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HER MAJESTY THE QUEEN .....Appellant;

AND

CHARLES MARMADUKE REES .....Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—"Knowingly or Wilfully" contributing to juvenile delinquency—Mens rea—Whether honest belief that child was not a juvenile a defence—Juvenile Delinquents Act, R.S.C. 1952, c. 160.

Under s. 33(1)(*b*) of the *Juvenile Delinquents Act* (R.S.C. 1952, c. 160), the fact that an accused does not know that the girl is a juvenile and honestly and reasonably believes that she is over the age limit, constitutes a good defence.

The respondent was convicted under s. 33 of "knowingly or wilfully" contributing to juvenile delinquency. He had had sexual intercourse with a girl under 18 years of age with her consent. The girl had told him that she was 18 although she was only a few months over 16 and therefore a juvenile under the law of British Columbia.

*PRESENT: Kerwin C.J., Taschereau, Rand, Locke, Cartwright, Fauteux and Nolan JJ.

***Reporter's Note:* The appeal was first argued on May 11, 1955 before Taschereau, Rand, Estey, Locke and Fauteux JJ. By order of the Court it was re-argued on May 9 and 10, 1956.

The juvenile court judge, stating that he was bound by the decision in *Regina* v. *Paris* (105 C.C.C. 62), held that, as a matter of law, the fact that the respondent honestly believed that the girl was 18 could afford no defence to the charge and made no finding as to whether the respondent did in fact so believe. An appeal to a judge of the Supreme Court of British Columbia was dismissed. But the Court of Appeal for British Columbia allowed a further appeal and ordered that the case be remitted to the judge of the Supreme Court.

This Court granted leave to appeal on two questions of law: (i) Whether the Court of Appeal erred in holding that the respondent could not be convicted unless he knew or was wilfully blind to the fact that the girl was under 18; and (ii) whether it erred in law or exceeded its jurisdiction in remitting the case to the judge of the Supreme Court.

Held (Fauteux J. dissenting): That the appeal should be dismissed, the order referring the case back struck out, the conviction quashed and an acquittal directed.

Per Kerwin, C.J.: The words "knowingly or wilfully" in s. 33(1)(*b*) permitted the respondent to raise the issue of mens rea. There can be no doubt as to the general rule and that where it applies it covers every element of an offence. Consequently, it applied not only to the act which it was alleged contributed to the delinquency, but also to the accused's state of mind as to the girl's age. It was open to the trial judge to register a conviction if he concluded on the evidence, either that the accused knew the girl was under the age fixed by law, or that, notwithstanding his pro forma question to her, he proceeded without a real belief in her answer that she was above the age. The trial judge found neither of these facts.

This Court is in a position to make the order that the Court of Appeal should have made under s. 1014(3) of the old *Criminal Code*.

Per Taschereau J.: There is no valid reason why the word "knowingly" in s. 33 should be interpreted as relating only to the quality of the act, and not to the age of the child. Unless the contrary appears in the statute, that word applies to all the elements of the actus reus.

In view of s. 2 of the *Act* which defines the word "child", and in view of the conclusive evidence heard at the trial, it is impossible to reasonably hold that the girl was not apparently of the age of 18, or that the respondent did not have an honest belief that she had reached that age.

Per Rand and Locke JJ.: The general principle of criminal law is that accompanying a prohibited act there must be an intent in respect of every element of the act, and that is ordinarily conveyed in statutory offences by the word "knowingly". As is seen in s. 33(1) (*a*) and (*b*), the offending act embraces the elements of something done of a certain quality and by or in relation to a "child". The principle would thus extend the word "knowingly" to the age as well as to the conduct. The language of the statute contemplates the application of the principle of mens rea.

It was not shown that the respondent either knew the age of the girl to be under 18 or was otherwise chargeable with that knowledge.

Per Cartwright and Nolan JJ.: The words "knowingly or wilfully" govern the whole of s. 33. Therefore honest ignorance on the part of the accused of the one fact which alone renders his action criminal (in this instance the age of the girl) affords an answer to the charge.

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The jurisdiction of the Court of Appeal under the *Act* being the same as under s. 1014 of the *Criminal Code*, it had no jurisdiction to refer the matter back to the judge of the Supreme Court. Proceeding to give the judgment which the Court of Appeal ought to have given, the appeal should be dismissed as no tribunal acting reasonably could have found it to be established beyond a reasonable doubt that the respondent knew, or was wilfully blind to, the fact that the girl was under age of 18 at the time.

Per Fauteux J. (dissenting): The words "knowingly or wilfully" in the section do not relate to all the constituent elements of the offence which are (1) the doing of an act; (2) contributing to the delinquency; (3) of a child. They relate only to the first. To apply them to the other two elements would permit the accused to substitute his own opinions and have them prevail over the opinion of the court as to whether the act complained of would contribute to delinquency or as to whether the person involved was "apparently" over the age of 18. The accused assumes the risk that the opinion he forms from appearance as to the age of the girl will be the same as the court's opinion.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing the appeal from a conviction under the *Juvenile Delinquents Act*.

L. A. Kelley, Q.C. and *J. J. Urie* for the appellant.

H. A. D. Oliver for the respondent.

THE CHIEF JUSTICE:—It should be held, in accordance with the settled course of judicial decision, that the words "knowingly or wilfully" in s. 33(1)(*b*) of *The Juvenile Delinquents Act*, R.S.C. 1952, c. 160, permitted the respondent to raise the issue of *mens rea*. There can be no doubt as to the general rule and that where it applies it covers every element of an offence. In the present instance it applies not only to the act which it is alleged contributed to the delinquency, but also to the accused's state of mind as to the girl's age. It would be open to the Judge trying the accused to register a conviction if he concluded on the evidence, either that the accused knew the girl was under the age fixed by law, or that, notwithstanding his *pro forma* question to her, he proceeded without a real belief in her answer that she was above that age. Here the trial Judge found neither of these facts as he felt himself bound by *Rex* v. *Paris* (2). On an appeal by the present respondent to Wood J. the latter followed his

(1) 109 C.C.C. 266. (2) [1952] 7 W.W.R. 707; 105 C.C.C. 62.

own judgment in the Paris case. I agree with the Court of Appeal (1) that that decision cannot be supported. *Rex* v. *Prince* (2), does not apply as the statute there in question did not contain the word "knowingly". More to the point are *Emary* v. *Nolloth* (3) and *Groom* v. *Grimes* (4). The Court of Appeal therefore correctly set aside the conviction.

It was suggested that, in view of the holding of this Court in *Welch* v. *The King* (5), the judgment before us was a nullity, (and therefore the order of Wood J. should stand), because it not only allowed the appeal from the judgment of Wood J. but remitted the case to that learned judge. In the *Welch* case, however, the accused had been found guilty on his first trial and, while that conviction had been set aside by the Court of Appeal for Ontario, we held on an appeal from that Court's order affirming a subsequent conviction that the Court of Appeal on the first occasion had not directed an acquittal, or directed a new trial, or made such other order as justice requires as specified in s. 1014(3) of the old *Criminal Code*. Here the respondent had not been tried before and on this appeal we are in a position to make the order that the Court of Appeal should have made.

The respondent has served his sentence and this was a test case in which the Attorney General of British Columbia desired the opinion of this Court on the two points mentioned. Under these circumstances the Order appealed from should be varied by striking out the reference back and by quashing the conviction and directing an acquittal.

TASCHEREAU J.:—The facts in the present case have been fully exposed in the judgments of my colleagues, and it is therefore useless to deal with them once more.

The respondent was charged under s. 33(1)(*b*) of the "Act respecting Juvenile Delinquents". This section reads as follows:—

33. (1) Any person, whether the parent or guardian of the child or not, who, *knowingly or wilfully,*

(1) 109 C.C.C. 266.
(2) (1875) L.R. 2 C.C.R. 154.
(3) (1903) 20 Cox C.C. 507.
(4) (1903) 20 Cox C.C. 515.
(5) [1950] S.C.R. 412.

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(*b*) does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent,

is liable on summary conviction before a juvenile Court or a magistrate to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

He was found guilty by a judge of the Juvenile Court in and for the City of Vancouver, and sentenced to be imprisoned at Oakalla for a term of six months. The magistrate thought that he was bound by the decision of Mr. Justice Wood of the Supreme Court of British Columbia in *Regina* v. *Paris* (1), where it was held:—

In view of the fact that juvenile court judges in Vancouver have held throughout the past 28 years that, despite the inclusion of the words "knowingly or wilfully" in the Juvenile Delinquents Act, 1929, ch. 46 (Dom.) and in the informations thereunder, the fact that an accused thereunder did not know that the girl in question was a juvenile, i.e., under 18 years of age, and honestly and reasonably believed that she was over 18, does not constitute a good defence, Wood, J. was of the opinion that the contrary should not be held by a single judge of the Supreme Court and, therefore, dismissed an appeal based on said ground, where the girl was in fact 16 years old but told the accused that she was 19, and looked even older.

Appeal in the present case was brought again before Mr. Justice Wood, who still held that the section applied, and that in such circumstances, it was not a valid defence for the accused to say that he believed honestly and reasonably that the girl was over 18, while in fact she had not reached yet that age. He therefore followed his previous decision in *Regina* v. *Paris* (*supra*).

The Court of Appeal reversed that decision and held that upon the express language of the statute which uses the words *"knowingly or wilfully"*, it is a valid defence for an accused to show that he acted upon the honest belief that the girl was 18 years of age. It was therefore ruled that *Regina* v. *Paris* (*supra*) had been wrongfully decided, and could not be considered as a correct exposition of the law.

It has been submitted on behalf of the appellant that the judgment of the Court of Appeal of British Columbia conflicts with a judgment of the Court of Criminal Appeal of England, in the case of *Regina* v. *Prince* (2). In that case, the accused was charged with having *unlawfully* taken

(1) [1952] 7 W.W.R. 707; 105 C.C.C. 62. (2) (1875) 13 Cox C.C. 138.

one Annie Phillips, an unmarried girl being under the age of sixteen, out of the possession and against the will of her father.

Section 55 of the *Offences Against the Persons Act* provided that:—

> Whoever shall *unlawfully* take any unmarried girl under the age of sixteen years of age, out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her shall be guilty of a misdemeanour.

The Court of Criminal Appeal held that it was no defence to an indictment under s. 55 that the defendant bona fide and reasonably believed that the girl was older than sixteen. Baron Bramwell who delivered the judgment of the Court which was assented to by Lord Chief Baron Kelly, Cleasby, B., Grove, J., Pollock, B., Amphlett, B., said at page 142:—

> In addition to these considerations one may add that the Statute does use the word *"unlawfully"* and does not use the words *"knowingly* or not believing to the contrary".

And at page 144:—

> The question, therefore, is reduced to this, whether the words in 24 & 25 Vict. c. 100, s. 55, that whosoever shall unlawfully take "any unmarried girl being under the age of sixteen, out of the possession of her father" are to be read as if they were "being under the age of sixteen, and he knowing she was under that age." No such words are contained in the statute, nor is the word "maliciously", "knowingly", or any other word used that can be said to involve a similar meaning.

It is clear to my mind that the Court implied that if the word *"knowingly"* had been used instead of the word *"unlawfully"*, the decision of the Court would have been different.

It is further submitted that the word *"knowingly"* has reference only to the quality of the act charged and not to the knowledge that the juvenile was in fact a juvenile. I do not believe that this contention can be upheld. A meaning must be given to the word *"knowingly"* in the statute, and it cannot be disregarded. I see no valid reason why it should be interpreted as relating only to the quality of the act, and not to the age of the child. The law makes no such distinction, and I would invade the legislative field if I did attempt to make any.

Since the *Prince* case (*supra*), this word *"knowingly"* has been considered by the courts, and it has been rightly held that when it is found in a statute, full effect must be

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given to it. Unless the contrary appears, it applies to all the elements of the *actus reus*. For instance, the offence of *"knowingly"* selling intoxicants to a person under age is not committed, if the vendor honestly believes the child to be over the required age. (*Groom* v. *Grimes* (1)). In that case, the Court of Appeal of England held:—

> A licence-holder cannot be convicted under sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, for *"knowingly selling"* intoxicating liquor to a person under the age of fourteen years, when he himself has no knowledge of the sale and when the barman who sells the liquor has no knowledge that the person to whom he sells is under the age of fourteen years, but honestly believes that he has attained that age.

If any additional and more recent authorities are needed, vide: (*Rex* v. *Cohen* (2)); (*Gaumont* v. *Henry* (3)).

Professor Glanville Williams in his treatise on "Criminal Law" sums up the jurisprudence on the matter as follows:—

> (*c*) We now see the influence of the word "knowingly", used in a statute, upon the rules relating to ignorance and mistake. On principle the word "knowingly" has no extra effect where the crime requires intention, for intention itself presupposes knowledge of the circumstances. The word "knowingly" does, however, affect the position where the crime can be committed recklessly. If the word is not included in the statute, the party will be deemed to act recklessly unless he mistakes a relevant fact; simple ignorance is not enough. But if the word is inserted, simple ignorance becomes a defence, and it is only knowledge (or its equivalent wilful blindness) that convicts.

Where Parliament in similar offences wishes to eliminate "knowledge" as an essential element, it says so in unmistakable terms. For instance, s. 138(1) of the *Criminal Code* reads:—

> Every male person who has sexual intercourse with a female person who
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> (*a*) is not his wife, and
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> (*b*) is under the age of fourteen years, *whether or not he believes that she is fourteen years of age or more,* is guilty of an indictable offence and is liable to imprisonment for life and to be whipped.

Such language is not used in s. 33(1) of the *Juvenile Delinquents Act,* and such a wide difference in the phraseology clearly reveals the intention of the legislator. In the first case "knowledge" is immaterial, but it is essential in the second.

I have therefore reached the conclusion that the interpretation of s. 33 of the *Juvenile Delinquents Act,* as given by the Court of Appeal of British Columbia is right.

(1) (1903) 20 Cox C.C. 515. (2) [1951] 1 K.B. 505.
(3) [1939] 2 K.B. 711.

Although I would dismiss the appeal, I do not think that any useful purpose can be served in remitting the matter to the lower court, as ordered by the Court of Appeal. In view of s. 2 of the *Act* which defines the word "child", and in view of the conclusive evidence heard at the trial, I am of opinion that it is impossible to reasonably hold that the girl was not apparently of the age of eighteen, or that the respondent did not have an honest belief that she had reached that age.

Subject to the above modification, I would dismiss the appeal and direct the acquittal of the respondent.

The judgment of Rand and Locke JJ. was delivered by

RAND J.:—This appeal involves the interpretation of certain provisions of the *Juvenile Delinquents Act, 1929.* The respondent was convicted of having "knowingly or wilfully" committed an act or acts

producing, promoting, or contributing to Lorraine Brander, a child, being or becoming a juvenile delinquent or likely to make the said child a delinquent. . . .

The girl had told the respondent that she was 18 years old although she was in fact under that age. The question is whether the principle of mens rea applies to the element of the offence as to her age.

"Child" is defined by s. 2(1)(*a*) as

any boy or girl apparently or actually under the age of sixteen years, or such other age as may be directed in any province pursuant to subsection (2);

The age, for the purposes of the prosecution here, was 18 years.

The culpable act is declared in s. 33::—

(1) Any person, whether the parent or guardian of the child or not, who knowingly or wilfully

(*a*) aids, causes, abets or connives at the commission by a child of a delinquency, or

(*b*) does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent,

is liable on summary conviction before a Juvenile Court or a magistrate to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

In the definition of "child", the essential words are "apparently or actually" under the age specified. This expression must necessarily mean "apparently and

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actually" for otherwise an offence could be committed with a person over 21 years who was "apparently" under 18. That is obviously not the intention of the statute.

So read it might be suggested that the apparency is a fact to be found by the magistrate. But to what mind should it be apparent? to the magistrate, to the accused, to the average person of his age, or of any age? Whatever it may be, other language of the statute relieves me from exploring the question further and this is found in s. 33.

Mr. Kelley, on behalf of the Attorney General of British Columbia, argues that the words "knowingly or wilfully" in that section qualify only part of the offence described: the act which contributes to the delinquency. This seems to omit both the appreciation of its relation to the delinquency and the age of the child. But the former is not of materiality here, and it is on the latter that the issue hinges.

The general principle of criminal law is that accompanying a prohibited act there must be an intent in respect of every element of the act, and that is ordinarily conveyed in statutory offences by the word "knowingly". As stated by Professor Glanville Williams in his Criminal Law at p. 131:—

> It is a general rule of construction of the word "knowingly" in a statute that it applies to all the elements of the actus reus.

As is seen in s-s. (1)(*a*) and (*b*) of s. 33, the offending act embraces both the elements of something done of a certain quality and by or in relation to a "child". The principle would thus extend the word "knowingly" to the age as well as the conduct. Is there anything in the statute to exclude its application?

To this the word "wilfully" is significant. Whatever it may mean in other contexts, I think the intention of s. 33 is this that either the offender knows the child to be under the age fixed or that he is indifferent as to age. In this, "wilfully" and as well, "knowingly", hark back to "apparently or actually" and in the combined conception the mind of the accused in relation to the child's age is an essential of the offending act. Where, therefore, there is belief that the child is 18 years or over, the offence is not committed: *Groom* v. *Grimes* (1), where it was held that

(1) (1903) 20 Cox C.C. 515.

the offence of "knowingly" selling intoxicants to a person under 14 is not committed if the barman is not chargeable with knowledge that the child is under 14.

It is said that this *Act*, being intended for the protection of young persons, places the entire risk of age upon the accused; and that was the argument in *Groom* (*supra*). But whatever the policy of Parliament, its intention must be gathered from the language it has used; and on that of the provisions of the *Act* before us, I am in agreement with the Court of Appeal that so far from excluding the principle of mens rea, it contemplates it.

The appeal should, therefore, be dismissed; but as the matter has been fully opened before us, another circumstance must be considered. The accused has already served the sentence of six months imposed upon him. I am inclined to gather from the remarks of the judge of the Juvenile Court that if he had not felt himself bound by the case of *Regina* v. *Paris* (1), he would have dismissed the charge: but in any event it was not shown that the accused either knew the age of the young woman to be under 18 years or was otherwise chargeable with that knowledge. In this situation, the judgment of this Court should be that the order of Wood J. affirming the conviction be vacated and that judgment be entered setting aside the conviction of the Judge of the Juvenile Court and dismissing the charge.

The judgment of Cartwright and Nolan JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (2) whereby the appeal of the respondent from a judgment of Wood J. was allowed and it was ordered, in the words of the formal judgment of the Court of Appeal, "that the case be remitted to the Honourable Mr. Justice Wood in the Supreme Court of British Columbia".

The respondent was convicted on November 23, 1953 before the Judge of the Juvenile Court on the charge that he:—

> at the said City of Vancouver, between the 24th and 27th days of October, A.D. 1953, knowingly or wilfully, did unlawfully commit an act or acts producing, promoting or contributing to Lorraine Brander, a child, being or becoming a juvenile delinquent or likely to make the said child a

(1) [1952] 7 W.W.R. 707. (2) 109 C.C.C. 266.

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juvenile delinquent, to wit, by occupying the same bed and by having sexual intercourse with the said Lorraine Brander, contrary to the form of the Statute in such case made and provided.

The effect of the evidence at the trial may be briefly stated. The respondent had sexual intercourse with Lorraine Brander with her consent. The uncontradicted evidence of Lorraine Brander and of the respondent is that prior to the act of intercourse she had told him that she was 18 years of age; he deposed that he would have taken her to be 18 years or older. In fact her age was 16 years and 5 months. In the province of British Columbia a boy or girl under the age of 18 years is a "child" within the terms of the Juvenile Delinquents Act.

The learned Juvenile Court Judge held that, as a matter of law, the fact that the respondent honestly believed that the girl was over the age of 18 could afford no defence to the charge and made no finding as to whether the respondent did in fact so believe.

Pursuant to s. 37(1) of the *Juvenile Delinquents Act* the respondent applied to Wood J. for special leave to appeal; that learned judge granted leave to appeal and having heard the appeal dismissed it. Special leave to appeal to the Court of Appeal was granted by that court and it disposed of the appeal as set out above.

On October 5, 1954, this Court granted leave to appeal from the judgment of the Court of Appeal. This leave having been granted pursuant to s. 41 of the *Supreme Court Act*, the appeal lies only "in respect of a question of law or jurisdiction" (s. 41(3)). Two such questions were argued before us: (i) Whether the Court of Appeal erred in law in holding that the respondent could not be convicted on the charge above set out unless he knew or was wilfully blind to the fact that Lorraine Brander was under the age of 18 years; and (ii) whether the Court of Appeal erred in law or exceeded its jurisdiction in remitting the case to Wood J..

As to the first point, I agree with the reasons and the conclusion of the learned Chief Justice of British Columbia, but wish to add a few observations of a general nature.

Section 7(2) of the *Criminal Code* provides as follows:—

> 7 (2) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

In the case at bar we are concerned with the application of the rule of the common law summed up in the first sentence of the maxim—*Ignorantia facti excusat; ignorantia juris non excusat.* The rule has been stated and applied in countless cases. In *The Queen* v. *Tolson* (1), Stephen J. says at page 188:—

> I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. I am unable to suggest any real exception to this rule, nor has one ever been suggested to me.

and adds at page 189:—

> Of course, it would be competent to the legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case.

The first of the statements of Stephen J. quoted above should now be read in the light of the judgment of Lord Goddard C.J., concurred in by Lynskey and Devlin JJ. in *Wilson* v. *Inyang* (2), which, in my opinion, rightly decides that the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining such essential question.

The question then is as to the true construction of the following words of s. 33(1) of the *Juvenile Delinquents Act*, read in the context of the whole *Act*:—

> Any person . . . who, knowingly or wilfully, . . . does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent, is liable on summary conviction to a fine . . . or imprisonment. . . .

(1) (1889) 23 Q.B.D. 168 at 188.

(2) [1951] 2 All E.R. 237.

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In approaching this question the following rules of construction should be borne in mind. In *Watts and Gaunt* v. *The Queen* (1), Estey J. says:—

> While an offence of which *mens rea* is not an essential ingredient may be created by legislation, in view of the general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention.

In his book on Criminal Law (1953) at pages 131 and 133, Mr. Glanville Williams says:—

> It is a general rule of construction of the word "knowingly" in a Statute that it applies to all the elements of the *actus reus* . . .
>
> The sound principle of construction is to say that the requirement of knowledge, once introduced into the offence, governs the whole, unless Parliament has expressly provided to the contrary.

In my opinion these passages are supported by the authorities collected by the learned author at the pages mentioned and correctly state the general rule.

In argument counsel for the appellant stressed the case of *R.* v. *Prince* (2); but I agree with Mr. Oliver's submission that it is implicit in the reasons of both Blackburn J. and Bramwell B. that they would have decided that case differently if the section which they were called upon to construe had contained the word "knowingly".

Were the matter doubtful, it would be of assistance to consider the provisions of the Criminal Code which is a statute of the same legislature *in pari materia*. Subsections (1) and (2) of s. 138 of the *Criminal Code* and their predecessors subsections (1) and (2) of s. 301 of the former code, illustrate the type of language employed by Parliament when it is intended to provide that the belief of an accused as to a matter of fact is irrelevant.

> 138 (1) Every male person who has sexual intercourse with a female person who . . . is under the age of fourteen years, *whether or not he believes that she is fourteen years of age or more, is guilty* . . .
>
> 138 (2) Every male person who has sexual intercourse with a female person who . . . is fourteen years of age or more and is under the age of sixteen years, *whether or not he believes that she is sixteen years of age or more,* is guilty . . .

The contrast between the wording of these sub-sections, particularly those portions which I have italicized, and that of s. 33 of the *Juvenile Delinquents Act* is too sharp to be disregarded.

(1) [1953] 1 S.C.R. 505 at 511. (2) (1875) L.R. 2 C.C.R. 154.

While I have already expressed my agreement with the reasons of the learned Chief Justice of British Columbia on this point, I wish to expressly adopt the following passage:—

> In my view of the matter we must start out with the proposition that sexual intercourse with a woman, not under the age of 18 years and with her consent, is not a crime, except under exceptional and irrelevant circumstances. It follows that if the appellant had sexual intercourse with a girl not under 18 years of age he could not be convicted of contributing to her becoming a juvenile delinquent for the simple reason she is not a child within the meaning of the Act.
>
> It is the age factor alone that, in these circumstances, moves the act from a non-criminal to a criminal category.
>
> It follows, it seems to me, that when a man is charged with konwingly and wilfully doing an act that is unlawful only if some factor exists which makes it unlawful (in this instance the age of the girl) he cannot be convicted unless he knows of, or is wilfully blind to, the existence of that factor, and then with that knowledge commits the act intentionally and without any justifiable excuse.

It would indeed be a startling result if it should be held that in a case in which Parliament has seen fit to use the word "knowingly" in describing an offence honest ignorance on the part of the accused of the one fact which alone renders the action criminal affords no answer to the charge.

Turning now to the question whether the Court of Appeal erred in remitting the case to Wood J., it will be observed that the jurisdiction of the Court of Appeal is found in s. 37(1) of the *Juvenile Delinquents Act,* reading as follows:—

> 37 (1) A Supreme Court judge may, in his discretion, on special grounds, grant special leave to appeal from any decision of the Juvenile Court or a magistrate; in any case where such leave is granted the procedure upon appeal shall be such as is provided in the case of a conviction on indictment, and the provisions of the *Criminal Code* relating to appeals from conviction on indictment *mutatis mutandis* apply to such appeal, save that the appeal shall be to a Supreme Court judge instead of to the Court of Appeal, with a further right of appeal to the Court of Appeal by special leave of that Court.

Having granted leave to appeal, the jurisdiction of the Court of Appeal, would appear to be the same as that exercised by it in an appeal from a conviction for an indictable offence, which, at the date of the hearing and determination of the appeal, was to be found in s. 1014 of the *Criminal Code,* the relevant words being:—

> 1014 (1) On the hearing of any such appeal against conviction the court of appeal shall allow the appeal if it is of opinion

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(b) that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law;

(3) Subject to the special provisions contained in the following sections of this Part, when the court of appeal allows an appeal against conviction it may

(a) quash the conviction and direct a judgment and verdict of acquittal to be entered; or

(b) direct a new trial;

and in either case may make such other order as justice requires.

I have already indicated my view that the Court of Appeal was right in allowing the appeal on the ground of a wrong decision of a question of law by Wood J.. The judgment of my brother Fauteux in *Welch* v. *The King* (1), concurred in by the majority of the Court, makes it clear that, having decided to allow the appeal, it became the duty of the Court of Appeal (i) to quash the conviction, and (ii) either to direct that a judgment of acquittal be entered, or to direct a new trial. I am unable to find that there was jurisdiction to refer the matter back to Wood J. in the manner set out in the opening paragraph of these reasons. The power "to make such other order as justice requires" is, I think, merely supplemental to the provisions of clauses (*a*) and (*b*) of sub-section (3) of s. 1014.

It remains to consider what order we should make. In my view our duty is to give the judgment which the Court of Appeal ought to have given. I have examined all the evidence with care and have reached the conclusion that it is in the last degree improbable that the learned Juvenile Court Judge would have convicted the respondent if he had instructed himself correctly on the law. Indeed I do not think that any tribunal acting reasonably could have found it to be established beyond a reasonable doubt that the respondent knew, or was wilfully blind to, the fact that Lorraine Brander was under the age of 18 years at the relevant time.

It follows that, in my opinion, the Court of Appeal should have allowed the appeal, quashed the conviction and directed a judgment of acquittal to be entered and I would direct that the judgment of the Court of Appeal should be amended to so provide.

(1) [1950] S.C.R. 412.

FAUTEUX J. (dissenting):—The respondent was charged before a Judge of the Juvenile Court in and for the city of Vancouver, under s. 33(1)(*b*) of the *Juvenile Delinquents' Act* (1929) c. 46, enacting that:—

> Any person, whether a parent or guardian of a child or not, who knowingly or wilfully
>
> (*a*) . . .
>
> (*b*) does any act producing, promoting or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent, shall be liable on summary conviction before a Juvenile Court . . .

Under the *Act*, a "child" means a boy or a girl under the age of sixteen years or such other age as may be directed in any province, which, in the province of British Columbia, is eighteen. According to the evidence, the female, in relation to whom the offence was alleged to have been committed, was, at the time of its commission, sixteen and therefore a child under and for all the purposes of the *Act*. The accused testified that from her appearance as well as from her own declaration to him, he believed that she was over eighteen. Relying, in fact, on such evidence and submitting, in law, that *mens rea* with respect to the age is of the essence of the offence, counsel for the accused asked for the dismissal of the charge. The merit of this evidence did not have to be considered by the trial Judge as he felt bound by *Regina* v. *Paris* (1), where a same contention as to the law was ruled out. The accused was convicted and his conviction was subsequently maintained by the Hon. Mr. Justice Wood of the Supreme Court of British Columbia, who had decided *Regina* v. *Paris*. The Court of Appeal of British Columbia (2) reached the view that knowledge of the age was of the essence of the offence, allowed the appeal and ordered the case to "be remitted to Mr. Justice Wood for re-consideration upon the issue of *mens rea*." The Crown now brings the latter judgment for review.

The ancient maxim that in every criminal offence there must be a guilty mind cannot now, as illustrated by the cases of *Rex* v. *Prince* (3) and *Rex* v. *Bishop* (4), apply generally to all statutes. It is necessary to look at the object and the provisions of each Act to see whether and how far knowledge is of the essence of the offence created.

(1) [1952] 7 W.W.R. 707.
(2) 109 C.C.C. 266.
(3) (1875) L.R. 2 C.C.R. 154.
(4) (1880) 5 Q.B.D. 259.

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There can be no doubt as to the object of the *Juvenile Delinquents' Act*. Manifested throughout its provisions, and particularly in those of sub-section 2 of section 3, section 38 and section 33, the object is to care, aid, encourage, help and assist misdirected or misguided juveniles and, under section 33, protect them from becoming or being the victims of social or moral degradation in punishing these actions or omissions, of even their own parents or guardians, which, of their nature, are "likely to make *any* child a juvenile delinquent". With respect to the interpretation of the *Act*, reference must be made to section 38 thereof reading:—

> 38. This Act shall be liberally construed to the end that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

In addition to this specific provision, one must also refer to section 15 of the *Interpretation Act* R.S.C. (1952) c. 158, providing that:—

> 15. Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of any thing that Parliament deems to be for the public good, or to prevent or punish the doing of any thing that it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

Under section 33(1)(*b*), the constituent elements of the offence mentioned are (i) the doing of an act; (ii) which, of its nature, does or is likely to produce, promote or contribute to the delinquency; (iii) of a child. What amounts to delinquency is defined in section 2(1)(*h*) and, under section 3(1), delinquency does constitute an offence. It is contended that either of the words "knowingly or wilfully", appearing in the opening phrase of section 33(1)(*b*), are related to all the constituent elements therein mentioned. Undoubtedly, they are related to the first; but the question is whether they are related to all. In my respectful view, it cannot have been the intention of Parliament to leave it to the arbitrary judgment of those very persons mentioned in the opening phrase of section 33—against the

action or omission of whom it was intended to protect juveniles from becoming delinquents—to successfully oppose their views to those of the Court or Judge entrusted with the operation of the *Act,* on the point whether, of its nature, a particular act is one "producing, promoting or contributing to a child's being or becoming a juvenile delinquent or likely to make *any* child a juvenile delinquent." Any person, whether a parent or a guardian, giving to a child a book containing the crudest obscenities, would admittedly do an act forbidden under the section; however, should the evidence of the Crown fail to show that he had knowledge of the contents of the book, the prosecution would fail. But if knowledge is shown, his own views as to whether such book might or might not produce, promote or contribute to a child's delinquency or be likely to make *any* child a juvenile delinquent, would afford no defence, since the act done is precisely the one against which Parliament intended to protect juveniles. If this is so, it cannot be said therefore that the words "knowingly or wilfully" are related to all the constituent elements of the offence. I cannot think either that the same words are related to the age of the juveniles. Again, a child, under the definition enacted for all the purposes of the Act, means any boy or girl "*apparently* or actually" under the age mentioned. Comprehensively, the word "actually" does not include the concepts of uncertainty or of mistake, but the word "apparently" does not exclude them. The belief which a person, contributing to the delinquency of a juvenile the age of whom could not "actually" be determined, might then form from appearance only cannot, at his trial, prevail over the opinion which the Judge must, of necessity, form himself to assert his jurisdiction over the matter, which he only has if a child is involved. Under the Act, a juvenile cannot be, at the same time, a child for purposes of jurisdiction and not a child for other purposes; the definition of a child applies to every provision of the Act where the word is found. Evidence may show that, from appearance, the accused could have mistakenly, but reasonably, formed and did, in fact, form an honest belief that the juvenile was not a child. While such evidence could support a defence based on a mistake of fact in cases where the actual age must definitely be established, it does not follow that such

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a defence obtains in cases, as in the present, where appearance, involving the possibility of mistake, is sufficient. A person contributing to the delinquency of a juvenile assumes the risk that the opinion he forms from appearance as to the age be not the one taken by the trial Judge. Under the Act, knowledge of the actual age is not of the essence of the offence; appearance is sufficient, failing the best evidence as to the age. In my respectful view, Parliament did not intend that the operation of the section be dependent upon the views an accused might form from appearance. What Parliament clearly intended is the protection of children. In none of the cases to which we were referred by respondent, the statutory provisions alleged to have been violated included such a definition of "child" as under the *Act* here considered. I would maintain the appeal and restore the conviction.

Appeal dismissed; conviction quashed; acquittal directed.

Solicitor for the appellant: *H. A. Maclean.*

Solicitor for the respondent: *H. A. D. Oliver.*