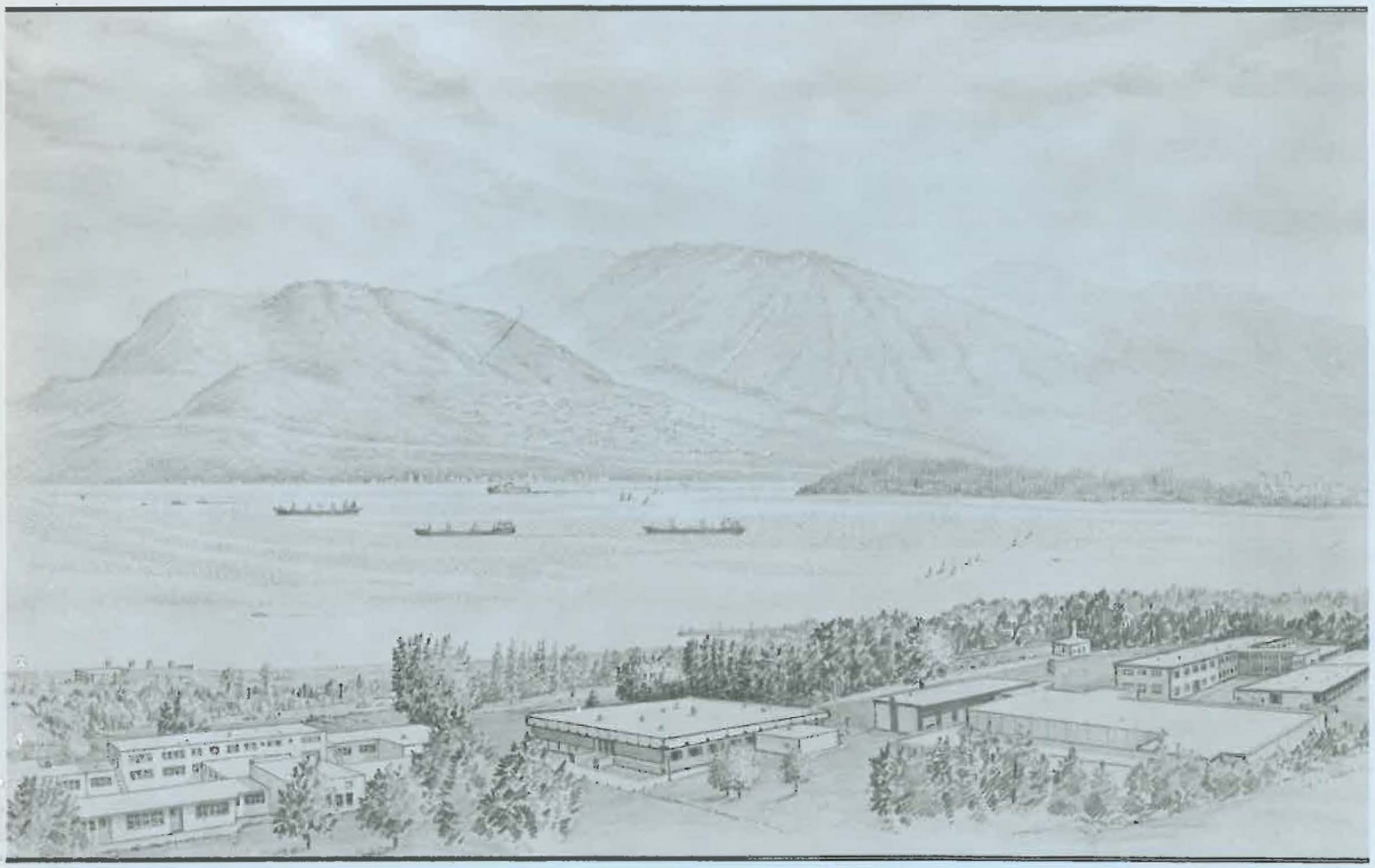
ISSUES OF INTEREST

VOLUME #1



Justice Institute
Of British Columbia
4180 West 4th Avenue
Vancouver, B.C.
V6B 4J5

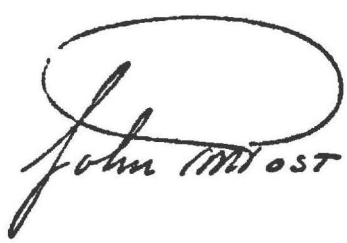
TABLE OF CONTENTS

June 1981

At the Academy we are attempting to tap all sources of information to assure that what we teach is accurate and current. In the process we continuously run across matters which are important to know for the working police officer. Through our courses we are in contact with a small segment of police personnel only and it was decided that an attempt should be made to be of service by means of a training bulletin.

This is the first bulletin and more will follow when sufficient material has accumulated or importance of information dictates publication. This time the content is exclusively on issues that were before our Courts. Needless to say that other topics must also be included.

If you have any suggestions for improvement or any specific topics you would like to see covered, please let us know.



John M. Post
Director

Boggs v. The Queen Feb. 3, 1981
Supreme Court of Canada

The Supreme Court of Canada has dealt many times before with legal questions in connection with s. 238 (3) C.C. which creates the offence of driving while disqualified. However, no one apparently questioned the validity of the section before.

The accused was convicted in Alberta of driving while disqualified by reason of the suspension of his drivers licence. He appealed this conviction to the Supreme Court of Canada challenging the constitutional propriety of s. 238(3) C.C. In other words, the accused claimed that the offence is not within the jurisdiction of the Canadian Parliament.

The Supreme Court reviewed the history of section 238 C.C. and came to the conclusion that its remains are no more than piggy-back legislation. At one time s. 238 provided that the Court, upon a conviction under the Criminal Code, could impose the suspension of a drivers license or prohibit a person from driving anywhere in Canada. At present the provincial authorities or a Judge,upon conviction of a provincial offence, may suspend a driver's license or one's right to obtain one. This was the reason why the Court referred to s. 238(3) C.C. as piggy-back legislation; the province suspends - the Canadian Parliament creates the offence.

The question to be answered was: ".....is Parliament competent to add a criminal consequence to a provincial licence suspension whatever the reason for that suspension."

The Court recognized that the obvious intent of creating the offence under section 238(3), was to give national effect to a provincial licence suspension. In spite of this expediency the Parliament of Canada overstepped its legislative authority with the section in its present form.

It was concluded that s. 238(3) C.C. is ultra vires the Parliament of Canada. The accused's conviction was set aside.

NOTE: In B. C., three persons were charged with driving whilst their respective driver's licenses were suspended. The charges were preferred under the provisions of the B. C. Motor Vehicle Act instead of section 238 of the Criminal Code.

Boggs v. The Queen

> The B. C. Court of Appeal held that the provision under the Motor Vehicle Act creating an offence for something which the Parliament of Canada has considered to be a crime, renders that provision ultra vires the Provincial Legislature. "The Criminal Code provision would eventually be nullified by the provision in the Motor Vehicle Act", said the Court.
>
> (R.v Munroe, Beatty, Jasket June 1980)

It may well be that the decision by the Supreme Court of Canada, ruling that the "suspension" offence under the Criminal Code is invalid, has revived the B. C. Provincial legislation the B. C. Court of Appeal ruled ultra vires.

Written by John M. Post
March 1981

Is a Roadside Demand for a Breath Sample a Form of Detention?
Must a Demand for the Presence of a Lawyer be Complied With?
Does Failure to Wait Until Lawyer is Present Provide a Reasonable Excuse for Refusing to give Sample?

Chromiak v. The Queen 49 C.C.C. (2d) 257
Supreme Court of Canada

In 1972, a Mr. Brownridge was subject to a demand for a sample of his breath. He accompanied the officers to the police station and there refused to give a sample until he had consulted his lawyer. He was not allowed to contact his lawyer and was convicted of refusing to give a breath sample.* He appealed his conviction to the Supreme Court of Canada which held that Mr. Brownridge was detained and had therefore the right to retain and instruct counsel without delay (section 2 (c) (ii) Bill of Rights). The failure on the part of police to meet the obligation on them to allow anyone arrested or detained access to legal counsel provided Mr. Brownridge with a reasonable excuse to refuse giving a sample of breath.

In this case the accused Chromiak was subject to a demand for a breath sample under the new section 234.1 (1) C.C., known as the roadside breath test. He, like Mr. Brownridge, demanded to consult his lawyer before giving the sample. No opportunity for legal counsel was provided and Mr. Chromiak was convicted of unlawfully failing to comply with a demand made of him under section 234.1 (2) C.C.

Arguing that there was no distinction between his legal situation and the one Mr. Brownridge found himself in back in 1972, Mr. Chromiak appealed his conviction to the Supreme Court of Canada.

The main issue, of course, was if the accused was detained within the meaning of section 2 (c) of the Bill of Rights, and the reasoning of the Supreme Court of Canada and its consequences should be of interest to police officers.

Firstly the Supreme Court of Canada explained that Mr. Brownridge was not simply accompanying a police officer in compliance with a demand under section 234 C.C., but reviewed that he had been arrested for impaired driving. At the time he demanded legal counsel he was under arrest and detained in cells. This fact by itself made the Chromiak case distinct from the Brownridge one. Mr. Chromiak was not arrested and had been issued an appearance notice for his refusal on the scene, and was sent home with a sober friend.

* Brownridge v. The Queen (1972) 7 C.C.C. (2d) 417

Chromiak v. The Queen

This left the Supreme Court to decide whether a demand for a breath sample causes the person,who is by law obliged to comply with that demand, to be detained within the meaning of the Bill of Rights. Furthermore,is there any distinction in this regard between a demand for a sample of breath at the roadside and one where the officer demands the suspected impaired driver to accompany him for the purpose of a breath analysis.

The seven Justices unanimously accepted the observations a Justice of this Court made in a dissenting judgement in the Brownridge decision. Though the opinion was a dissenting one in regards to its conclusion, the definition of "detention" it contained was considered to be accurate. The Criminal Code of Canada uses the words "detain" and "detention" in a number of sections and they are "consistently used in association with actual physical restraint". At minimum the restraint must be compulsory before it can be considered detention. The Justice had observed that to be detained means "to be held in custody". He had reasoned that in a lot of situations we are obliged to comply with directions a police officer is entitled to issue, particularly under provincial traffic laws, and decided that no distinction existed between such obligations and those imposed by a demand for a breath sample under section 234 C.C.

The Supreme Court of Canada concluded in this Chromiak judgment that the observations made regarding detention in the dissenting opinion in the Brownridge case are equally as pertinent to section 234.1(1) C.C. This means that in the absence of compulsory or actual physical restraint a suspected impaired driver is not "arrested or detained" when subjected to a demand for a sample of breath under section 234 or 234.1(1)C.C. Consequently the accused had not been deprived of his right "to retain and instruct counsel without delay" and had therefore no reasonable excuse for his failure to comply with the demand of the officer.

Appeal dismissed.
Conviction upheld.

Written by J. Post
March 1981

INVASION OF PRIVACY, PART IV 1. C.C.

What is a private communication?
Who is the "originator" of a private communication?
What is a "lawfully made" interception of a private communication?
Must the consent to an interception be voluntary?

Goldman v. The Queen (1980) 51 C.C.C. (2d) 1

Supreme Court of Canada

The Privacy Act under the Criminal Code creates an indictable offence for intercepting a private communication unless the interception was made with the consent of the originator or the intended receiver of the private communication.

The Code also stipulates that evidence obtained directly or indirectly as a result of an interception of a private communication is not admissible in evidence unless it was lawfully made OR the originator or intended receiver of the communication gives his express consent to such admission.

The Criminal Code defines a "private communication" as any oral or telecommunication where it is reasonable for the originator thereof (not the intended receiver) to expect that the communication will not be intercepted.

A Mr. D. was one of the alleged co-conspirators of the accused in the offence of possessing and distributing counterfeit U. S. money. D. was arrested in the States with such money in his possession. To make things better for him and his woman friend he co-operated with police in their investigation of the accused. After being brought to Canada he gave a written consent to police to intercept private communications between him and the accused. He then phoned the accused and met him later with a body-pack transmitter on him. Both communications were taped and the contents became the main evidence against the accused.

After Mr. D. rendered his services he disappeared.

The accused was acquitted at trial, then ordered to stand trial again by the Ontario Court of Appeal and he appealed that judgment to the Supreme Court of Canada. The arguments raised in this case are extremely interesting and the judgement of our highest Court settles a number of ambiguities about the interpretation of the invasion of privacy provisions.

Goldman v. The Queen

The Crown had taken the position that the private communications between D. and the accused were lawfully intercepted. Due to the consent by D. it was not an offence to intercept the communications and the interceptions were therefore lawful.

In the event the Court would find that a lawful interception is exclusively one that is judicially authorized, the Crown submitted that the communications between D. and the accused were not private. This as D. was the originator of them and he was fully aware that they were intercepted. If this was the case, the invasion of privacy provisions would not apply at all and the conversations should be evidence.

Defence counsel argued that the required consent to the interception had not been proved; furthermore that a lawfully made interception is a judicially authorized interception. This means, he said, that the only way the Crown could have the communications admitted in evidence was upon proof of express consent to such admission by Mr. D. Needless to say, such evidence was not available as D. had flown the coop.

The Supreme Court of Canada held that the originator of a private communication is not, as popular belief has it, the person who dialed the phone number, the one who arranged the meeting or the person who started the conversation. He may be the originator of a conversation, the meaning of which is quite distinct from a communication. A series of communications make up a conversation. A communication "involves the passing of thoughts, ideas, words or information from one person to another". He who utters these is the originator of the communication.

Therefore, whatever the accused said in the conversations with D. was a private communication of which the accused was the originator and Mr. D. the intended receiver.

Said the Supreme Court:

> "If a person with a reasonable expectation of privacy, speaking in an electronically intercepted conversation makes statements which the Crown seeks to use against him, he has, in my view as the originator of those statements, the protection of the privacy provisions of the Criminal Code because those statements constitute private communications upon his part and their admissibility at any subsequent trial will depend upon the provisions of Part IV.1 of the Criminal Code".

The Supreme Court also ruled that when the originator or the intended receiver of a private communication has consented to the interception, the interception is lawful and the evidence resulting therefrom may be admitted. A lawfully made interception is not exclusively one that is judicially authorized.

Goldman v. The Queen

In regards to the voluntariness of D's consent to the interception, the Court found that he was "a person of some recorded criminal reputation" who had been "persuaded by promise of leniency to cooperate with the police in the interception". If a statement had been obtained by these means, it would no doubt have been ruled inadmissible in evidence. The Court held, however, that Parliament had contemplated the kind of consent D. gave.

The Supreme Court said:

> "The consent given under s. 178.11 (2)(a) C.C. must be voluntary in the sense that it must be free from coercion. It must be made knowingly in that the consentor must be aware of the significance of his act and the use which the police may be able to make of the consent".

Therefore the voluntariness here differs considerably from that prerequisite to the admissibility of a statement. The mere consent given on account of promise of leniency or immunity of prosecution would not prevent admissibility of the intercepted communication in evidence.

Accused's appeal dismissed Conviction upheld.

Comment

Although there is now a judicial precedent binding on all Canadian Courts, one could have argued on about what was really intended by those who wrote and passed these enactments. For instance does this mean that the consent to intercept and the consent to the admissibility in evidence are equal? If so, one seems to be superfluous. Like in this case, if consent is obtained, the interception is lawful and the evidence admissible. Perhaps the only purpose served by the provision that the evidence of a communication may be admitted upon express consent, is to adduce such evidence where the interception was unlawful. It seems then that the only purpose consent to admission in evidence serves is where the interception was unlawfully made.

The Courts did not allude to this, but another argument could be advanced in support of the reasoning of the Supreme Court of Canada in regards to the meaning of the phrase, "lawfully made interceptions". The finding of the Court was very consistent with the interpretation of "lawful" in other provisions of criminal law. Anything that is not contrary to law is lawful but where Parliament only will permit something if the letter of the law has been followed, it will use the phrase "by law". Section 517 C.C. is a prime example of this. It provides that anyone who possesses property "by law" is for the purpose of theft the owner of that property. In the Scott* case the possessor of the property stolen was named as the owner in the information as he had possession by means

of a civil contract with the real owner. This, the Court held, made him the "lawful" possessor but not a possessor "by law". A possessor by law is a person who possesses something because of a specific provision in legislation that makes him the possessor, e. g. executor of an estate, a peace officer who has seized goods the law stipulates he can seize, etc.

* R. v. Scott 1970 3 C.C.C. 109

Written by John M. Post
March 1981

TO TELL THE TRUTH

DOUBLE JEOPARDY - PERJURY - CONTRADICTORY EVIDENCE

ISSUE ESTOPPEL

R. v. Gordon 3 W.W.R. [1980] 655
Alberta Queen's Bench

The Accused was tried by a Judge and Jury of having robbed a Mr. M. of a wallet and content, a jacket and a wrist watch. A Mr. B. was the companion of Mr. M. at the time of the alleged robbery, but nothing was taken from him. The Crown, of course, subpoenaed Mr. B. but he could not be located for service and the trial went ahead without him.

The accused testified that the items he was supposed to have taken from Mr. M. had been given to him by Mr. B. This aparently raised a reasonable doubt in the Jury's mind and the accused was acquitted.

Subsequently, Mr. B. was located and he could testify that the accused did rob Mr. M. and that he had not given the stolen articles to the accused. A charge of perjury was preferred against the accused and he was tried before a jury.

The defence raised the matter of double jeopardy and issue estoppel claiming that the accused was tried for a second time on the same facts in issue but simply in the guise of a different charge. In other words, the issues had been tried and determined in previous Court proceedings and trying them again would render the process a farce. The principle is known as Res judicata. Whether or not issue estoppel applies because of a violation of this rule is a question of law and has to be decided by the Judge. This reason for judgement is exclusively on this question and should be of interest particularly to criminal investigators.

Issue estoppel, an issue that effectively stops a proceeding, has not been heard of too often in criminal cases as it was doubtful if it applied to criminal law. In the latter part of 1979 the Supreme Court of Canada settled this ambiguity when it ruled unanimously that "issue estoppel is part of the criminal law of Canada".*

*(Gushue v. the Queen) 50 C.C.C. (2d) 417. Supreme Court of Canada December 1979.

R. v. Gordon

Whether issue estoppel applied in this case and would stop the proceedings against the accused for perjury, required the Judge to determine if the prerequisite conditions existed:

1. If one testifies during a trial and is consequently charged with perjury, he can only claim double jeopardy (if it is available) if he was the one being tried when he testified;

2. The heart of the dispute between the Crown and the accused was whether the accused robbed Mr. M. He testified to the heart of the matter and stated under oath that he did not rob Mr. M. In his trial for perjury, for the Crown to be successful, the same facts had to be proved as in his original trial - that is that the accused did rob Mr. M. If such is the case the accused is doubly jeoparidized in that the same matters and facts have to be tried again. This would be an issue that can stop the proceedings. (Had the accused testified and allegedly committed perjury regarding some peripheral point, rather than the heart of the dispute, he could be tried for perjury); and

3. If the evidence regarding the perjury was fresh and became available to the Crown since the original trial, then the accused could be tried for the perjury, in spite of the fact that his testimony that is alleged to be perjurous was to the heart of the criminal dispute.

The prerequisites mentioned in 1. and 2. existed, so the remaining question was whether the testimony and information that has to prove the accused a perjurer in this trial was available to the Crown at the original trial.

Evidence that was not available during the original trial includes evidence that did not exist at that time. For instance the accused may confess subsequent to his trial that he perjured himself. That was not the case here. The test to be applied to all other evidence to determine whether or not it was available at the original trial is whether or not "reasonable diligence was exercised" to secure it and make it available to the Court.

In this case the witness, Mr. B., could not be served with his subpoena. This does not mean that his evidence was not available. When that is the case the Crown is, as a matter of right, entitled to an adjournment. It had also been open to the Crown to enter a stay of proceedings when Mr. B could not be found, obtain a warrant for his arrest and seek all other appropriate remedies to secure his attendance. Therefore, the law does not consider that in a case such as this, the evidence was not available.

The facts in issue in the robbery trial were the very facts in issue in this trial for perjury; the evidence of Mr. B. was available and not fresh. The accused was therefore doubly jeopardized and the proceedings against him were stopped.

Accused acquitted.

R. v. Gordon

The Court recognized the extreme difficulties the Crown may experience when an accused testifies and wishes to rebut his evidence. If it cannot proceed with perjury subsequently the Crown must call its witnesses to counteract the accused's alleged false claims during the same trial. This may be extremely difficult where it cannot be anticipated what the accused's testimony will be. Particularly when he, in his testimony, lays the foundation for a defence of alibi. The Court expressed support for the much discussed and suggested rule that an accused is obliged to notify the Crown in advance of his trial, when he intends to raise an alibi.

Many legal minds do disagree with the reasoning in this judgement and argue that, in the first trial the dispute was whether the accused committed robbery, while in the second the issue was whether he gave false evidence, and did thereby mislead the Court. In other words, in the second trial the main issue in the first one (the accused's testimony to the heart of the dispute, that he did not rob Mr. M.) was only a means by which he committed perjury.

This also appears to be the opinion of the House of Lords*. Although it was held that the Crown can only prosecute a person once for an alleged delict, perjury was seen as an exception to this principle. The Lords expressed the opinion that a person "is not to be permitted to escape the consequences of having testified falsely at his trial".

Whether or not this is also the case in Canada, has not been decided by our Supreme Court. As will be explained below, our highest Court was deprived of making this decision in the Gushue case, supra.

The accused Gushue and one Mr. McDonald set out to commit a robbery. The victim was the proprietor of a taylor shop. The Crown alleged that the accused entered the store and shot and killed the victim, while his partner, McDonald, stayed outside or simply withdrew from the plan; at least that is what McDonald said in his testimony. The accused also testified and said that he was the one who withdrew from the criminal scheme and that it was McDonald who had entered the store. The accused was acquitted at the conclusion of his trial for non-capital murder.

*Director of Public Prosecutions v. Humphreys (1976) 2 All E.R. 497.

R. v. Gordon

Some four years later, while being questioned for other offences, the accused told police how he had been resisted by the taylor and that he had killed the man to overcome the resistance. As a consequence the accused was charged with robbery and perjury. The Provincial Court Judge refused to accept the accused's plea of guilty to perjury and held a preliminary inquiry during which the accused testified to have murdered the taylor. The Judge was of the opinion that the same issue, whether or not the accused murdered the taylor, had to be tried in the perjury case. He ruled that due to the acquittal on the murder charge, the issue could not be re-litigated.

The Crown persisted and with the consent of a County Court Judge, preferred an indictment against the accused for perjury and giving contradictory evidence; the former being based on his testimony during his trial for murder and the latter for the contradiction of that evidence and the evidence he gave during the preliminary inquiry. On his trial by Judge and jury the accused was acquitted of perjury for the same reason as the Provincial Court acquitted the accused. However, the accused was convicted of giving contradictory evidence.

Both the Crown and the accused appealed. The Crown disputed the acquittal of perjury and the accused his conviction for robbery (to which he pleaded guilty) and the conviction of giving contradictory evidence.

The Ontario Court of Appeal basically left matters as they were, but the justices commented that they did not see anything wrong with a conviction of perjury in these circumstances and would have ordered a new trial if it was not for the conviction of giving contradictory evidence. The Crown did not appeal that issue any further but the accused received leave to appeal his convictions for robbery and giving contradictory evidence to the Supreme Court of Canada. This then meant that not the same issue as in the Gordon and Humphrey cases, supra, was before the Supreme Court.

The accused pleaded that issue estoppel applied in this case. Firstly the Court reiterated that issue estoppel is part of the criminal law of Canada, and then addressed itself to the question whether it had any application to the two convictions of the accused in this case. It was decided that, in this case, it was not important whether the testimony was to the heart of the issue in the trial or not. The charge was giving contradictory evidence in regards to the same occurrence and not perjury. The Supreme Court held that it had one thing to consider: "did the Crown make an attempt to retry the accused". The Court found that this was not the case, therefore issue estoppel was excluded, and held consequently that:

> "-----issue estoppel cannot be founded on false evidence when the falsity is disclosed by subsequent evidence not available at the trial from which issue estoppel is alleged to arise".

R. v. Gordon

In respect to the acquittal of the accused on the charge of murder and his subsequent conviction of armed robbery, the defence argued that this was a matter of double jeopardy in this situation. It was made clear during the murder trial that the robber and murderer was one and the same person. It follows then, that if the accused was not the murderer (he was acquitted) he could not be the robber. Therefore, the same issue was tried during his robbery trial. The Supreme Court rejected this argument. There are all kinds of possibilities which may have led the jury to the accused's acquittal. To say that the jury acquitted the accused because he was not the robber is not the "only rational explanation of the verdict of the jury". It is therefore conjecture what the issues were for the jury. Not knowing this we cannot say if the accused was being tried again on the same issue. Robbery is not an included offence in murder and he was therefore not tried for the former offence during his murder trial.

Note:

It should be noted that the Gushue case does not negate the findings in the Gordon case by the Alberta Queen's Bench. The distinctions between the two cases in that in Gordon the charge was perjury in regards to the heart of the case. Furthermore, it was alleged that the accused Gordon lied when he testified and that Mr. B., the lost witness in the robbery trial, spoke the truth when he testified during Gordon's trial for perjury.

In Gushue, the accused was charged with giving contradictory evidence. The testimony came from one source both times and it was not necessary to prove during which proceedings his evidence was false.

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A case involving "knowingly giving false testimony" was dealt with by the B.C. Court of Appeal in Regina v. Moore*.

Moore was tried in Provincial Court for a driving offence. He testified that he had not been driving at the time of the alleged offence. He explained that he was a mere passenger and that his wife had been driving. As a result, the Crown preferred the following three charges against the accused:

1. perjury for testifying that he did not drive;

2. perjury for testifying that his wife had been driving and that he was a passenger; and

3. attempting to obstruct justice by "giving false testimony in a trial in the Provincial Court of B.C."

* R. v. Moore [1980] 4 W.W.R. 511

R. v. Gordon

A jury acquitted the accused on count 1 and 2 but convicted him of count 3. Both the Crown and the accused appealed the jury's decision. Only the accused's appeal was successful and the B.C. Court of Appeal ordered a new trial on count 3.

Somewhat aside from the topic, when the accused appeared for his new trial an argument immediately ensued. Defence counsel claimed that the accused was entitled to enter a plea while the Crown was of the opinion that the accused was not entitled to enter a plea on a directed new trial and that the Court must proceed on the basis of the plea entered at the original trial. The Judge presiding at the new trial allowed the accused to enter a plea and he, of course, entered the special plea of double jeopardy "autrefois acquit", which in essence means "I have been tried for and acquitted on the same facts and events and cannot be tried again". Counsel for the accused argued that the "same facts and events" had been tried during the perjury trial as all three counts arose from the same testimony. Needless to say that if the accused had been tried originally only for attempting to obstruct justice and was acquitted, then, if upon an appeal a new trial was ordered, he could not claim double jeopardy. The statutory provision for conducting a directed new trial upon appeal, simply supersedes the common law doctrine of double jeopardy.

This was not the case here. The accused claimed double jeopardy at his new trial for attempting to obstruct justice on account of his acquittals on the charges of perjury.

In any event, the judge presiding over the new trial allowed the special plea to be entered and held that it was available to the accused. The Crown appealed this decision.

Firstly, the B.C. Court of Appeal, dealing now with this case for the second time, held that although an accused is not required to enter a plea at his new trial he is not precluded from doing so. The Court reasoned that the accused may well wish to plead guilty at his new trial. Surely the Crown would not object to that.

In considering if the accused's acquittal of perjury would prevent a subsequent trial on attempting to obstruct justice, where both charges arise from the same facts and events the Court identified the ingredients to each of these charges in this case.

For perjury the Crown had to prove that the accused:

1. was a witness at a judicial proceeding;
2. while such a witness gave false evidence;
3. knew the evidence he gave was false; and
4. gave the false evidence with the intent to mislead the Court.

R. v. Gordon

For the allegation of attempting to obstruct justice by giving false evidence the Crown had to prove that the accused (1) wilfully attempted to obstruct the course of justice by means of (2) giving false testimony in a trial in the Provincial Court of B.C. The B.C. Court of Appeal held in regard to the availability of the plea of autrefois acquit that the issue was not necessarily the one claimed by that plea, but issue estoppel, and dealt with the alternative claim by the defence that the verdict by the jury was inconsistent. In view of the identical ingredients to be proved in the charges of perjury and that of attempting to obstruct justice it (the jury) was not entitled to find the accused innocent of perjury and guilty of attempting to obstruct justice by giving testimony that he knew to be false.

The Court of Appeal disagreed with the submission and observed that by virtue of Section 123C.C. perjury must be "corroborated in a material particular by evidence that implicates the accused", which is not a prerequisite to find guilt of obstructing justice.

In other words, the jury may well have found that there was no corroboration and was therefore precluded to return a verdict of guilty on the perjury charge. This meant that the verdicts of not guilty of perjury but guilty of obstructing justice were not inconsistent.

Crown's appeal allowed
Discharge on plea of autrefois acquit set aside
New trial to be conducted

Written by John M. Post
March 1981

CRIMINAL CHARGES AND DISCIPLINARY PROCEEDINGS ARISING FROM THE SAME FACTS

SUPREME COURT OF NOVA SCOTIA

Re Hartley and Fry et al Spearns v. Fry et al 102 D.L.R. (3d)
Martin v. Attorney General of Nova Scotia 110 D.L.R. (3d)

In both cases police officers were charged under the Criminal Code with common assault as well as "discreditable conduct" contrary to the Code of Discipline which is part of the regulations pursuant to the Nova Scotia Police Act. In each case the criminal charges and the disciplinary actions arose from the same facts and circumstances.

In the Hartley and Fry case the criminal and disciplinary charges were preferred simultaneously and the disciplinary hearing was commenced prior to the officers' trial in Provincial Court. Hartley and Fry petitioned the Supreme Court for an order prohibiting the disciplinary proceedings against them.

In Martin v Attorney General the constable was acquitted of the criminal charge and subsequently accused of the discipline offence. He admitted - the discreditable conduct and was fined 8 days pay. After this, Cst. Martin sought ancillary relief from the Supreme Court in respect to the disciplinary action to which he had been subjected.

The officers based their arguments on the fact that the Code of Discipline stipulates that where a police officer has been acquitted or convicted of an offence no disciplinary action shall be taken against him arising from the same facts and circumstances. Practically in the same breath, however, the Regulations state that this provision does not apply where the disciplinary proceedings relate to "separate and distinct issues". (Note that it does not say separate and distinct facts and circumstances)

In both cases the officers failed to persuade the Supreme Court that the disciplinary actions against them were illegal. The Justice who decided the Martin case agreed with his "brother" who presided over the Hartley and Fry

dispute. That portion of the reason for judgement in the Hartley and Fry case that goes to the heart of the issue, reads as follows:

> "It is my opinion that if the constables are acquitted of the criminal charges, they would nevertheless be subject to disciplinary procedures on charges under s. 1(a) of the Code of discipline as the disciplinary hearing relates to a separate and distinct issue from that tried in the criminal proceedings, the issue in the criminal proceeding being whether the constables committed an assault under the Criminal Code, while the issue in the discipline proceedings being whether the constables contravened the Code of Discipline by acting in a manner that was reasonably likely to bring discredit upon the reputation of the Halifax Police Force".

Written by John M. Post
March 1981

Regina v. Colet December 2, 1980
Supreme Court of Canada

> "The house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose ....."*

This famous dictum dating back to 1604 was cited by the Supreme Court of Canada on December 2nd, 1980 in its reason for judgement in Colet v the Queen. Mr. Colet was charged with two counts of attempted murder and two counts of intending to cause bodily harm. His intended victims were police officers.

Mr. Colet lived in "rudimentary shelter" and the municipality decided to take down his home and clean up the property. The accused made it known that he would protect his humble abode and it was apparently common knowledge that he to that end had armed himself with firearms and explosives.

To ensure safety for the Public Works personnel to carry out council's orders, police obtained a warrant pursuant to section 105(1)C.C., which authorized the seizure of all firearms and explosives from the accused. As neither the wording of the section nor that of the warrant included the power to search, police sought legal advice. Seemingly the experts were of the opinion that authorization to seize includes power to search.

When police arrived at the accused's home it was evident that he disagreed with the legal experts. Even waving the warrant, accompanied by a shouted message that this was an authorization by the Supreme Court to search his home, did not deter him from defending his property from the roof of his home. Luckily no one was hurt.

The accused, who was acquitted by a jury, was ordered to stand trial again by the B. C. Court of Appeal. He appealed the Court of Appeal decision to the Supreme Court of Canada.

The issue to be decided was whether the police officers were trespassers when they attempted to search the accused's home. To do this the Court had to first determine if authority to seize includes power to search.

The Crown's position in support of such a finding was that the Supreme Court of Canada in 1975 had decided in Eccles v. Bourque** that entering and searching a home on the strength of reasonable and probable grounds that the person for whom police had a warrant was in the home, was a situation where personal rights had to yield to public interest.

* 1604 7 E.R. 194 5 Co. Rep. 91a
** (1975) 2 S.C.R. 739

Regina v. Colet

The Supreme Court of Canada had added:

> ".....The criminal is not immune from arrest in his own home nor in the home of one of his friends..... Thus it will be seen that the broad basic principle of sanctity of the home is subject to the exception that upon proper demand the officials of the King may break down doors to arrest".

In addition the Crown drew the Court's attention to section 26(2) of the Federal Interpretation Act, which states:

> "Where power is given to a person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing".

In their reason for judgement the Justices of the Supreme Court of Canada made it clear that they were not reversing their views as they expressed them in Eccles v. Bourque. However, they found that the precedent did not afford authority for the proposition that public interest is paramount and the rights of the individual secondary. All sections in the Criminal Code were enacted in the public interest. This does not mean that therefore the rights of individuals can be violated in furtherance of the enforcement of criminal law, unless there are specific provisions to do so. In Eccles v.Bourque the Court's remarks were limited to incidents of entering a home against the tenant's will to search for a "fugitive from justice".

The Court reviewed nearly all provisions in law authorizing the seizure of property and found that in all cases a separate provision to search is made. It therefore rejected the suggestion that the Interpretation Act creates a dual authority from s. 105 C.C., that is to "seize" and to "search". Said the Supreme Court of Canada:

> ".....if Parliament intended to include the power "to search" in the provisions of S. 105(1), the failure to do so was a clear case of legislative oversight, but that power which has not been expressly conferred cannot be supplied by invoking the provisions of the Interpretation Act".

As a consequence the officers were trespassers.

Acquittals were restored.

Written by John M. Post
March 1981

STATEMENTS

Regina v. Coons 51 C.C.C. (2d) 388 1980
British Columbia Court of Appeal

Usually the objective of the Crown in adducing a statement made by the accused is to thereby prove the truth of its content. It is because of the possible acceptance of the statement as evidence of facts that the Courts have insisted on voluntariness on the part of the accused as a prerequisite to its admissibility in evidence. Statements extracted by coersion of some kind cannot be relied upon to be true.

It has happened, however, that statements made by a suspect, which were later ruled inadmissible in evidence, led investigators to the scene of a crime or the location of items related to the crime (known as subsequent facts). The Supreme Court of Canada reiterated in 1970* that where, by virtue of an inadmissible statement by an accused, facts are discovered those facts and those portions of that statement directly and strictly related to those facts must be admitted in evidence. This, of course, as the statement is then no longer the exclusive proof of its content. The discovery of the fact confirms the truth of the content of part of the confession that relates to that fact. In the Wray case, for instance, the confession was ruled inadmissible but that portion of it that led investigators to a rifle which Wray claimed to be, and which by a ballistic test proved to be the murder weapon, was admitted in evidence.

In this Coons case, the accused was convicted of the murder of a young woman, whose mutilated body was found behind a school building. The body had been found before the police questioned the accused. The accused did take police to the murder scene. The "walk" to the location was part of a confession by the accused that he had murdered the woman. The confession had been preceded by an inducement, and consequently the trial judge ruled it inadmissible in evidence. The Crown had submitted that, as in R. v. Wray, the "walk" and that portion of the confession related to it should be admitted in evidence. The trial judge had disagreed and held that this case was distinct from Wray and other similar cases** in that the scene, and the body was discovered by police without any assistance from the accused, and certainly not as a result of anything said to them. Crown counsel had argued that whatever the accused said during "the walk" was a part of the inadmissible confession that ought to be admitted in evidence as it proved the accused's knowledge of the location of the scene and the position of the body. In other words, it confirmed the truth of what the accused said and it was therefore safe to accept as a fact "that the accused was with the girl at the very place where her body was found".

* Regina v. Wray (1970) 4 C.C.C. 1)
** R. v. St. Lawrence [1949] 7 C.R. 464 and R. v. Hoase [1965] 2 C.C.C. 5

Regina v. Coons

The trial judge ruled that the same could be accomplished by allowing in evidence all of the actions and gestures by the accused when he led police to the known scene, rather than what he said.

Before the B. C. Court of Appeal the defence argued that one's statements and gestures are inseparable. As an example a nod by the accused was allowed in evidence, a gesture which is the equivalent to a verbal "yes". As interesting as these arguments are, the Court of Appeal held that the actions and gestures should not have been admitted in evidence. The Wray case "has restricted the application of the principle to evidence of subsequent facts and so much of the confession as strictly relates to them".

Conviction set aside. New trial ordered.

Written by John M. Post
March 1981

Admissibility of Private Communication
Undercover Agent in Cell Block

Regina v. Grant, Higgins and Sharma 48 C.C.C. (2d) 504
County Court, Vancouver, B. C.

A police officer assumed the role of a person charged with an offence and was placed in the lock-up with the accused. The officer, in his testimony at the trial of the accused, related conversation he overheard between the accused and others and direct conversation he had with the accused.

Defence counsel objected, submitting that all the conversations adduced in evidence were intercepted private communication for which no authorization was obtained.

In regards to the overheard conversations, it was argued that the definition of intercept "includes listen to". (s. 178.1 C.C.). Respecting the direct conversation between that officer and the accused the defence encouraged the Court to hold that an "intended receiver" is the person who the originator of private communication intended to receive it. In this case the accused intended a person who was charged with an offence to receive his communication but not a police officer. The pretence by the police officer therefore did amount to an interception, defence counsel argued.

The Court rejected both arguments. The conversations between the accused and other prisoners as well as that between the accused and the undercover officer were "not contaminated with an electromagnetic, acoustic, mechanical or other device".

Furthermore, in relation to the direct conversation between the accused and the officer, the Court held that there was no interception in spite of the fact that "the originator did not appreciate who the receiver truly was".

Communications admitted in evidence.

Written by John M. Post
March 1981

RECENT COMPLAINT

Regina v. Kulak 46 C.C.C.(ed) 30 Ontario Court of Appeal

The accused visited the apartment of a friend who had too much to drink to drive his fiancee home. The accused offered to drop the girl off at her place of residence on his way home and left with her at 3:00 A. M. Instead of driving her home he drove out of town on a highway. While driving at high speed, he ordered the girl to undress and commit various indecent acts. Whenever the girl hesitated he swerved to frighten her.

Finally the accused stopped at a remote area and after an unsuccessful attempt of sexual intercourse, he forced her to commit an act of fellatio (oral sex). During this the girl found a hammer on the floor of the car, and with the intent to kill him, she struck the accused on the head. The blow did not more than momentarily stun the accused. After another attempt of sexual intercourse he dropped the girl off at her home at 12:30 P. M.

The accused denied all allegations of involvement with the girl, other than driving her directly home from his friend's place and adduced evidence of a normal working day and being home with his wife.

The jury obviously did not believe the accused as they returned verdicts of guilty to charges of kidnapping, unlawful confinement and indecent assault.

The accused appealed these convictions and the most interesting ground of appeal was the trial judge's decision to admit in evidence two separate statements made by the complainant (the girl) to her room-mate and a priest under the exemption to the hearsay rule commonly referred to as "recent complaint".

When the complainant had arrived home after her alleged ordeal, her room-mate was home. She had noticed that the complainant was very upset and had asked to tell her what was wrong. At first the answer was that she could not tell anybody and that if she told "he" would kill her. The room-mate then asked: "Have you been raped?" and the complainant had replied: "Yes, I have". After this the complainant had told all to her room-mate.

After this the complainant had a sleep and then went for a walk, ending up in a church where she prayed. An elderly woman had noticed how upset she was and had advised the complainant to see the priest. She had told the priest the whole story and said to have a real feeling of guilt to have tried to kill a man.

Regina v. Kulak

The Crown had adduced the statements made to the room-mate and the priest to be admitted in evidence under the above mentioned exemption to the hearsay rule.

Some of the basic prerequisites to admissibility in evidence of "recent complaints" are:

1. the complaint must be made by the victim at a first and reasonable opportunity to do so;

2. the complaint must be voluntary in that it must not be extracted from the victim by probing or suggestive questions;

3. the complaint must relate to a crime which is emotionally so stressful that it may cause hysteria on the part of the victim, etc.

However, the rules are not stringent and particularly in relation to the voluntariness of the complaint a lot must be left to the discretion of the trial judge.

For instance, the relationship between the complainant and the confidant is important. A mother's probing, leading, suggestive and/or pressing questions may well render the first complaint inadmissible, while concerned questioning by a peer may not affect the voluntariness of the response. One of the most basic tests to determine if a first complaint may be admissible in evidence, is the question "If it was not for the questioning would there have been a statement?" If the answer is "no" the statement's admissibility may well be in jeopardy.

The trial judge in this case ruled that the complainant's answer to her room-mate's question: "Have you been raped?" was inadmissible. However, the statement the complainant made to the priest had been admitted in evidence. It was reasoned that a complaint must be made, not at the first opportunity, but the first reasonable opportunity. In regards to the statement to the priest being the second and not the first complaint, the trial Court held that there was a reasonable sequence to consider the statement to the room-mate and the priest a simple continuous complaint.

The Court of Appeal disagreed with the trial judge. Firstly, the question by the room-mate was not considered to be capable to preclude the complainant's response from the admissible evidence. The relationship between the room-mate and the complainant was not such that the question would put words in the mouth of the complainant or in any way compel or induce her to complain. Said the Court of Appeal:

> "Mere persuasion to account for an upset state does not render a statement made as a result of such persuasion inadmissible as a recent complaint."

Regina v. Kulak

In regards to the statement to the priest the Court of Appeal made it clear that where two statements are made by a complainant and the first one is ruled inadmissible, that does not give the second complaint the status of a first complaint for the purpose of this exemption to the hearsay rule.

There may be situations where there is a sequence of statements which can be considered a continuation of the first complaint. In such a circumstance the statements are not separate and distinct and may be admitted as one complaint although made at different times, locations and to different persons.

In this case, the Court held that the complaint to the room-mate and the priest were separate and distinct from one another.

The Court commented that if the statement to the room-mate had not been made, the complaint to the priest could have been considered for admissibility.

Accused's Appeal Allowed
New trial ordered.

Notes: This exemption to the hearsay rule is usually seen as something that favours the Crown only. It is often believed that the evidentiary value of a recent complaint is similar to that of an admission or a confession by an accused. These are actually misconceptions.

The history of the rule seems to indicate that it was introduced by the defence side of the criminal dispute. It was reasoned that a person who had been the victim of a crime such as related to sexual abuses, would complain of the crime at the first reasonable opportunity.

If the victim did not raise a "hue and cry" about it, while the opportunity was there, then possibly her testimony could not be believed. The absence of a "hue and cry" is a presumption against the complainant.

The recent complaint therefore is adduced and admitted to show consistency between the first and spontaneous complaint and the complainant's testimony, rather than to prove the truth of its content.

It is also viewed and referred to as corroborative evidence. This, of course, it is not. Corroborative evidence is evidence from an independent source, which does not only show that a crime was committed but is also inclined to show it was committed by the accused. Firstly, the recent complaint and the testimony came from the same source, the complainant, in spite of the fact that it is given by the recipient of the complaint. Secondly such a complaint does not necessarily have to show that the crime was committed by the accused.

Regina v. Kulak

The words "first reasonable opportunity" have received a fairly clear interpretation. Reasonable does not only refer to time but also relates to the person complained to. For instance a young girl may feel inhibited to complain to a strange man. In this regard, each situation has to be weighed on its own merits and all circumstances must be considered, such as the personality and character of the victim and the relationship or lack of it, with the persons to whom the complaint could have been lodged earlier. It could be said that the receiver of the complaint should be a sort of a confidant. Needless to say that a complainant can be selective in this regard and may forego opportunities to complain until she finds someone she can confide in. The word "reasonable" refers to the time lapse, the opportunities and the personalities.

It is not inconceivable that a victim will complain to a person unknown. This does not mean that the complaint cannot be adduced in evidence. Although it will no doubt lessen the weight of the evidence, the complainant may testify of the complaint. Conversely, if the complainant does not testify of her complaint the recipient of it cannot give it in evidence.

In most cases the complainants are women and children when they have been the victims of sexual abuses. The Courts have usually admitted the complaint if it was prompted by fear or hysteria on account of physical abuse. For a man to so react was inconsistent with his role and image. However, in 1966 a recent complaint by a 23 year old man was ruled admissible by the B. C. Court of Appeal.* He had been the victim of a sexual assault.

This leaves the obvious question about the admissibility of recent complaints in regard to alleged crimes other than sex offences. Also in this the B. C. Courts made history. Guided by Regina v. Hurst and Miller, a B. C. County Court Judge ruled in a case of unlawful confinement of a sixteen year old girl, that a recent complaint is admissible in evidence if the acts of the accused cause fear or hysteria on account of abuse.**

In this case, Regina v. Kulak, the Court held that the complaints to the roommate and the priest were separate and distinct. The case usually referred to when continuous first complaints are adduced, is Regina v. Volk.*** Volk was charged with gross indecency as a result of an act of fellatio. The girl hitched a ride on the highway immediately after the act and complained to the motorist who gave her a ride and drove her to an R.C.M.P. Detachment some distance away. The complaint to the motorist as well as the complaint to the police officer was admitted in evidence as a continuous first complaint.

* Regina v. Hurst and Miller 1966 3 C.C.C. 399
** Regina v. Frome 31 C.C.C. (2d) 332
*** Regina v. Volk 6 W.W.R. 29 1973

Written by John M. Post
March 1981

HEARSAY-CONTINUITY-RECORDS

Regina v. LAL 51 C.C.C. (2d) 336
British Columbia Court of Appeal

The accused, along with others, was arrested and booked in a holding unit at a police station.

A day previous to the arrest, a house was broken into and approximately $4,000.00 worth of jewelry and cash was taken. The arrest of the accused was unrelated to the break-in.

The investigation of the break-in led to the accused and his companions as one of them had lived at the home that was burglarized and knew where the valuables were kept. The accused and two others were charged and convicted of the breaking into the home. The accused appealed his conviction.

During the investigation a police officer had attended at the lock-up and requested access to the property taken from the accused by the booking officer. The envelope which contained the accused's property was found by comparing the number opposite the accused's name on the booking sheet with a corresponding number on an envelope. The envelope which bore the accused's name contained two new five dollar bills, the serial numbers of which were in sequence with similar bills in the teller's drawer, from which the victim of the break-in had received a sum of money just previous to the burglary.

During the accused's trial two of his companions testified. The one said that the accused was involved in and present during the break-in and the other said that the accused was not involved.

The trial judge held that the evidence of the accomplice who testified to the accused's involvement had been corroboratd by the evidence of the five dollar bills in the accused's possession. The finding that he was in possession of the bills is what the accused disputed.

The Crown had adduced the evidence of the money, by only calling the investigating officer. He had testified to have worked in the jail ten years ago and said about the procedure in respect of prisoners' property: "It has probably varied some since then".

The accused claimed that the evidence of his possession of the five dollar bills was hearsay and inadmissible.

Regina v. LAL

The B. C. Court of Appeal agreed with the accused and held that at best the investigator's evidence had proved that the bills were in the same building as the accused, and concluded:

> "The chain from the offence to the bills is complete but the continuity breaks down and does not continue to the appelant so as to link him to the offence".

The appeal was allowed and the accused acquitted.

Explanatory comments on the issue:

Generally, things conceived by one's own senses and personal acts may be attested to and are usually admissible in evidence. Where the reliability of those senses and personal credibility permits, our attestations may be proof of facts. One major means by which this reliability and credibility is tested is cross-examination. Needless to point out that cross-examination of a witness who cannot vouch that matters testified to are facts, would be an exercise in futility. Where a witness cannot vouch for the truth of those things testified to, the evidence is usually hearsay.

Unless there is an exception (there are more than thirty of them) the hearsay rule prohibits the admission of such evidence. In this case possession of the bills would link the accused to the offence he was charged with. The investigating officer's evidence in regards to his findings in the records of the jail was intended to result in a judicial inference that the accused did possess the money. This while the officer candidly conceded not to be too familiar with the procedures in the jail. He could not vouch for the fact that the bills were taken from the accused or even assure the Court that there were procedural safeguards that the property of prisoners did not get mixed up. The officer who booked the accused is the only one who may have been able to do so. His evidence would not be hearsay, capable of admission and could lead to the finding that the accused was in fact in possession of the five dollar bills.

The Court of Appeal suggested that if the Crown had presented in evidence the envelope in which the five dollar bills were found with a notation by the booking officer made at the time of the booking to say for instance: "I found the contents of this envelope on the person of (name of the accused) upon booking him on the (date of booking) "the envelope could be admitted to prove the truth of that statement.

At least it would have helped the Court to draw the inference the Crown suggested it could. In essence, the Crown suggested that the Court accept the jail's filing system without giving the defence any opportunity to scrutinize that system for its reliability and accuracy. Although the Canada Evidence Act provides some exceptions to the hearsay rule allowing facts to be proved by

means of records, the Court here had no opportunity to rule if the jail records would be admissible as none were presented.

If the Crown had called the booking officer, and he could not specifically remember booking the accused or what he found on him, then it may be expected that the rule regarding "recorded recollections of recent events" would apply. There are many things we routinely do in life. If it was not for records and diaries we could not attest to them. Yet notations may not bring back memories or details. The rule referred to, was established or at least confirmed in England in the early part of this century. A tramline was sued for injuries sustained by a passenger in a run-a-way tram car, the brakes of which failed while descending a slope. To rebut the allegation of negligence the company called their car inspector who had checked the tram car for safety, a short time before the accident. The man who checked a number of cars each day could not remember this specific inspection, but produced the inspection report which he used on the occasion of inspecting the car in question. He testified how he systematically works his way down the checklist on his inspections and would never tick anything off as safe unless it met the set standards. In other words the witness could vouch for the accuracy of the notations as he made them truthfully and at a time that he remembered the details. The Court held that such testimony rendered the notation proof of the truth of its content.

We may expect that the same would have applied if the booking officer had testified, provided, of course, that the Court found that the procedures followed made the record reliable.

Written by John M. Post
March 1981

CORPORATE CRIMINAL LIABILITY

Regina v. P. G. Marketplace and McIntosh. 51 C.C.C. (2d) 185
British Columbia Court of Appeal.

Mrs. B. went to the accused company and agreed to consign her car to the company which agreed to pay Mrs. B. a minimum of $4,300.00. The contract called for any funds received for the car over and above that amount to go to the company. Mr. M., a salesman and employee of the company, drew up the contract which was signed by a company director. The car was sold and when Mrs. B. came for her money she was told by Mr. M. that due to trade-ins and other disappointments the company could not give her more than $3,600.00. Bargaining brought this amount up to $3,700.00. The same director who approved the contract signed the cheque to Mrs. B. who subsequently discovered that the car had been sold for $4,800.00. The company was convicted of fraud and appealed the conviction.

The company did not deny any of the facts or that the transaction did not amount to fraud. It simply claimed that it was not criminally liable for acts committed by employees.

In 1969 the Ontario Court of Appeal ruled on the same issue* and did create a precedent which has been quoted and followed by many Canadian Courts. To the question put by the accused company the B. C. Court of Appeal quoted and agreed with the precedent which states:

> "... if an agent falls within a category which entitles the Court to hold that he is a vital organ of the body the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent render the company indictable by reason thereof."

Two things persuaded the B. C. Court of Appeal that Mr. M. was such an agent. Mrs. B. had exclusively dealt with Mr. M. who received proforma approval for the transactions from a senior official of the company. Secondly, the primary benefit of the fraud was to the company with only a secondary benefit to Mr. M. in the form of commission.

Conviction upheld.

* R. v. St. Lawrence Corp. Ltd. et al [1969] 3 C.C.C. 263

Written by John M. Post
March 1981

CONFESSIONS AND STATEMENTS

Regina v Reburn 55 C.C.C. (2d) 419
Alberta Court of Appeal September 1980

A police officer at a complaint desk received a telephone call from a man who claimed to be at the home to which an ambulance and police were on the way to attend a reported stabbing.

The caller confessed to be responsible for the stabbing. The police who in the meantime had arrived at the scene were made aware of the confession. The caller was instructed to leave via the front door and surrender to the officers at the scene who arrested the accused in accordance to and consistent with these arrangements.

The accused was acquitted of second degree murder. The Crown had declined to adduce any further evidence when the trial judge at the conclusion of a voir dire ruled the confession inadmissible as he was not satisfied beyond a reasonable doubt that it was the accused who made the confession. The judge had rejected to rule on the voluntariness of the confession, claiming that proof of the accused having made the statement is prerequisite to the issue of voluntariness.

The objective of presenting a statement by an accused in evidence, is to prove the truth of its content. Whether a statement is admissible in evidence is a point of law and the responsibility of the judiciary; whether the content of the statement can be accepted as fact is a point of fact, and the function of the jury.

The Alberta Court of Appeal held that the trial judge had been wrong. Upon examination of precedents on this issue the Court held that where a statement by the accused is adduced in evidence the trial judge must conduct a voir dire solely for the purpose of determining if the statement was made voluntarily. If the statement is found to have been given voluntarily, then if there is some evidence to be considered by the jury, it must be admitted in evidence.

The judge of the facts (jury or judge when he sits alone) determines whether the accused made the statement, if it is true or what weight it can be given. In other words whether the statement is evidence is a point of law, its evidentiary value is a point of fact. The statement should have been admitted if found to have been given voluntarily; whether the accused made it and if its content should be relied upon must be considered at the conclusion of the trial when deciding on the verdict.

A new trial was ordered.

Written by John M. Post
March 1981

Can a Peace Officer by his method of investigation become an accomplice in the commission of the crime?

The defence of entrapment.

Regina v. Ridge 51 C.C.C. (2d) 261
British Columbia Court of Appeal

The accused and one W. were associates in trafficking MDA. Police officers investigating this conspiracy availed themselves of the services of one B. He became involved in the conspiracy and purchased quantities of MDA from W. which were delivered by the accused. Police provided B. with the funds to make the purchases. He in turn supplied police with samples for the purpose of analysis of each shipment, and was allowed to keep the remainder and traffic it for his own benefit.

At the conclusion of his trial, at which B. and the officer who liaised with him testified, the accused was convicted of conspiracy and several counts of trafficking. He appealed these convictions claiming among other things that:

1. the jury had not been adequately instructed on the definition of accomplice;

2. the police officer's evidence required corroboration as he was an accomplice; and

3. the method of gathering evidence against him amounted to entrapment and consequently the Court proceedings leading to his convictions were an abuse of the process of the Court which should have resulted in a judicial stay of proceedings.

The trial judge had explained to the jury that an accomplice is a "participes criminis", (an accomplice). He had given an example but failed to explain the content of section 21, C. C. (parties to an offence).

The Court of Appeal found that the instructions must have been incomprehensible to a group of lay people and were therefore insufficient. There was no doubt that B. was an accomplice, but the trial judge had instructed that "it can be argued with great force" that the officer was an accomplice also.

It is well established in law that the evidence of an accomplice must be corroborated to be accepted as proof of claimed facts. Corroborative evidence must originate from an independent source which confirms the truth of the accomplice's testimony. Furthermore, an accomplice cannot corroborate the evidence of another accomplice.

Regina v. Ridge

The Crown had contended that the evidence of the officer had corroborated the evidence of B.. Defence counsel's position was, of course, that the officer's evidence required corroboration also if the Jury found that he was indeed an accomplice. If so, the evidence of both witnesses remained uncorroborated.

The Crown reminded the Court of the precedent* that a police officer who participates in an offence for the purpose of collecting evidence cannot be a true accomplice. This as the officer does not have the "mixed motives" a true accomplice may have which tends to render his testimony unreliable. An obvious motive is that the true accomplice may expect to be treated more leniently if his evidence supports the Crown.

The B. C. Court of Appeal agreed that the precedent applied in this case. Therefore the officer's evidence required no corroboration, was separate from B's testimony and sufficient to support the convictions of trafficking. In regards to the charge of conspiracy the conviction resulted mainly from the uncorroborated evidence given by B. and not from testimony by the officer. A new trial on the conspiracy charge was ordered therefore.

Entrapment

When evidence against an accused has been gathered by "calculated inveigling or persistent importuning"** and particularly where the accused would not have committed the offence had it not been for these questionable methods, the issue of entrapment may arise.

It is very questionable if the defence of entrapment is available in Canada. When it was found that an accused had been entrapped the Canadian Judiciary could remedy the situation by invoking a judicial stay of proceedings. This as such surreptitious methods justified Judges to exercise what was believed their inherent jurisdiction and duty to prevent the abuse of the process of their Courts.

In view of a decision by the Supreme Court of Canada in 1977*** it is not clear if Judges still have this remedy available to them. In the light of this the Court of Appeal held that "it was not persuaded" that the trial Judge could have given the Jury the option to find that the process of the Court was abused.

* Sneddon v. Stevenson [1967] 2 All E.R. 1277
** Regina v. Ormerod [1969] 4 C.C.C. 3 Supreme Court of Canada
*** Rourke v. The Queen 35 C.C. C. (2d) 129.

Regina v. Ridge

As interesting as these matters may be, the Court of Appeal did not have to decide on these issues. It held that if there was entrapment in this case, W. rather than the accused was the victim. The defence had claimed that the accused had been entrapped "vicariously" as W. was his agent. The Appeal Court responded that the evidence revealed that W. had persuaded the accused to enter into the arrangement rather than the other way around. Therefore, W. was not the accused's agent and vicarious entrapment did not apply.

All this resulted in dismissal of the accused's appeal against his convictions of trafficking.

The apparent improper arrangement which allowed B. to traffic profitably in drugs purchased with tax dollars, did not receive the rebuke from the Courts one may have expected. The Crown stressed that the drugs provided to B. had to be made available on the market. They were of such quantity that the lack of supply would have been noticed immediately, aroused suspicion and have jeopardized the gathering of evidence against the principals in this drug trafficking operation.

Shortly after handing down the decision in the Ridge case, three Justices of the B. C. Court of Appeal had to decide in Regina v. Amato* if in that case entrapment was a defence. Amato was persuaded by his employer to obtain some cocaine for a third party. The accused complied reluctantly. Shortly after the accused was approached by a police informer to purchase cocaine for him. Again the accused expressed not to be interested and only procured the narcotic on persistent persuasion. The third time the accused was approached by the informer and an undercover policeman. This time the accused's reluctance was overcome by threats that force would be used by their clients if he would not perform.

The accused was charged with trafficking for the second and third transaction. At his trial in Provincial Court he had raised the defence of entrapment and had drawn the attention of that Court to the definition of entrapment by the Chief Justice of the Supreme Court of Canada in minority and dissenting judgement:**

> "The problem which has caused judicial concern is the one which arises from the police instigated crime, where the police have gone beyond mere solicitation or mere decoy work and have actively organized a scheme of ensnarement, of entrapment, in order to prosecute the person so caught. In my opinion, it is only in that situation that it is proper to speak of entrapment and to consider what effect this should have on the prosecution of a person who has thus been drawn into the commission of an offence."

* 51 C.C.C. (2d) 401
** Regina v. Kirzner (1977) 38 C.C.C. (2d) 131

Regina v. Ridge

The trial judge had added that before one can speak of entrapment, it must be shown that had it not been for the instigation and ensnarement the accused would not have been involved in the crime. However, the trial judge had concluded that the evidence only supported the finding of "persistent solicitation" on the part of the informer and the police. The accused was convicted and appealed this decision.

The B. C. Court of Appeal agreed with the trial judge that the accused was not entrapped. They expressed the opinion that whether entrapment is available as a defence should be decided by the Supreme Court of Canada, or when the matter arises in B. C., by their Court when "it is composed of five members who can deal definitively with the problem".

Appeal by accused dismissed
Convictions upheld

Comment: Although this is strictly a prediction, a precedent by one of our Courts of superior jurisdiction, that entrapment is available as a defence seems inevitable. That is if the comments in passing by Justices and the tenor of the up-until-now dissenting judgements on this issue are any indication.

Some judges of the B. C. Provincial Court, in the absence of what they consider a binding decision, have already accepted entrapment as a defence.

One example of this is Regina v. Haukness [1976] 5 W.W.R. 420.

Written by John M. Post
March 1981

MAKING A DEAL!

Crown: "You plead guilty and consent to admissibility of intercepted communication and we will not ask for a jail sentence".

Question: Does the "deal" and consent after the interception affect admissibility of the communication in evidence?

Rosen v. The Queen 51 C.C.C. (2d) 65
Supreme Court of Canada

The accused and a number of other persons were charged with conspiracy to defraud the public by means of some manipulation of the stock market. Essential evidence was the private communications between the accused and his co-conspirators. Three of the co-conspirators went with their lawyers to police a few days prior to the trial and made a deal. They promised to plead guilty and testify to consent to the admissibility in evidence of all the intercepted communications to which they had been a party. The reciprocal part of the bargain was that the Crown would not seek a jail sentence. Everybody lived up to the agreement and the three were put on probation.

During the accused's trial the three co-conspirators testified as promised but conceded in cross-examination that they did so to live up to the terms of the bargain which they solely agreed to out of fear of going to jail. The accused who was convicted appealed arguing that the intercepted communication was inadmissible in evidence because:

(a) consent to admissibility was given after the interception;

(b) that such consent was intended by Parliament to be admissible only against the consenter and not against anyone else; and

(c) that such consent must be given freely and voluntarily, without a promise or threat.

In regards to the consent having to be given prior to the interception, the Supreme Court held that this is only the case where there is no authorization to intercept a private communication (178.11 (2)(a) C.C.). The consent to admission of an intercepted private communication can be given any time, and by virtue of the law of evidence, section 178.16 (1)(b) C.C. was designed for consent given after the interception. If it was given before, the interception would be lawful even without an authorization and the communication would be admissible in most circumstances.

Rosen v. The Queen

In regards to the second cause for appeal the defence raised an interesting argument. Historically the matter of admissibility of evidence against a person is a question of law to be decided by the judiciary. In this case, no law or judicial discretion is involved. The important question of admissibility of this damaging evidence against the accused was "upon the whim of a co-accused". Therefore, Parliament must have meant that a person may consent to damaging evidence to be admitted against himself only (after all a person may plead guilty if he wishes) but not against another person, said defence counsel.

The Supreme Court of Canada disagreed and held that section 178.16 (1) C.C. is unambiguous and needs no clarification. If Parliament had intended the consenter and the person against whom the evidence is admissible to be one and the same, it would have clearly said no.

Does the consent to admission in evidence of intercepted private communication have to withstand the test of voluntariness? The Supreme Court said that it does, but also held that there is a difference between this test and the one applied to determine the admissibility in evidence of a statement made to a person in authority. The latter is far more stringent for obvious reasons, while the voluntariness of the consent to admission of intercepted communications must be "in the sense that it may not be the result of coercion".

Said the Supreme Court:

> "It must be the conscious act of the consenter, freely performed for reasons of his own which appear to him to be sufficient. The consent will not be vitiated, however, because the motives for it may be selfish or even reprehensible".

Appeal by the accused dismissed.
Conviction upheld.

NOTE

The Supreme Court of Canada sat with "a full house". Only one of the nine Justices dissented. He was of the opinion that the consent can only result in the evidence of the communication to be admissible against the consenter. He also favoured that there is no distinction between the voluntariness prerequisite to the admissibility in evidence of statements to a person in authority and the voluntariness to be proven to hold that there was consent to the admission of intercepted private communication.

Written by John M. Post
March 1981

LEGAL TID-BITS

(Written by John M. Post)
March 1981

In County Court in New Westminster an accused who elected to testify was cross-examined by Crown Counsel. It became relevant whether or not the accused had marks on his arm and he was asked to bare same. Defence counsel took issue and argued that this was a violation of the right against self crimination.

The Court ruled it was no such violation and the accused was ordered to answer the Crown's question by complying.

(R. v. Wilson February 1979).

For some reason an information was found wanting and consequently quashed by the Court. The Crown proceeded with a new information. The charge was one which required certificates to be served on the accused by means of which essential ingredients to the offence charged are proved. The accused claimed that the certificates served on him prior to the quashing of the information could not be used to prove their content and that new certificates should have been issued and served. Not so, held a Vancouver Island County Court Judge. Apparently the quashing of the information does not invalidate the certificates.

(R. v. Miles December 1979).

A person was by deceitful means persuaded to purchase real estate. The money was placed in trust with a third party and returned to the purchaser when he detected the deceit. The vendor was charged with fraud although the purchaser had all his money returned to him. The Vancouver County Court ruled that parting with money on false information for some considerable period is a sufficient detriment to consider that the person who parted with that money was defrauded.

(R. v. Abramson, et. al. December 1979).

The B. C. Court of Appeal held that God has no granted rights nor any obligations and is therefore no person. As a consequence, communication with Him (prayer) is not private, and unauthorized interception of such communication does not render it inadmissible in evidence.

(R. v. Davie September 1980)

Hugging is a wonderful means of expressing one's affection for another. One hugger who went somewhat overboard in expressing himself by this means (the hug lasted 3 minutes) found himself charged with a criminal offence by the huggee. It was alleged that the unappreciated gesture amounted to "confinement". The B.C. Court of Appeal held that being hugged against your will does not amount to confinement.

(R. v. Calvin June 1980).

A man drove 90 - 100 km/p.h. through a residential area. It was dark and there was evidence of other vehicular traffic on the streets. Such driving, said the B. C. Court of Appeal, amounts to dangerous driving under the Criminal Code of Canada.

(R. v. Grube April 1980).

Section 383 of the Criminal Code creates a crime for secret transactions with an agent (this includes an employee) to the detriment of the agent's principal (this includes an employer). This includes secret commissions, payment for favours, issuing of false receipts for expense accounts, etc. A man was charged with corruptly offering a benefit to an agent in consideration for a favour which would be to the detriment of the agent's principal.

The B. C. Court of Appeal held that:

1. Nothing needs to be done by the agent to make the offence complete; and
2. the Crown need not show that an actual favour was granted the accused.

The Court held that the corrupt intention and the effort to influence or reward the actual favour required are sufficient to prove the offence.

(R. v. Costgate October 1979).

The Supreme Court of Canada has held that calling Crown Counsel corrupt may amount to Contempt of Court.

(R. v. Paul June 1980)

A company employee suspected of stealing from her employer was questioned by the company's accountant. In these circumstances the accountant may have been seen by the accused as a person who may influence the path of prosecution and would as such, be a person in authority. The B. C. Court of Appeal held that a voir dire must be held concerning the statement.

Sometimes a refusal to give a statement or explanation to police may be considered in assessing the accused's credibility. The B. C. Court of Appeal reiterated this but added that where the refusal results from instructions by counsel such consideration would be improper.

(R. v. Dase February 1980)

It has been held that where a suspected impaired driver had reasonable cause for believing that the outcome of an analysis of his breath could be inaccurate or unfair, he has a reasonable excuse to refuse to give a breath sample. A man who had been drinking since he drove his car, said that an analysis of his breath would be an inaccurate base from which to determine his blood-alcohol level at the time of driving.

Not so, said the B. C. Court of Appeal. Such consumption is at most "evidence to the contrary", capable of rebutting the statutory presumption that the blood alcohol levels at the time of analysis and driving were equal.

(R. v. Lawrence - February 1980)

An alleged impaired driver had been served with xeroxed copies of the original certificates of the B.T.A. tests. The officer who made the copies said he looked at the copies to see if they were alright but did not check them in detail. This was sufficient evidence to show that the accused was served with "true copies" said a Vancouver County Court Judge.

(R. v. Newman - February 1980)

When the accused was convicted of impaired driving the Crown sought a greater punishment due to one previous conviction. However, the second offence was committed on a date preceding the date on which the conviction for the first offence was entered. The accused apparently argued that this meant that when he committed the second offence he was still innocent of the first one and therefore no greater punishment could be imposed. A Vancouver County Court judge held that the prior conviction only has to be entered prior to the conviction for which greater punishment is sought

(R. v. Bentley Keighton - June 1980).

A person is not competent nor compellable to testify against his or her spouse. There are exceptions to this rule by statute (s.4(2) Canada Evidence Act) and at common law where the "liberty, health or person" of the witness was affected. A father did assault his six year old son in the presence of the mother, who charged her husband with assault. Defence counsel objected to the mother's testimony claiming that she was not a competent witness against her husband, as the offence charged was not included in s.4(2) of the Canada Evidence Act, nor was the alleged act one that had affected the "liberty, health or person" of the mother. The Courts held that the abuse by one parent on a child does affect the person, health or liberty of the other parent. "Would not a normal parent prefer to have themselves subjected to physical abuse rather than see their child suffer from the cruel acts of their spouse?". Furthermore, if the mother could not testify "there would be no way to vindicate the criminal law" in a case like this.

(Regina v. MacPherson 52 C.C.C. (2d) 547)

The accused was involved in an accident and went home, arriving there shortly before police. While the officer made a demand for a sample of breath, the accused took a glass of whiskey in his hand obviously with the intent to drink it. When the officer said he would take the glass the accused smashed it against the officer's hand.

The Courts held that it was the officer's duty to make the demand and that the accused's actions amounted to an attempt to obstruct the officer.

(B. C. Court of Appeal September 1980 R. v. Soltys)

When asked for breath samples a man is entitled to a telephone book, a telephone and a private area to contact counsel.

As long as the suspected impaired driver makes a sincere effort to contact counsel and there is enough time within the two hour statutory limit he must be allowed to continue those efforts.

Insisting on a sample of breath while the suspect is still trying to contact counsel within those conditions and limits, is unreasonable.

(B. C. Court of Appeal - December 12, 1980 R v. Sanderson)

When an item is proved to be a weapon, additional proof that it was carried concealed may lead to a criminal conviction. The criminal intent to be proved is not that the accused intended to conceal the weapon (a lead pipe in this case) but merely that he intended to put it in the place where it was concealed.

(B. C. Court of Appeal - September 24, 1980 R. v. Lemire)

The Supreme Court of Canada has held that the voluntariness prerequisite to the admissibility in evidence of a statement made by an accused to a person in authority goes beyond the mere absence of fear of prejudice or hope of advantage. Increased attempts to argue that such statements are involuntary for a sundry of reasons, are to be expected.

Can self induced drunkeness on the part of an accused render his statement involuntary?

The accused was not so drunk that she did not know what she was saying held the Court. In case of self induced intoxication where an otherwise voluntary statement has been made, the intoxication does not affect the voluntariness. However, the issue is whether, in such circumstances, the content of the statement is reliable to accept as proof of its content. To that end, it had to be determined if the accused had an "operating mind" to give her statement probative value.

(B. C. Court of Appeal Nov. 4 1980 (R v. Richard)

Driving without insurance and wrongful use of licence plates are offences of strict rather than absolute liability. Therefore an honest belief, based on reasonable and probable grounds that the manner of use in the circumstances was permissible, is a defence.

(B. C. Court of Appeal December 2, 1980 R. v. Blackburn)

An employee diverted to his own use money credits the company had with banks and customers thereby depriving his employer of the benefit of those credits. He was charged with theft of money. The accused argued that the Crown failed to prove he stole money. It was held that the deprivation was included in "anything" within the meaning of that word in s. 283(1)C.C. and furthermore that the money credits were "money" in exchange.

(B. C. Court of Appeal, November 20, 1980 Hardy v. The Queen)

If a suspected impaired driver consumes alcohol between the time of driving and the giving of breath samples, then what value has the evidence of the analyses? In such case the blood alcohol level at the time of analysis may not be assumed to be equal to that at the time of driving. The evidence of drinking since the driving is "evidence to the contrary" which destroys the well known presumption of equalization in s. 237(1)(c)C.C. However, a conviction may still result on the whole of the evidence.

(B. C. Court of Appeal, October 28, 1980, The Queen v. Kizan)

Police successfully applied for an authorization to intercept private communications between the accused and his co-accused. They failed to reveal in the application that the interception was to take place while the two shared a cell.

Although technically and formally all conditions of the law were complied with, the application was not "frank, full and fair". Such application must be made with scrupulous regard for obligations of the authorizing judge. The concealment of this information gave the trial judge a reason not to accept the authorization at face value.

A new trial was ordered.

(B. C. Court of Appeal, October 20, 1980, The Queen v. Gill)

The Criminal Code requires that each sample of breath be taken not less than 15 minutes apart and as soon as practicable after the alleged offence has occurred.

An accused claimed that where the two samples are taken 26 minutes apart, it means that the second sample was not taken as soon as practicable after the driving.

Not necessarily so, said the Court. The words of the law must be given their plain meaning. The delay was in the circumstances not unreasonable.

(B. C. Court of Appeal, September 29, 1980, The Queen v. Kaduk)

> "Where one of two or more persons with the knowledge and consent of the rest has anything in his possession, it shall be deemed to be in the custody and possession of each and all of them". s. 3(4)(b) C.C.

The accused was a passenger in a car. Another passenger threw stolen jewelry out the window when the car was stopped by police. The accused was convicted of possessing the stolen goods. He appealed claiming he did not possess the goods. In spite of the provision that knowledge and consent constitutes possesion, the Courts have held that the Crown must prove in addition that the accused had some measure of control over the goods and that his consent is more than a matter of "mere indifference or passive acquiescence". In the absence of such evidence the accused cannot be convicted.

(Ontario Court of Appeal - R v. Piaskoski - 52 C.C.C. (ed.) 316)

The accused was convicted of armed robbery and appealed. During his trial a statement was admitted in evidence which the accused made to a police officer. Apparently the officer was in a position to issue a traffic ticket to the accused and promised not to do so in return for the accused giving him information regarding the robbery. The accused claimed the statement was inadmissible while the Crown claimed the contrary arguing that the hope of advantage was in regards to the ticket and not the robbery. The Court responded that it is irrelevant what the hope of advantage is in relation to: as long as the statement was made in response thereto, it is inadmissible.

New trial ordered.

(B. C. Court of Appeal, February 16, 1981 The Queen v. Kalashnikoff)

In his defence to a charge of "over .08%" the accused adduced in evidence the breathalyzer manual which stipulates that an accuracy test requires the standard alcohol solution to be within 1 degree C. of the room temperature. The Crown adduced evidence of an accuracy test but the technician had no knowledge of the two temperatures.

The accused claimed that this raised a reasonable doubt of the accuracy of the breath analysis which in turn amounts to "evidence to the contrary" that the blood alcohol content at the time of driving and the analysis was the same. (s. 237 (1)(c) C.C.).

Not so, decided the Supreme Court of Canada. The law (s. 237 C.C.) had been complied with and the technician's certificate was proof of its content. The analysis resulted in readings of .15% and the evidence raised by the defence was insufficient "evidence to the contrary" to raise a reasonable doubt. Evidence to the contrary must show an inaccuracy of such a degree that there is doubt that the blood alcohol content of the accused was over the allowable amount of .08%.

(Regina v. Crosthwait 52 C.C.C. (2d) 129 May (1980)

The B. C. Court of Appeal also dealt with the meaning of "evidence to the contrary" in s. 237 (1)(c)C.C. The law states that the certificate of a technician is <u>proof</u> of the blood alcohol content unless there is evidence to the contrary. The Court held that even when there is <u>evidence</u> to the contrary with "probative value and cogency" the effect of the certificate remains <u>evidence</u> although, no longer <u>proof</u>. All the evidence in such case must be weighed and a conclusion of fact reached. The accused's appeal was dismissed.

(R. v. Mooney, November 1980)

Accused picked up two girls who testified that, on account of being threatened by accused with a knife, they engaged in sexual activities with him.

The accused said he had only placed, in the presence of the girls, a knife in the glove compartment to have it out of the way. He advanced the new "Papajohn" defence that he had an honest mistaken belief that the girls consented.

The Court held that "the defence was deprived of all sense of reality" in this case. This in spite of holding the view that where consent is obtained by "fear of bodily harm" rather than by "threats", it is more likely that the accused would be mistaken as to consent.

(The Queen v. Trottier B. C. Court of Appeal March 1981)

The accused, a "foolish and arrogant 18 year old", told a police officer in colourful terms that he would not blow when stopped and demanded to accompany and give a sample of breath. At the police station he again responded in no uncertain terms that no sample was forthcoming. He refused a third time when the breathalyzer was ready to receive his sample.

At his trial the accused testified that after the second refusal he had requested to phone counsel but was denied this right. As tenuous as his evidence was, the trial judge accepted it but convicted the accused. This by virtue of a B. C. binding precedent (R. v. Rowe 1973 12 C.C.C. (2d) 24) which establishes that once a person has refused, the offence is complete. In other words, before he asked for counsel he had already committed the offence of refusing.

The Appeal Court Judge agreed, but held that since the accused was not charged after the first or second refusal and the breathalyzer had been readied, the officers had obviously not taken the refusal of this foolish boy seriously. Therefore, the third refusal had to be considered in isolation. In view of the denial to obtain counsel the accused had a reasonable excuse to refuse giving the sample.

(Kostiniuk v. The Queen, New Westminster County Court February 1980)

A B. C. Municipal Constable made a misleading statement claiming that he was on annual leave while in fact he was not. Apparently to accommodate this falsehood, he omitted to carry out an administrative duty. As a consequence, he was convicted of a disciplinary default, to wit deceit, and received a one day suspension. He appealed this conviction and sentence to the B. C. Police Commission.

Form 3, by means of which disciplinary hearings under the B. C. Police Act are commenced, is analogous to an information in the procedures for summary conviction offences.

The Municipal Constable appealed on two grounds:

1. The form 3 was "duplicitous" as it alleged in one count, the making of a misleading statement and the failure of an administrative duty; and

2. The allegation failed to contain the essential words "wilfully and/or negligently".

The B. C. Police Commission unanimously dismissed the appeal and upheld the sentence as appropriate.

The content of form 3 was not found to be duplicitous. The constable was charged with one disciplinary default only - deceit. This was the gravamen of the charge and the misleading statement and the administrative omission were mere means by which this one default was committed.

In regards to the omission of the words wilfully and/or negligently, the Commission held that the constable was reasonably informed of the transactions against him. There was nothing in the format or wording of the form that inhibited the Constable from making a full defence or that jeopardized his right to a fair trial.

(Judge R. S. McQueen, Chairman B. C. Police Commission March 25, 1981).
