle or car of an electric railway that is directly or indirectly involved in the accident shall,

(a) remain at or immediately return to the scene of the accident;

3 The relevant part of the stated case is as follows:

The facts as found were that the accused on the 25th day of November, 1973 was in charge of a vehicle license number AZE 704 and was involved in an accident with another motor vehicle parked on Kenwood Avenue in the Municipality of Metropolitan Toronto at about 12:30 P.M. and the accused, not knowing that the vehicle he was in charge of made contact with the parked vehicle, failed to remain or immediately return to the scene of the accident.

1. Did I err in law in holding that the accused while in charge of a motor vehicle, because he caused that vehicle to be involved in an accident by touching another vehicle and failed to remain at the scene of the accident, was guilty of the said charge even though the accused did not know that the motor vehicle he was operating touched the other motor vehicle.

4 The Justice of the Peace in convicting relied upon the decision of the Supreme Court of Canada in *Hill v. The Queen* (1973), 14 C.C.C. (2d) 505, 43 D.L.R. (3d) 532, 24 C.R.N.S. 297. In that case the accused was aware of a contact between her vehicle and that of the complainant but was not aware that damage had ensued. The majority of the Court found that the offence had been proved.

5 The facts of *Hill* differ from the facts at bar in that here there is no knowledge of contact and consequently that case cannot be direct authority for the conclusion reached by the Justice of the Peace. Indeed, to the extent that it is direct authority, it is authority for precisely the opposite. Dickson, J., for the majority, expressly took note that the accused was aware of the contact between the two vehicles. At p. 511 C.C.C., p. 301 C.R.N.S., he stated as follows:

Nor was she without knowledge. She knew that the car she was driving had "touched" the car ahead. The only fact of which she was ignorant was the extent of the damage and she had means of readily informing herself of this through inquiry of the taxi driver or examination of the rear of the taxi.

6 Spence, J., who, with Laskin, J., constituted the minority, in considering that aspect, had this to say at p. 506 C.C.C., p. 303 C.R.N.S.:

Had she not been aware of such contact then I am of the view that no interpretation of the section could have cast upon her the duty of remaining or returning.

7 In consequence, I am of the view that the majority has expressed no opinion on the facts on the case at bar and the minority in *Hill* expressed an opinion that would result in the acquittal of this accused. While the minority opinion is *obiter* and not binding, it is of great persuasive force.

8 The real problem that we have to deal with is the dicta of the majority with respect to *mens rea*. Dickson, J., at p. 512 C.C.C., p. 302 C.R.N.S., after reviewing the many cases on the subject, concluded that the offence created by the section was not a crime in the "true sense" but part of a "comprehensive code for the regulation and control of traffic on highways, enacted ... in the interests of public safety". He concluded that *mens rea* was not a part of the offence and went on, "If *mens rea* is not essential, then whatever Mrs. Hill believed or did not believe is irrelevant."

9 The problem shortly stated is whether the clearly enunciated principle in *Hill* that *mens rea* is not essential to a conviction for this offence precludes a defence based upon a mistaken assumption or misunderstanding by the accused which rendered his action entirely innocent by any moral standard. In my view it does not.

10 I think there is a distinction between the requirement of *mens rea* and the requirement that the *actus reus* be voluntary and that there not be some mistake of fact or ignorance of fact that excuses it. As was said by Dixon, J., of the High Court of Australia, in the celebrated case of *Proudman v. Dayman* (1941), 67 C.L.R. 536, at pp. 540-1:

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

11 I find support also for the proposition in our Courts in the words of Schroeder, J.A., in *R. v. King* (1961), 129 C.C.C. 391, [1961] O.W.N. 37, 34 C.R. 264. In that case the accused in the course of a dental operation had been given a drug which impaired his ability to drive. Before the effect had worn off, he drove erratically, was arrested and charged with impaired driving under s. 223 (now s. 234) of the *Criminal Code*. The facts as found by the majority of the Court of Appeal were, that when he drove he did not know and could not reasonably have been expected to have known that his ability to drive was then or might thereafter become impaired. Schroeder, J.A., for the majority, stated at pp. 415-6 C.C.C., p. 44 O.W.N., as follows:

Even in the case of statutory crimes, therefore, the offender should not be condemned if his conduct was not voluntary, save in cases where such exception is expressly or by necessary implication excluded in the Act creating the offence. *Mens rea* signifies those mental processes of an accused person which actuate and accompany that voluntary conduct on his part which produces the forbidden result called the *actus reus*.

Unless the appellant knew or ought to have known that when he undertook to drive, the effect of the drug would incapacitate him within the meaning of s. 223, he could not have entertained the will to drive while his ability to do so was impaired or was likely to become impaired. This is a true case of *ignorantia facti* which should have been held to have excused the *actus reus* prohibited by the statute.

In Kenny's *Outlines of Criminal Law*, 17th ed., the author writes at p. 49: "From the preceding paragraphs it is to be observed that it is not possible to formulate any general principle by which to decide to what extent *mens rea* is a constituent in statutory offences. Students must remember that the first essential is to examine carefully the words of the statute itself, and then if no guidance can be obtained from the authoritative interpretations of them given by the courts, they should employ the ordinary principles of construction, remembering first that there is a strong presumption that there is no liability for the consequences of *involuntary* conduct, and second, that there is still a presumption, although a weaker one, that common law *mens rea* is required."

And again at pp. 417-8 C.C.C., p. 46 O.W.N.:

To brand as criminals persons to whom no moral fault can be imputed and who, through no fault of their own, committed an act which, in the circumstances, must be regarded as involuntary, is a course of action which must be avoided unless the legislation plainly and imperatively requires such a result, for such a

course would undoubtedly tend to weaken respect for the law and eventually bring the law into disrepute.

The circumstances of this case are highly exceptional and the reasons for the disposition of the appeal which I propose are to be read in the light of its unusual and peculiar facts. To reject the appeal would, in my view, involve a departure from fundamental and salutary principles which have become deeply rooted in our law.

12 The decision was confirmed in the Supreme Court of Canada, 133 C.C.C. 1, 35 D.L.R. (2d) 386, [1962] S.C.R. 746. Taschereau, J., dealt with the problem at p. 3 C.C.C., pp. 749-50 as follows:

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

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

These words "*mens rea*", though they are in common use, are, as Stephen, J., said in *R. v. Tolson* (1889), 23 Q.B.D. 168, most unfortunate and not only likely to mislead but actually misleading. In the present case, intention must not be confused with "*mens rea*". Intention is not an element of the offence of driving while impaired by liquor or drugs, when the offender voluntarily takes liquor or drugs, and then drives a motor vehicle or takes the care or control of it. There must be an act proceeding from a free will that may bring about the mental condition necessary to meet the requirements of s. 223 *Cr. Code*.

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

13 It must be conceded that there was a mistake of fact in *Hill*, in that the accused thought there had been no damage. But there was no mistake and no misunderstanding of the essential fact that an accident had occurred. In the present case there was no knowledge of contact and the accused was therefore ignorant of the existence of an accident when he drove his vehicle away and failed to remain at the scene. His failure to remain was dictated by an ignorance of essential fact and was involuntary, and even though *mens rea* is not a part of the offence he is not guilty.

14 As Schroeder, J.A., said with respect to the facts in *Hill*, I consider the circumstances of this case highly exceptional. In the normal course where any serious damage occurs, the accused will know there has been contact between the vehicles and may in many instances be deemed to have that knowledge notwithstanding his denial. In the instant case, however, the evidence of the accused that he was without such knowledge was accepted by the Justice of the Peace, and accordingly, the law as I have stated it should apply.

15 I would accordingly direct that the question posed in the stated case be answered in the affirmative, the conviction be quashed and a verdict of acquittal entered. The accused is entitled to his costs of this appeal.

16 *Appeal allowed; conviction quashed.*

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