BRUNO PEDA .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1969

*Mar. 11, 12
June 2

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Motor vehicles—Dangerous driving—Charge to jury—Section of Code read and paraphrased—Must jury be told that advertent negligence necessary—Effect of previous judgments of Supreme Court of Canada—Criminal Code, 1953-54 (Can.), c. 51, ss. 221(4), 597(1)(a).

The appellant was convicted by a jury of dangerous driving. The conviction was affirmed by a majority judgment in the Court of Appeal. An appeal was taken to this Court where it was argued that the directions of the trial judge as to the nature of the offence were inadequate and that it should have been made clear to the jury that the offence involved an element of advertent as opposed to inadvertent negligence. The trial judge simply read and paraphrased s. 221(4) of the *Criminal Code*.

Held (Cartwright C.J. and Hall and Spence JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The charge was adequate and correct. Section 221(4) is straightforward and free of ambiguity. It contains its own definition of dangerous driving. It was not necessary to instruct the jury as to the difference between "advertent" and "inadvertent" negligence. The decision of this Court in *Binus v. The Queen*, [1967] S.C.R. 594, in which the opinion was expressed that *Mann v. The Queen*, [1966] S.C.R. 238, had decided that proof of inadvertent negligence was not sufficient to support a conviction under s. 221(4), and that it was necessary to instruct the

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

1969

PEDA
v.
THE QUEEN

jury to this effect, was not binding as that opinion was not a necessary step to the judgment pronounced. The *Mann* case was concerned with constitutional law. The issue in the present case was as to the instruction to be put to a jury. There is nothing in the *Mann* case which would require the Court, when explaining to the jury the nature of the offence charged, to do so in terms other than those contained in the section itself. Parliament has defined the kind of conduct which shall constitute an offence under that subsection, and this Court, in the *Mann* case, has said that such definition is not to be construed as creating a crime of inadvertent negligence.

Per Pigeon and Ritchie JJ.: The instructions were sufficient. The actual decision in *Mann v. The Queen* was essentially that the offence requires *mens rea* and therefore differs in nature from statutory offences aimed at specific acts irrespective of intention. The majority opinion in *Binus v. The Queen* that the jury must be instructed that dangerous driving by inadvertence is not contemplated by the section, is not binding as that case was decided on application of s. 592(1)(*b*)(iii). Only such instructions need be given as the case being tried actually requires. Although *mens rea* is always required on the charge, it is only in exceptional circumstances that the jury need instructions in this connection. In most cases the fact itself is sufficient proof of the intention. In this case there was no suggestion of a circumstance from which the jury might infer that the accused's manner of driving was inadvertently dangerous. The only question therefore was whether the driving was actually dangerous within the meaning of the section. Such being the case, it was not necessary to instruct the jury that the accused should not be found guilty if the accident had occurred by his inadvertence.

Per Cartwright C.J. and Hall and Spence JJ., *dissenting*: Assuming that, on a strict application of the principle of *stare decisis*, *Binus v. The Queen* is not a binding authority as to the manner in which a judge must instruct a jury on a charge under s. 221(4), the combined effect of the judgments of this Court in *O'Grady v. Sparling*, [1960] S.C.R. 804, and *Mann v. The Queen*, [1966] S.C.R. 238, is to decide that s. 221(4) does not render "inadvertent negligence" a crime. The enunciation of that legal proposition was a necessary step to the judgment pronounced in both cases. Although this Court has power to depart from the *ratio decidendi* of both of these cases, there was no ground sufficient to warrant the refusal to follow them. Such a course could result in the re-opening of the question of the constitutional validity of the provincial statutory provisions considered in *O'Grady* and *Mann*. So long as it is the law that a necessary ingredient of the offence of dangerous driving is "advertent negligence" it is essential that the trial judge should so instruct the jury in all cases in which on the evidence they might properly find that the conduct of the accused, while dangerous in fact, did not involve "advertent negligence". On the evidence in this case, a properly instructed jury might well have either convicted or acquitted the appellant.

Droit criminel—Automobile—Conduite dangereuse—Directives au jury—Article du Code lu et paraphrasé—Doit-on dire au jury que la négligence intentionnelle est nécessaire—Effet des arrêts antérieurs de la Cour suprême du Canada—Code criminel, 1953-54 (Can.), c. 51, art. 221(4), 597(1)(a).

1969

PEDA
v.
THE QUEEN

L'appelant a été déclaré coupable par un jury d'avoir conduit d'une façon dangereuse. La déclaration de culpabilité a été confirmée en Cour d'appel par un jugement majoritaire. Sur appel à cette Cour, l'appelant a prétendu que les directives du juge concernant la nature de l'infraction avaient été inadéquates et que le juge aurait dû expliquer clairement au jury que l'infraction contenait un élément de négligence intentionnelle par opposition à la négligence par inadvertance. Le juge au procès s'est contenté de lire et de paraphraser l'art. 221(4) du *Code criminel.*

Arrêt: L'appel doit être rejeté, le Juge en Chef Cartwright et les Juges Hall et Spence étant dissidents.

Les Juges Fauteux, Abbott, Martland, Judson et Ritchie: Les directives étaient adéquates et correctes. L'article 221(4) est simple et sans ambiguïté. Il contient sa propre définition de la conduite dangereuse. Il n'était pas nécessaire que le juge donne des directives sur la différence entre la négligence intentionnelle et la négligence par inadvertance. L'arrêt de cette Cour dans *Binus c. The Queen,* [1967] R.C.S. 594, où l'on exprime l'opinion que *Mann c. The Queen,* [1966] R.C.S. 238, avait décidé que, pour obtenir une déclaration de culpabilité sous l'art. 221(4), une preuve de négligence par inadvertance n'est pas suffisante et qu'il est nécessaire de donner des directives à cet effet au jury, n'est pas un précédent obligatoire parce que cette opinion n'est pas un élément essentiel du jugement prononcé. Dans l'arrêt *Mann,* il s'agissait d'une question de droit constitutionnel. Dans le cas présent, il s'agit des directives qui doivent être données au jury. Il n'y a rien dans l'arrêt *Mann* qui exige que la Cour explique au jury la nature de l'infraction en des termes autres que ceux de l'article lui-même. Le Parlement a donné une définition du genre de conduite qui constitue une infraction en vertu de l'alinéa 4, et cette Cour, dans l'arrêt *Mann,* a dit qu'une telle définition ne doit pas être interprétée comme faisant un crime de la négligence par inadvertance.

Les Juges Pigeon et Ritchie: Les directives étaient suffisantes. L'essence de l'arrêt *Mann c. The Queen* est que l'infraction créée par l'alinéa 4 exige la *mens rea* et que par conséquent elle diffère par nature des infractions statutaires visant des actes spécifiques sans égard à l'intention. L'opinion majoritaire dans *Binus c. The Queen* que les directives doivent spécifier que la conduite dangereuse par inattention n'est pas visée par l'article, ne constitue pas un précédent obligatoire parce que cette affaire a été décidée par application de l'art. 592(1)(*b*)(iii). Seules les directives actuellement requises pour les fins du procès doivent être données. Quoique la *mens rea* soit toujours requise sur une inculpation de conduite dangereuse, ce n'est que dans des circonstances exceptionnelles que des directives à cet égard doivent être données. Dans la plupart des cas le fait lui-même fait preuve de l'intention. Dans le cas présent, on ne suggère aucune circonstance de laquelle le jury pourrait conclure que la manière de conduire de l'accusé était dangereuse par inadvertance. La seule question est donc de savoir si la conduite était réellement dangereuse dans le sens de l'article. Tel étant le cas, il n'était pas nécessaire que le juge donne des directives que l'accusé ne devait pas être déclaré coupable si l'accident s'était produit par inadvertance.

Le Juge en Chef Cartwright et les Juges Hall et Spence, *dissidents*: Prenant pour acquis qu'en vertu de l'application stricte du principe de *stare decisis,* l'arrêt *Binus c. The Queen* n'est pas un précédent

1969

PEDA
v.
THE QUEEN

obligatoire au sujet des directives qu'un juge doit donner au jury sur une accusation en vertu de l'art. 221(4), l'effet combiné des arrêts de cette Cour dans *O'Grady c. Sparling*, [1960] R.C.S. 804, et *Mann c. The Queen*, [1966] R.C.S. 238, est de décider que l'art. 221(4) ne fait pas un crime de la négligence par inadvertance. L'énoncé de cette proposition est un élément essentiel du jugement prononcé dans les deux causes. Quoique cette Cour ait le pouvoir de s'écarter de la *ratio decidendi* de ces deux causes, il n'y a aucun motif suffisant pour justifier le refus de s'y conformer. Une telle ligne de conduite pourrait avoir comme résultat de remettre en question la validité constitutionnelle des dispositions législatives provinciales considérées dans *O'Grady* et *Mann*. Tant que la loi est à l'effet que la négligence intentionnelle est un élément nécessaire de l'infraction de conduite dangereuse, il est essentiel que le juge au procès donne des directives dans ce sens dans tous les cas où les jurés peuvent conclure de la preuve que la conduite de l'accusé, quoique dangereuse en fait, ne comporte pas un élément de négligence intentionnelle. Dans le cas présent, un jury ayant reçu des directives adéquates aurait pu tout aussi bien acquitter l'appelant que le déclarer coupable.

APPEL d'un jugement majoritaire de la Cour d'appel de l'Ontario[1], confirmant une déclaration de culpabilité. Appel rejeté, le Juge en Chef Cartwright et les Juges Hall et Spence étant dissidents.

APPEAL from a majority judgment of the Court of Appeal for Ontario[1], affirming the appellant's conviction. Appeal dismissed, Cartwright C.J. and Hall and Spence J.J. dissenting.

J. C. Eberle, Q.C., for the appellant.

M. Manning, for the respondent.

The judgment of Cartwright C.J. and of Hall and Spence JJ. was delivered by

THE CHIEF JUSTICE (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1] pronounced on June 20, 1968, dismissing an appeal from the conviction of the appellant of the offence of dangerous driving.

The appeal is brought, pursuant to s. 597(1)(*a*) of the *Criminal Code*, on the questions of law on which Laskin J.A. dissented in the Court of Appeal.

The appellant was tried before His Honour Judge Martin and a jury on an indictment containing two counts (i)

[1] [1969] 1 O.R. 90, 4 C.R.N.S. 161.

driving a motor vehicle while his ability to drive was impaired by alcohol (contrary to s. 223 of the Code) and (ii) dangerous driving (contrary to s. 221(4)). The wording of these counts is set out in full in the reasons of my brother Judson. The appellant was acquitted on the first count and found guilty on the second.

Both charges arose out of the same occurrence. The facts are summarized as follows in the reasons of McLennan J.A.:

> The events giving rise to the two counts occurred about 6:30 a.m. on June 29, 1967. It was raining at the time. The appellant was driving his taxi-cab easterly on the exit lane from the Gardiner Expressway which runs into Lakeshore Boulevard. Between the exit lane and the southerly lane of Lakeshore Boulevard is a narrow strip separating the two lanes. This dividing strip is some inches higher than the level of the exit lane and Lakeshore Boulevard. The two eastbound lanes are separated from the westbound lanes by a median the level of which is higher than the highway.
>
> The case for the Crown, on the count of dangerous driving was that the appellant drove his car from the exit lane, across the dividing strip, then across the two eastbound lanes on Lakeshore Boulevard and over the median striking a car being driven westerly on the north side of Lakeshore Boulevard. There is no direct evidence as to the speed at which the appellant was driving but there was evidence from which it might be inferred that the speed was high, the strongest being what happened to the appellant's car in leaving the exit lane.
>
> The appellant gave evidence stating that as he was driving down the exit lane the driver of a car ahead of him, who he said had been driving quite erratically just before the accident, suddenly applied his brakes and he remembers nothing until after the accident occurred. A passenger in his car, a friend of the appellant, gave the same evidence. He, likewise, remembered nothing after seeing the brake lights of the car ahead illuminate suddenly.

There was conflicting evidence as to whether or not the appellant's ability to drive was impaired by alcohol.

In answer to a question from the Bench counsel stated that the record does not show what is the maximum rate of speed permitted by law at the point where the appellant's vehicle went out of control.

McLennan J.A. who delivered the main reasons of the majority in the Court of Appeal was of the view that had the appellant offered no evidence the facts summarized above would have constituted sufficient circumstantial evidence to justify a conviction of dangerous driving, that it followed from the verdict of guilty that the jury must have rejected the appellant's defence, which was that the real cause of the course which his car took was that the sudden application of the brakes by the driver of the car ahead

1969

PEDA
v.
THE QUEEN

Cartwright C.J.

caused the appellant to lose control, or, alternatively, that the jury must have taken the view that the speed at which the appellant was driving was the cause of the accident.

MacKay J.A. agreed with the reasons of McLennan J.A. and added that the explanation offered by the appellant having been rejected by the jury, "there was only one rational conclusion to be reached on the evidence—that is that the admittedly dangerous manner in which the accused's car was driven was due to the advertent negligence on the part of the accused".

The majority examined and rejected the grounds on which Laskin J.A. would have allowed the appeal.

The first ground on which Laskin J.A. proceeded was that this Court has decided in *Binus v. The Queen*[2] that proof of inadvertent negligence is not sufficient to support a conviction of dangerous driving under s. 221(4) of the *Criminal Code* and, that being so, the charge of the learned trial Judge in the case at bar was inadequate. He concluded his reasons on this point as follows:

> ...If advertent negligence is the test I do not see how it can suffice to direct the jury merely in the words of the Statute without additional elaboration. In these circumstances, and having regard to the other facts detailed here as to the course of the trial, I am unable to say that there was no substantial wrong or miscarriage of justice.

I have had the advantage of reading the reasons of my brother Judson and, for the purposes of this appeal, am prepared to assume that, on a strict application of the principle of *stare decisis, Binus* is not a binding authority as to the manner in which a judge must instruct a jury on the trial of a charge under s. 221(4). It appears to me, however, that the combined effect of the judgments of this Court in *O'Grady v. Sparling*[3] and *Mann v. The Queen*[4] is to decide that s. 221(4) does not render "inadvertent negligence" a crime.

O'Grady was decided prior to the enactment of s. 221(4). My brother Judson, giving the judgment of seven Members of the Court, said at p. 809:

> What the Parliament of Canada has done is to define 'advertent negligence' as a crime under ss. 191(1) and 221(1). It has not touched

---

[2] [1967] S.C.R. 594, 2 C.R.N.S. 118, [1968] 1 C.C.C. 227.

[3] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

[4] [1966] S.C.R. 238, 47 C.R. 400, [1966] 2 C.C.C. 273, 56 D.L.R. (2d) 1.

'inadvertent negligence". Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the *Criminal Code* as 'crime', it is not crime.

Mann's case arose after the enactment of s. 221(4) and it was sought to distinguish *O'Grady* on the ground that by s. 221(4) Parliament had made inadvertent negligence a crime. Of the seven Judges who sat in *Mann's* case five decided that s. 221(4) did not create a crime of "inadvertent negligence". It is sufficient to quote a sentence from the judgment of Ritchie J., concurred in by Martland and Judson JJ.; he said at pp. 250 and 251:

> I have had the advantage of reading the reasons for judgment of my brothers Cartwright and Spence and I agree with them that this appeal should be dismissed and that the provisions of s. 221(4) of the *Criminal Code* are not to be construed as creating a crime of 'inadvertent negligence'.

The other two judges who sat in *Mann's* case did not find it necessary to express an opinion on this question.

It is quite true that in both *O'Grady* and *Mann* the question to be decided was whether a section of a provincial Highway Traffic Act was effective, but the conclusion appears to me to be inescapable that the decision that Parliament has not defined "inadvertent negligence" as a crime was the enunciation of a legal proposition which was a necessary step to the judgment pronounced in each case. It follows that unless we are prepared to depart from the *ratio decidendi* of both of these cases we cannot say that s. 221(4) has created a crime of "dangerous driving" where the manner of driving is in fact dangerous but the conduct of the accused does not amount to "advertent negligence" (as that expression was used in *O'Grady* and in *Mann*).

As I said in *Binus,* with the concurrence of Ritchie and Spence JJ., I do not doubt the power of this Court to depart from previous judgments of its own; but I can find no ground sufficient to warrant our refusing to follow the carefully considered judgments of this Court in *O'Grady* and in *Mann* on the point now under consideration and to say that a person can be convicted on a charge under s. 221(4) when his conduct amounted to "inadvertent" but not to "advertent" negligence. If this Court should take that course the result might well be to make possible the

1969

PEDA
v.
THE QUEEN

Cartwright C.J.

re-opening of the question of the constitutional validity of those provincial statutory provisions considered in *O'Grady* and in *Mann* which make "careless driving" a punishable offence. It must not be forgotten that in the two last mentioned cases we had the advantage of hearing full argument not only from counsel for the parties but also from counsel for the Attorney-General of Canada and for the Attorneys-General of several of the Provinces.

So long as it is the law that a necessary ingredient of the offence of dangerous driving is "advertent negligence" it is essential that the trial judge should so instruct the jury in all cases in which on the evidence they might properly find that the conduct of the accused, while dangerous in fact, did not involve "advertent negligence". I do not mean by this that the judge should employ the adjectives "inadvertent" and "advertent"; but he must, in my view, bring home to the jury that in order to convict they must be satisfied that there was "negligence of sufficient gravity to lift the case out of the civil field into that of the *Criminal Code*.....something more than mere inadvertence or mere thoughtlessness or mere negligence or mere error of judgment" that there was on the part of the accused "knowledge or willful disregard of the probable consequences or a deliberate failure to take reasonable precautions". I have taken the words in quotation marks from the judgment of Casey J. in *Loiselle v. The Queen*[5]. The passage in which they occur was quoted in *Mann v. The Queen, supra,* at p. 245, and I remain of the opinion that I there expressed that Casey J. has stated the law accurately.

No doubt there may be cases where evidence of the manner in which an accused did in fact drive may, in the absence of an acceptable explanation, be sufficient evidence to warrant a finding that his conduct involved "advertent negligence". The judgment of Laskin J.A. on this first ground does not proceed on the basis that there was not evidence on which it was open to the jury to convict but on the view that in this respect the charge of the learned trial Judge was insufficient.

Since writing the above I have had the advantage of reading the reasons of my brother Pigeon. I agree with what

[5] (1953), 17 C.R. 323 at 332, 109 C.C.C. 31.

he says in his analysis of the judgments of this Court in *O'Grady* and in *Mann* and with his conclusion that in those cases:

> The actual decision was essentially that the offence created by subsection 4 (of section 221) requires *mens rea* and therefore differs in nature from statutory offences aimed at specific acts irrespective of intention.

The reason that I differ from his view as to how this first ground of appeal should be disposed of is that, in my opinion, on the evidence in this case a properly instructed jury might well have either convicted or acquitted the appellant.

As I agree with Laskin J.A. that this appeal should be allowed on the first ground with which he has dealt, it becomes unnecessary to examine the other grounds on which he based his decision, but I wish to say a few words about them.

Laskin J.A. described these grounds as follows:

> Second, whether in view of the single trial on two charges arising out of the same facts the trial judge adequately separated the issues relating to each charge so as to leave the jury with a clear understanding of the relevant law; and, third, whether the acquittal of the accused on the impaired driving charge resulted in an inconsistent verdict of guilty of dangerous driving in the light of the charge which was in fact delivered.

While these two grounds raise questions of law their decision is, of course, closely related to the manner in which this particular case was presented and to the charge to the jury which was in fact delivered.

Where both charges arise out of the same occurrence, the acquittal of an accused on a charge of driving while impaired and his conviction on a charge of dangerous driving do not necessarily involve any inconsistency for a person may be perfectly sober and yet drive dangerously. But when the learned trial Judge had said to the jury in the passage quoted by both McLennan J.A. and Laskin J.A.:

> Now, did the accident happen as the accused man has related, that is, that he was forced to apply his brakes suddenly by the sudden stoppage of the car in front of him? Or did the accident happen, did the accused's car go out of control—and in my opinion the car was completely out of control—or did this car go out of control because the accused was impaired by alcohol and was not in possession of his proper faculties necessary to keep the car under control? As I see it, that is the question which you have to decide and which is entirely a matter for you to do so.

it appears to me that it was necessary for him to tell them that if they found that the ability of the accused to drive

1969

PEDA
v.
THE QUEEN

Cartwright C.J.

was not impaired by alcohol they could not convict of dangerous driving unless the evidence other than that led to show impairment satisfied them of the guilt of the accused.

With the greatest respect I disagree with the following statement of McLennan J.A.:

> ...In any event, a verdict of acquittal does not mean that there was no impairment—it means only that the Crown has not established impairment to the satisfaction of the jury beyond a reasonable doubt.

The law in this regard is, in my opinion, correctly stated by Lord MacDermott giving the judgment of the Judicial Committee in *Sambasivam v. Public Prosecutor Federation of Malaya*[6], where he said:

> The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *'Res judicata pro veritate accipitur'* is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence.

On the following page Lord MacDermott makes it clear that the result of an accused having been found not guilty of an offence is that he is to be taken to be "entirely innocent of that offence".

If in the case at bar there should be a new trial on the charge of dangerous driving, the Crown would be precluded from taking any step to suggest that the accused's ability to drive was impaired by alcohol and the accused would be entitled to have the jury instructed that they must take it as conclusively established that, at the relevant time, his ability to drive was not so impaired. This principle is not altered, although its application is to some extent complicated, by the circumstance that the two counts were tried together and were both left to the jury at the same time. I agree with what I understand from their reasons to be the view of all the Members of the Court of Appeal that in the case at bar the counts should have been dealt with separately.

---

[6] [1950] A.C. 458 at 479.

However, I base my conclusion that the conviction cannot stand on the first ground upon which Laskin J.A. proceeded.

For the above reasons I would allow the appeal and quash the conviction. As the view of the majority is that the appeal fails it is unnecessary for me to consider what further order should have been made if the appeal had proved successful.

Fauteux, Abbott, Martland and Ritchie JJ. concurred with the judgment delivered by

JUDSON J.:—The appellant was indicted on two counts, which read as follows:

1. The jurors for Her Majesty the Queen present that Bruno Peda on or about the 29th day of June in the year 1967 at the Municipality of Metropolitan Toronto in the County of York, while his ability to drive a motor vehicle was impaired by alcohol or a drug, drove a motor vehicle, contrary to the Criminal Code.

2. The said jurors further present that Bruno Peda on or about the 29th day of June in the year 1967 at the Municipality of Metropolitan Toronto in the County of York, drove a motor vehicle on a street highway or other public place, to wit: The Frederick Gardiner Expressway and Lakeshore Boulevard at approximately 6:40 a.m., in a manner that was dangerous to the public to wit: by driving in the wrong lanes, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at that time was or might reasonably have been expected to be on such place, contrary to the Criminal Code.

He was tried before a judge and jury. The jury acquitted him on the impaired driving count but convicted him on the dangerous driving count. He was sentenced to twelve months imprisonment. On appeal[7] his conviction was affirmed by a majority, with Laskin J.A. dissenting. He now appeals to this Court and although his appeal was based on a number of grounds, in my view the only one of any substance is the contention that the jury were not properly instructed on the meaning of s. 221(4) of the Criminal Code. He contends that the direction of the trial judge was inadequate with respect to the elements which constitute the charge of dangerous driving and that it should have been made clear that the charge involved an element of advertent as opposed merely to inadvertent, negligence in accordance with what was said by the majority of this Court in *Binus v. The Queen*[8].

[7] [1969] 1 O.R. 90, 4 C.R.N.S. 161.

[8] [1967] S.C.R. 594, 2 C.R.N.S. 118, [1968] 1 C.C.C. 227.

1969

PEDA
v.
THE QUEEN

Judson J.

The extent of the direction of the trial judge on this point was to read s. 221(4) to the jury and then to paraphrase it in the following words:

> So, briefly, it is driving a car on a street, road, highway or other place in a manner that is dangerous to the public, and again, gentlemen, there is really no ambiguity in that language, it is a matter which you will have to decide: was the manner in which the accused drove the car, under the circumstances which have been related to you was it dangerous to the public having regard to all the circumstances?

In my opinion this is adequate and correct. The section is straightforward and free of ambiguity. As I pointed out in *Binus v. The Queen,* it contains its own definition of dangerous driving. The essence of the offence is the manner or character of the accused's driving, and the section instructs the jury to determine whether he was in fact driving in a manner which was dangerous to the public having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time was or might reasonably be expected to be at such place. Their task is to determine the actual behaviour of the driver in the light of the section and while this will necessarily entail some consideration of the state of mind of the driver, as a car does not drive itself, it does not mean that the jury must find that a given state of mind exists before they can convict. This was the judgment of the Ontario Court of Appeal in *Binus v. The Queen*[9], and, as I stated in the same case in this Court, I think that it is the correct one.

The decision of this Court in *Binus v. The Queen* is not a binding authority so as to prevent this conclusion being reached. The accused, in that case, appealed from a judgment of the Court of Appeal for Ontario from a conviction for dangerous driving, under s. 221(4) of the Criminal Code. The appeal was heard by a Court of five members and was dismissed by unanimous decision. Three of the five members of the Court did express an opinion which apparently differs from that which is expressed above, to the extent that they were of the opinion that *Mann v. The Queen*[10] had decided that proof of inadvertent negligence was not sufficient to support a conviction under s. 221(4), and that it was necessary to instruct the jury to this effect.

---

[9] [1966] 2 O.R. 324, 48 C.R. 279, [1966] 4 C.C.C. 193.

[10] [1966] S.C.R. 238, 47 C.R. 400, [1966] 2 C.C.C. 273, 56 D.L.R. (2d) 1.

Nevertheless, Cartwright J., as he then was, who delivered the reasons of these three members, went on to say, at p. 602:

> On the view of the meaning of s. 221(4) of the Code which I have expressed above, I incline to think that the instruction given by the learned trial Judge when the jury were re-called, and particularly the passages which I have italicized, was adequate in the circumstances of this case. Be that as it may, on consideration of all the record I agree with the conclusion of Laskin J.A. that this was a proper case in which to apply the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*.

It is apparent, therefore, that the opinion expressed as to the effect of *Mann v. The Queen* was not a necessary step to the judgment pronounced, and is not binding.

Mann v. The Queen was a judgment of this Court as to the constitutional validity of s. 60 of the *Highway Traffic Act* of Ontario, R.S.O. 1960, c. 172, which defined the offence of careless driving. It was held, unanimously, that this section was validly enacted.

The issue was whether this section was in conflict with s. 221(4) of the *Criminal Code,* which was not in existence when the earlier case of *O'Grady v. Sparling*[11] was decided, and which had affirmed the constitutional validity of s. 55(1) of the Manitoba *Highway Traffic Act,* R.S.M. 1954, c. 112, which created in that province the offence of driving without due care and attention.

In the *O'Grady* case, it had been said, at p. 809:

> What the Parliament of Canada has done is to define "advertent negligence" as a crime under ss. 191(1) and 221(1). It has not touched "inadvertent negligence." Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the *Criminal Code* as "crime", it is not crime.

The contention in the *Mann* case was that by s. 221(4) of the *Criminal Code,* Parliament had defined "inadvertent negligence" as a crime.

Cartwright J., with whom Spence J. concurred, held that Parliament had not defined "inadvertent negligence" as a crime, and that the case was indistinguishable from the *O'Grady* case.

Fauteux J., with whom Abbott and Judson JJ. concurred, held that the provisions of s. 221(4) of the *Criminal*

---

[11] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

1969

PEDA
v.
THE QUEEN

Judson J.

Code and of s. 60 of the *Highway Traffic Act* differed in legislative purpose and in legal and practical effect. The provincial enactment imposed a duty to serve bona fide ends not otherwise secured and in no way conflicted with the federal enactment. There were no obstacles to prevent both enactments living together and operating concurrently.

Ritchie J., with whom Martland and Judson JJ. concurred, said that s. 221(4) was not to be construed as creating a crime of "inadvertent negligence". He went on to say:

> The purpose and effect of s. 221(4) is to make it a criminal offence for anyone to drive to the public danger but, notwithstanding the careful argument to the contrary addressed to us on behalf of the Attorney General of Canada, I am satisfied that there is a type of careless and inconsiderate driving which falls short of being "dangerous" within the meaning of that section and that the purpose of s. 60 of the *Highway Traffic Act* is to provide appropriate sanctions for the regulation and control of such driving in the interests of the lawful users of the highways of Ontario.

This case was concerned with the constitutionality of the provision in the provincial statute. It was held that it was not in conflict with s. 221(4). In the reasons of Cartwright J. and of Ritchie J. it was held that s. 221(4) did not define a crime of "inadvertent negligence".

The issue in the present case is as to the proper instruction to be put to a jury in a case involving a charge under s. 221(4). It being accepted that that subsection, as framed, does not create a crime of "inadvertent negligence", there is nothing in the *Mann* case which would require the Court, when explaining to the jury the nature of the offence charged, to do so in terms other than those contained in the section itself. Parliament has defined the kind of conduct which shall constitute an offence under that subsection, and this Court, in the *Mann* case, has said that such definition is not to be construed as creating a crime of "inadvertent negligence". In my opinion, therefore, in this case, the charge to the jury, in the terms of the subsection, was adequate and correct, and it is not necessary, as the appellant contends, for the trial judge to instruct the jury as to the difference between "advertent" and "inadvertent" negligence.

I would dismiss the appeal.

Ritchie J. concurred with the judgment delivered by

PIGEON J.:—The appellant was convicted of "dangerous driving". The conviction was affirmed with a dissent in the Court of Appeal for Ontario[12] and the main question of substance raised on the appeal to this Court is the adequacy of the judge's instructions to the jury concerning the nature of the offence. He simply read and paraphrased subs. 4 of s. 221 of the *Criminal Code* without telling them that this did not make inadvertent negligence a crime as this Court has said in *Mann v. The Queen*[13]. I agree with Judson J. that those instructions were sufficient in this case and I wish to add the following observations.

Prior to the enactment of subs. 4 of s. 221 this Court, in *O'Grady v. Sparling*[14], dealt with subs. 1 of the same section, that makes it an offence to be "criminally negligent in the operation of a motor vehicle", that is, by virtue of s. 191(1), to drive with "wanton or reckless disregard for the lives or safety of other persons". Judson J. speaking for the majority of the Court, after stating (at p. 808) that between "criminal negligence" thus defined and negligence as contemplated in the enactments of regulatory authorities there is "a difference in kind and not merely one of degree", adopted as part of his reasons J. W. C. Turner's statement of this difference (Kenny's Outlines of Criminal Law, 17th ed., p. 34) in which he says:

> There are only two states of mind which constitute *mens rea,* and they are intention and *recklessness.*

Therefore the essential basis on which subsection 1 was held to be aimed at a kind of negligence different from the negligence contemplated in the enactments of regulatory authorities is that "criminal negligence" requires *mens rea.* It follows, of course, that inadvertent negligence is not criminal. Because negligence in the usual language includes both advertent and inadvertent negligence, it is obvious that in charging a jury on an indictment for "criminal negligence" a judge must in some way explain adequately the kind of negligence that is criminal and make it clear,

---

[12] [1969] 1 O.R. 90, 4 C.R.N.S. 161.

[13] [1966] S.C.R. 238, 47 C.R. 400 [1966] 2 C.C.C. 273, 56 D.L.R. (2d) 1.

[14] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

1969

PEDA
v.
THE QUEEN

Pigeon J.

but not necessarily in those words, that inadvertent negligence is not criminal. It may well be that he can do it by using the language of s. 191(1), seeing that "wanton or reckless" undoubtedly exclude mere inadvertence.

When in *Mann v. The Queen* this Court had subsequently to consider subs. 4 making "dangerous driving" a lesser offence, the question arose whether inadvertent negligence consisting in dangerous driving had thereby been made a crime. Following the principle established in *Beaver v. The Queen*[15] and *The Queen v. King*[16] it was, in effect, decided that *mens rea* was an element of the offence of "dangerous driving" as of other criminal offences generally. This was expressed by Cartwright J. (as he then was) by saying (at p. 246) "that in enacting s. 221(4) Parliament had not defined 'inadvertent negligence' as a crime" and by Ritchie J. (at p. 251) by saying similarly that "the provisions of s. 221(4) of the *Criminal Code*" are not to be construed as creating a crime of "inadvertent negligence".

In the context of a decision respecting the constitutional validity of provincial enactments with which subs. 4 was alleged to be in conflict, this mode of expression was, it appears to me, perfectly appropriate. However, because "a case is only an authority for what it actually decides", one should not read what was thus written as if it was an enactment but ascertain what was actually decided. It seems clear that the actual decision was essentially that the offence created by subs. 4 requires *mens rea* and therefore differs in nature from statutory offences aimed at specific acts irrespective of intention.

This construction, it should be noted, does not deprive subs. 4 of its effect. By virtue of s. 191(1), a conviction for "criminal negligence" requires "wanton or reckless disregard for the lives or safety of other persons". As against that, subs. 4 contemplates danger to other persons only. There is, therefore, ample room for distinction between the two offences even excluding inadvertence from the lesser.

However, wantonness and recklessness of themselves clearly imply the exclusion of mere inadvertence while "dangerous driving" does not necessarily. Does this mean that in a jury trial on that latter charge the judge must

---

[15] [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129.

[16] [1962] S.C.R. 746, 38 C.R. 52, 133 C.C.C. 1, 35 D.L.R. (2d) 386.

necessarily instruct the jurors that dangerous driving by inadvertence is not contemplated? A majority of the members of this Court sitting in *Binus v. The Queen*[17] expressed that opinion, however as the case was decided by application of s. 592(1)(*b*)(iii), this is not binding. With great deference to them, I must disagree because only such instructions need be given as the case being tried actually requires. Although *mens rea* is always required, it is only in exceptional circumstances that the jury need instructions in this connection. In most cases the fact itself is sufficient proof of the intention. It is only when a question arises as to the existence of this element of the offence that the jury need be bothered with it.

Therefore, in my view, the practical question is whether, in the circumstances of this case, there was something from which the jury might reasonably have concluded that, although objectively considered the accused's driving was "dangerous", it could be unconsciously so or be attributable to inadvertence. The only fact from which such an inference might be considered possible in this case is the sudden braking of the car ahead on the exit ramp, assuming accused's story of how the accident occurred was believed by the jury. Bearing in mind that the accused admitted being aware of the presence of the car ahead, his loss of control of his own car could not possibly be considered the normal result of a sudden application of the brakes by the other car. This result could only obtain if he was driving dangerously. When one is not driving dangerously, he does not lose control of his car because the driver of the car ahead suddenly puts on the brakes especially on an exit ramp where this is to be anticipated.

I fail to see in the present case any suggestion of a circumstance from which the jury might infer that the accused's manner of driving was inadvertently dangerous. If he had bumped into the car ahead and said that he had failed to notice that the latter was stopping, a question would have arisen whether this was inadvertent. It might equally have been so if he had said that he had not immediately noticed the braking action due to momentary inattention. Nothing of the kind was suggested and therefore, the only question was whether the driving was

[17] [1967] S.C.R. 594, 2 C.R.N.S. 118, [1968] 1 C.C.C. 227.

1969

PEDA
v.
THE QUEEN

Pigeon J.

actually dangerous within the meaning of the section. Such being the case, it was not necessary for the judge to instruct the jury that the accused should not be found guilty if the accident had occurred by his inadvertence. There was nothing to suggest that the ordinary rule ought not to be applied, namely that one must be deemed to intend to do what he is actually doing.

Although this may not be strictly necessary, I wish to add that, in my opinion, it would not be desirable when there is a need for instructions on the question of intention, to do it by saying that subsection 4 is not aimed at inadvertent negligence. While this wording was entirely appropriate in the context of the constitutional question that was decided in the *Mann* case, I feel it should be avoided in addressing a jury. My reason for this is that Parliament has created two distinct offences: one of "criminal negligence", the other of "dangerous driving". Although "dangerous driving" is admittedly a kind of "criminal negligence" because it is a lesser offence than that which is described by those words, the use of the word "negligence" appears to me highly undesirable in any instructions to a jury with respect to subsection 4 as being apt to create confusion.

Being of opinion that the jury was properly instructed in the terms of the section creating the offence of dangerous driving without any reference to negligence, the evidence respecting impairment became irrelevant to that charge. It was, therefore, unnecessary to add that if the accused was acquitted on the count of impairment that evidence should be excluded from consideration on the other count.

I would dismiss the appeal.

Appeal dismissed, CARTWRIGHT C.J. *and* HALL *and* SPENCE JJ. *dissenting.*

Solicitors for the appellant: Goodman & Goodman, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.