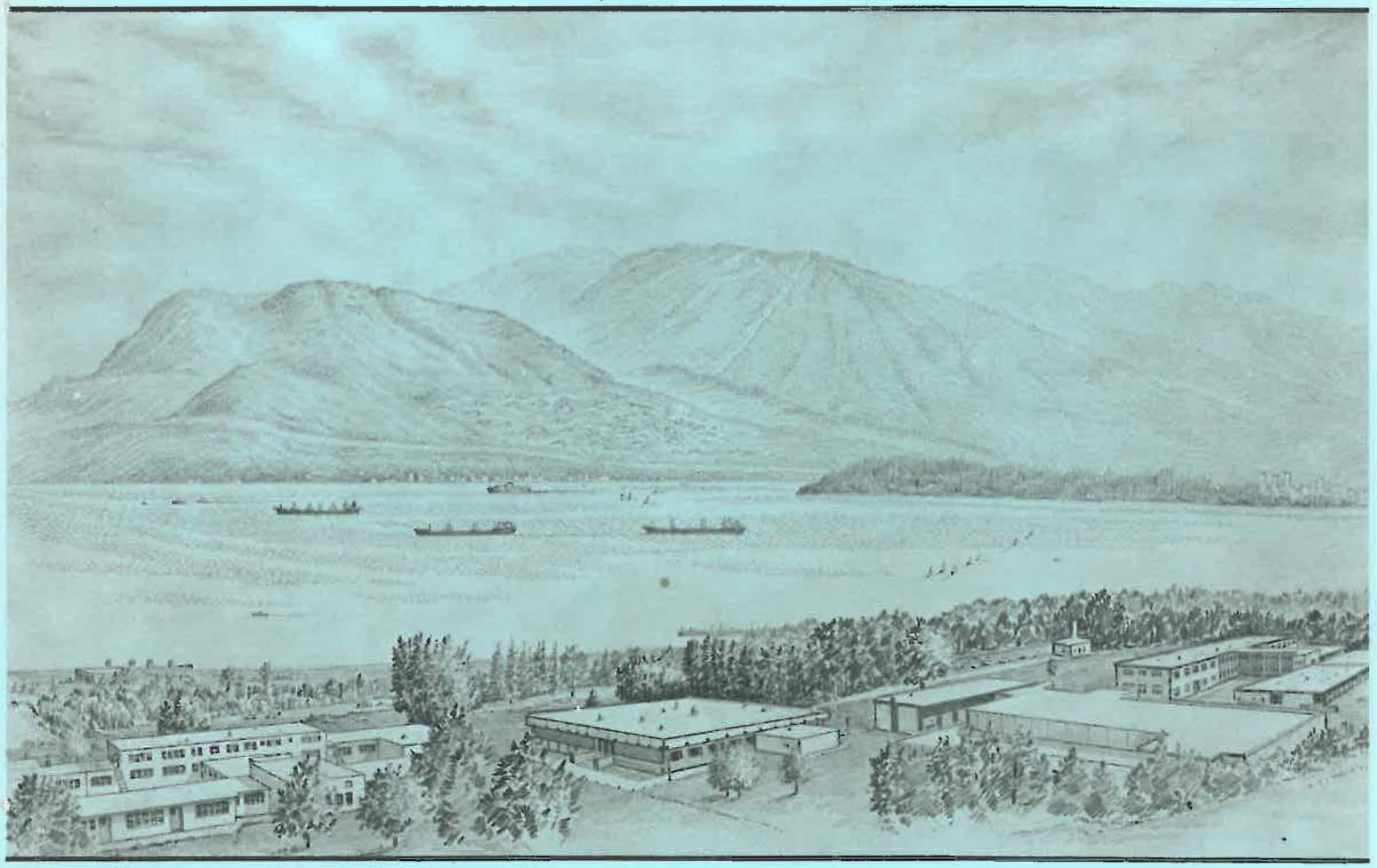
ISSUES OF INTEREST

VOLUME NO. 4



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82-01

ISSUES OF INTEREST

(VOLUME NO. 4)

January 25, 1982

TABLE OF CONTENTS

PAGE

PAGE

DRIVING UNDER SUSPENSION - MOTOR VEHICLE ACT PROSECUTIONS

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As you are aware, the Supreme Court of Canada (Boggs vs. The Queen, Feb. 3, 1981) ruled that Sec. 238(3) C.C. was ultra vires the Parliament of Canada. As a result, a period of time went by that no charges of Driving While Suspended were laid, simply because there was no charge available.

The Provincial Government stepped in and the Motor Vehicle Act was amended and charges of suspended driving are now included in the Motor Vehicle Act (Miscellaneous Statutes Amendment Act No. 2, 1981) effective 07 July 1981.

Reprinted here are the new applicable sections. Also, a new consideration, "industrial road" (reprinted from the Highway (Industrial) Act is included).

> "industrial road" means a road constructed or existing for transportation of natural resources, raw or manufactured, or transportation of machinery, materials or personnel by motor vehicle, and includes all bridges, wharves, log dumps and works forming a part of it, but does not include a public road, street, lane or other public communication; a privately owned road used by a farmer or resident for his own purposes; a road used exclusively for the construction and maintenance of electric power lines, telephone lines or pipe lines; roads and yards within manufacturing plants, industrial sites, storage yards, airports and construction sites; tote roads, cat roads and access roads;"

88.1 "(1) For the purpose of this section, 'industrial road' means an industrial road as defined in the Highway (Industrial) Act.

(2) A person who drives a motor vehicle on a highway or industrial road knowing that his driver's licence or his right to apply for or obtain a driver's licence is suspended under section 25, 83, 87, 88, 91, 94, or 214X commits an offence and is liable,

(a) on a first conviction, to a fine of not less than $300 and not more than $2,000 and to imprisonment for not less than 7 days and not more than 6 months, and

(b) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than $300 and not more than $2,000 and to imprisonment for not less than 14 days and not more than one year,

(3) Subject to subsection (4), where a person is charged with committing an offence under subsection (2) and a court admits a certificate of the superintendent or deputy superintendent stating that the driver's licence of the defendant or the defendant's right to apply for or obtain a driver's licence was suspended on the date of the alleged offence, it shall be proof that the defendant had knowledge of the suspension at the time of the alleged offence unless he establishes on the balance of probabilities that he did not know of the suspension.

(4) Where a person is charged with committing an offence under subsection (2) and the court finds that the defendant personally received a document containing notice of the suspension of his driver's licence or right to apply for or obtain a driver's licence before the time of the alleged offence under subsection (2), the defendant shall be conclusively deemed to have had knowledge of the suspension at the time of the alleged offence."

94.1 "(1) For the purpose of this section, "industrial road" means an industrial road as defined in the Highway (Industrial) Act.

(2) A person who drives a motor vehicle on a highway or industrial road while his driver's licence or right to apply for or obtain a driver's licence is suspended under section 82 or 92, commits an offence and is liable

(a) on a first conviction, to a fine of not less than $300 and not more than $2,000 and to imprisonment for not less than 7 days and not more than 6 months, and

(b) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than $300 and not more than $2,000, and to imprisonment for not less than 14 days and not more than one year.

(3) Subsection (2) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the suspension."

As you can see, it is still important for the police officer (crown) to ascertain the "**EXACT**" reason for the suspension.

Sec. 88.1 covers a driver who must have knowledge, as a prerequisite to conviction, that his licence was suspended for reasons of:

1. Sec. 25 - (Fails to comply with or meet medical standards);
2. Sec. 83 - (Various MVB Administration suspensions);
3. Sec. 87 - (Failure to satisfy judgment against him);
4. Sec. 88 - (Suspension by Superintendent);
5. Sec. 91 - (Failure to pay certain fees);
6. Sec. 94 - (Reciprocal agreement suspension);
7. Sec. 214X - (24 hour drinking/driving suspension).

If a person is suspended for any of the above reasons, then Sec. 88.1 is the appropriate section to charge. Sec. 88.1(3) and (4) set out how you can prove that a person knew of his suspension.

There are, however, other reasons for which a person's driver s licence might be suspended. These include a conviction for:

1. Sec. 88.1 - (Driving under suspension);
2. Sec. 94.1 - (Driving under suspension);
3. Sec. 233 C.C. - (Criminal Negligence in Operation of a Motor Vehicle, Hit & Run, Dangerous Driving);
4. Sec. 234 C.C. - (Impaired Driving);
5. Sec. 235 C.C. - (Refuse to give Breath Sample);
6. Sec. 236 C.C. - (Drive over 80 mg. Alcohol);
7. Sec. 203 C.C. - (Criminal Negligence Causing Death by use of a motor vehicle);
8. Sec. 204 C.C. - (Criminal Negligence causing bodily harm by use of a motor vehicle);
9. Sec. 82 M.V.A.- (Court ordered suspensions).

(Items #1 - 8 above are covered in Sec. 92 M.V.A.)

Where any of the above are the "EXACT" reason for a driver's suspension, than Sec. 94.1 must be used to charge.

You will notice that the penalty is the same for both charges but the method for proving "knowledge" is slightly different. (Compare Sec. 88.1(3) and (4) with Sec. 94.1(3).

Effective December 11, 1981, police now have the capability of obtaining specific information on suspensions from the "PARIS" system. When an enquiry is made regarding a suspension, the P.C. will be given the following information:

1. the start and end date of every suspension;
2. the exact section number under which the person was suspended;
3. a 'suggested' section number to charge the person.

This information comes directly from the Motor Vehicle Branch records. It is the same information that can be obtained by means of a phone call. This now allows us the opportunity to get information at times when the Motor Vehicle Branch is closed.

In the event of a "not guilty" plea, the Crown is still required to obtain a "certified extract" from the Motor Vehicle Branch for evidence. The CPIC message (at the present time) is not sufficient.

Although this system is a great aid to police, it is not infallible. In cases where there is any conflicting information, contact the Motor Vehicle Branch by phone. The clerks in the office will then go directly to the handwritten file, which is still the 'most accurate'.

ADDITIONAL AMENDMENTS

There are several amendments that you may not be aware of and are reprinted here to enable you to update your own Motor Vehicle Act. Sec. 61(1) is amended to substitute "$400" in place of $200 as the amount as to when a motor vehicle incident must be reported.

Sec. 92(1) is amended by adding "as it was before Sec. 57 of the Miscellaneous Statutes Amendment Act (No. 2), 1981 came into force or under Sec. 88.1 or 94.1 of this Act" after "subsection (9) of this section".

Sec. 92(9) and (10) is repealed.

Sec. 94.2:

> "Where a person who is convicted of an offence under Sec. 88.1 or 94.1 has previously been convicted of an offence under either section, that prior conviction shall be conclusively deemed to be a first conviction for the purpose of determining the punishment to which the person is subject under Sec. 88.1 or 94.1."

* * * * *

LIVING ON THE AVAILS OF PROSTITUTION OF ANOTHER PERSON

R. v. Murphy and Bieneck (1981) 60 C.C.C. (2d) 1
Alberta Court of Appeal

The evidence in this case revealed that the accused (Kevin Murphy) and the co-accused (Anne Bieneck) mutually agreed to live on the avails of Anne Bieneck's prostitution.

The Crown's case was simple and straight forward. It was conceded that for Anne to be a prostitute or for her to live on the funds thereby earned is not an offence known to law. However, the Crown claimed that by allowing Kevin to share those earnings to avail himself in whole or in part of a living, Anne aided and abetted Kevin in committing the offence created by s. 195(1)(j) C.C. (living on the avails of prostitution). Section 21 C.C. provides that anyone who aids another person to commit an offence is a party to the offence and is punishable like the person who actually committed it.

Furthermore the Crown claimed that the agreement between the two accused and their subsequent actions was sufficient to prove criminal conspiracy (s. 423 C.C.)

The lower Courts had disagreed with the Crown's contentions and the issues came before the Alberta Court of Appeal.

The defence position was that Anne was immune from the offence of living on the avails of her own prostitution and therefore could not be a party to the offence. This immunity also made it at law impossible for her to conspire to commit such an offence. Consequently, Murphy had conspired by himself, which is legally impossible.

On the question whether Anne Bieneck could be convicted by means of section 21 C.C. (aiding and abetting) the Court of Appeal held that:

> "Its operation must be confined to one who could, in law, have committed the offence charged." . . . ."It is senseless to invoke s. 21 to make a party to a crime a person for whom no such crime exists in law".

On the question if Anne Bieneck could be convicted of conspiring with Murphy for him to live on the avails of her prostitution, the Court of Appeal ruled also on this in her favor:

> "It is urged on behalf of Bieneck that the crime of conspiracy should not be bent to catch the victim of the substantive offence. Notwithstanding that the victim willingly and knowingly entered into an agreement to attain the criminal objective by which she was victimized, as did Bienick. A prostitute does not commit an offence under the Criminal Code by earning her living from sexual commerce and Parliament has not sought to penalize her for doing so. That statutory immunity, it is said, ought not to be eroded by a side wind".

On the question whether Murphy, on account of Bieneck's immunity, had not been capable in law to conspire with her to live on the avails of her prostitution, the Court of Appeal ruled in favor of the Crown. It, in essence, held that the fact that one of the two parties to the agreement has an immunity does not have any bearing on the question whether a conspiracy exists.

Comment: The finding that a person who cannot at law commit a certain offence cannot be a party to that offence, seems contrary to the intent of the law maker. For instance a woman cannot commit rape as the law defines this as an offence that can be committed by a male person only. However, women, by virtue of the provisions of section 21 C.C., have been convicted of that crime where it was shown that they aided and/or abetted the principal offender. One can hardly expect a woman who holds down the victim of a rape to accommodate the rapist to be immune from the offence of rape in those circumstances. Yet if one litterally applies the opinion of this Alberta Court to such a case, the accomplice would not commit any offence safe conspiracy where there was proof of prior agreement and planning.

It must be pointed out that in the hypothetical rape scene, the female offender is not the victim of the crime, while in the "living on the avails", she is. If this distinction caused the Alberta Court of Appeal to apply s. 21 of the Criminal Code the way they did, it is not clearly expressed in their reasons for judgement.

The relationship between the two accused is not very clearly described in this judgement, and the evidence may have been sufficiently clear that the issue did

not have to be addressed. The issue is the one raised in the B. C. Court of Appeal in R. v. Celebrity Enterprises Ltd. [1978] 2 W.W.R. 562 and refers to the parasitical element that must exist in the arrangement between the prostitute and the person who lives on the avails. After all, she must be the victim. Prostitutes have necessaries of life like anyone else. They purchase groceries, gasoline, pay rent, etc. When the merchant or landlord is aware that the person is a prostitute, does he or she then live on the avails of her prostitution? The answer has been "No". It is only when one takes advantage of the occupation the person plies. For instance, demanding exhorbitant rent knowing that the prostitute has problems acquiring accommodation, would render the landlord liable. The typical protection which is sold to or forced onto the prostitute by the pimp, is clearly one of the legislation's targets.

Assuming that in a marriage or living together arrangement both the man and the woman work and the woman voluntarily raises additional funds by prostituting herself so the rent and living expenses can be met, or the man can complete an education, it may, in B. C. at least, be viewed as not being a situation befitting the offence. The B. C. Court of Appeal held that "living on" connotes living parasitically.

* * * * *

RES GESTAE STATEMENTS

Klippenstein v. R. [1981] 3 W.W.R. 111
Alberta Court of Appeal

At 3:15 a.m., the accused and two others were found driving very slowly on the parking lot of a closed restaurant. Their pick-up truck (headlights doused) had come from behind a large garbage container where it was out of sight from the public road. "Jammed in" with them in the cab was a sledge-hammer, a crow bar, four pair of gloves and three flashlights.

They explained to have stopped to urinate. One said they had not had a chance to urinate, while the accused (Klippenstein) said they had urinated. All were convicted of possessing instruments suitable for house or safe-breaking, in circumstances giving rise to the inference that they were intended to be used for that purpose.

Klippenstein appealed his conviction and said that an inappropriate inference of guilt was drawn from the inconsistency between his explanation of their presence and that of his co-accused. The trial judge had suggested that this inconsistency made him doubt that the explanation given was the truth. The conclusion, the accused claimed, could only have resulted from an error in the application of the law on the part of the Court. It is well established in common law that a person's statement is only evidence related to him and not his co-accused. Here the Judge had used the statement of Klippenstein's co-accused to conclude that his (Klippenstein's) explanation of what they were doing on that parking lot was probably not true.

The Court of Appeal reviewed what had happened during the trial. Klippenstein's counsel had insisted that the explanation by his client was admitted. He waived the right to a voir dire and said that the statement was part of res gestae (so closely connected with a fact that it is part of that fact). He urged that a failure to admit the explanation would be unfair. On that basis, and agreeing that the explanatory statement was part of res gestae, the statement was admitted.

The Court of Appeal held that a voir dire must be held to consider the admissibility of a res gestae statement. However, the accused had explicitly waived his right to it. Furthermore a res gestae statement is distinct from other statements and becomes evidence against or in favour of all accused.

Accused's appeal dismissed.

* * * * *

SWEARING OF AN INFORMATION

Regina v. Pilcher and Broadberry [1981] 3 W.W.R. 455
Manitoba Provincial Court

Hundreds of informations are routinely sworn every day to commence criminal proceedings. An informant has a choice to swear that he "says" or has "reasonable and probable grounds to believe and does believe" what is alleged in the information. The former requires first-hand and personal knowledge of what is alleged and the latter, the self-explanatory prerequisite grounds.

In this case the informant was a police officer assigned to the Court. One of his functions was to swear informations. The defence called the officer to testify. He was found not to know anything of the case other than what was stated in the information.

The Court stressed that the oath of an informant must be beyond reproach. Although it is impossible for such an officer to have knowledge of all facts (or even most of them), he must, nonetheless, be satisfied that there is some evidence to support the charge. This can be derived from reliable reports made up by others in the course of their investigation.

The two accused were police officers accused of stealing firearms from the police department. A senior officer investigated the matter and discussed it with Crown Counsel who drafted the eleven count indictment. The senior officer and counsel simply handed the draft to the informant instructing him to have it typed and to swear to its content.

Merely reading what appears in an information is inadequate to "protect an accused person from frivolous or foundationless accusations". The lack of the reasonable and probable grounds for the informant to believe that the accused committed the crimes alleged, renders the information a nullity and invalid.

Information quashed.

* * * * *

STOLEN CREDIT CARD

R. v. Coleman [1981] 3 W.W.R. 572
Alberta Queen's Bench

Miss Coleman allegedly purchased clothing with a credit card which was stolen the previous day. As a consequence she was charged with unlawfully dealing with a credit card she knew was stolen (s. 301.1(e) C.C.) The Crown proved that she had possession of the card but failed to show that she used the card to make the purchase. This resulted in an acquittal.

The Crown proceeded again, this time charging the accused with possession of the card. She entered a plea of autrefois acquit (double jeopardy).

The Crown argued that the possession charge was an allegation of a separate and distinct offence (although it arose from the same circumstances). It maintained that the section 301.1(e) creates three offences, to wit: "possession of", "uses", and "deals in" a credit card one knows to be stolen (three verbs).

However, the French version of the section creates one offence only, to wit: "dispose" which means, "have in one's possession or make use of" (one verb). Since both languages confer equal authenticity, and as the French version favored the accused, the Court held that section 301.1(e) creates one offence only. This means that the section in English or French simply describes different means to commit this one offence.

In view of having been acquitted of this offence previously, the Court held that the accused was entitled to the plea of autrefois acquit.

* * * * *

SOLICITING FOR THE PURPOSE OF PROSTITUTION

PERSISTENCE OR PRESSURE

The Queen v. Whitter and The Queen v. Galjot
Supreme Court of Canada, December 1, 1981 (Not yet reported)

The circumstances in these two cases are identical. Ms. Whitter and Ms. Galjot were observed for a period of time and seen to approach several men on the streets of Vancouver. These periods ended by them being arrested after offering sexual services to an undercover police officer. The charges were soliciting a person in a public place for the purpose of prostitution.

In 1978, the Supreme Court of Canada ruled in the well known Hutt* case, that an element of "persistence and pressure" is included in the word "solicit". In these Whitter and Galjot cases, the Crown argued that the "cumulative effect" of approaching all these men, amounted to being persistent and pressing.

The Supreme Court of Canada observed that there was no evidence of what the conversation was between these unknown men and the accused . In spite of the fact that the Court considered it naive to assume that the accused wished to discuss "politics or other matters of social concern" the witnesses' approaches offered the Crown no assistance.

The Supreme Court held that each approach by the accused was an independent act. Thus, even if the Crown could show that each time the accused offered a sexual service for pay, it would not assist in proving "persistence or pressure". Said the Court:

> "At the most, the Crown has shown that the respondents may have been plying their trade energetically..."

In addition, the charges alleged in the words of the section that the accused solicited "a person". That person in both cases was the undercover officer and the evidence in either of them did not reveal that any persistence or pressure was applied.

Crown's Appeals Dismissed
Acquittals Upheld

Note: When these cases were decided by the B. C. Court of Appeal (which

* R. v. Hutt [1978] 2 S.C.R. 476, [1978] 2 W.W.R. 247.

had come to the same conclusion as the Supreme Court of Canada) there was one dissenting judgement. This Justice reasoned that the succession of approaches by the accused connected to one another by time and place, caused them to be one act of soliciting. He also expressed the view that it was Parliament's intent "to abate the social nuisance and inconvenience caused by the practice of soliciting for prostitution in public".

The Supreme Court of Canada considered this opinion, but concluded that the enactment gives no effect to such an intention. It said that if any change was desirable then "legislative action would be necessary".

In other words: "Don't come here again for a remedy for your social problems. As long as the law is worded the way it is now, we will give you the same answer as before. Persuade Parliament that you have a problem and ask them for an amendment to these laws".

* * * * *

IS A PRIVATE CAR A PUBLIC PLACE?

R. v. Figliuzzi [1981] 4 W.W.R. 595
Alberta Queen's Bench

In 1978 in the now famous Hutt* case, the Supreme Court of Canada "volunteered" their opinion on whether a private car on a public street is a public place. Ms. Hutt had entered the car of an undercover agent and had, while inside the car, offered sexual services for remuneration. The issue placed before the Supreme Court of Canada was the definition of soliciting. However, the Court offered an opinion on whether or not the alleged soliciting occurred in a public place. Said our highest Court:

> "I am most strongly of the opinion that this officer's automobile was not such a public place but was, on the other hand, a private place of which he had the sole control".

In this case, the accused Figliuzzi was charged with committing an indecent act in a public place (s. 169(a) C.C.). The entire act took place in the accused's car on a public street in view of at least one person who was using the street. The accused raised the argument that in view of the Hutt decision his car was a private place.

The Alberta Queen's Bench Justice was of the opinion that there was quite a distinction between the Hutt case and this case. In the soliciting incident, only words were exchanged. Visually, nothing offensive to the public occurred. The opinion given by the Supreme Court of Canada is limited to the facts of the Hutt case and not a precedent to say that the interior of a private car is not a public place irrespective of the circumstances. The Justice suggested that the Supreme Court of Canada's definition does not apply to offences like indecent acts, nudity, etc., where the act is observed by another person in a public place.

* * * * *

* R. v. Hutt [1978] 2 S.C.R. 476, [1978] 2 W.W.R. 247.

PROTECTION OF PRIVACY

Regina v. Monachen (1981) 60 C.C.C. (2d) 286
Ontario Court of Appeal

The accused had phoned the police station on two occasions and threatened to kill a certain police officer. All calls on the switchboard are taped and the recording was adduced in evidence to prove the accused "knowingly uttered a threat to cause death".

The accused argued that the communication was a private one as it was not reasonable to expect that a call to the police station will be intercepted (which includes to record).

The Court of Appeal disagreed and held that:

> "It was not reasonable to expect that the communications in question which threatened a police officer would not be listened to or recorded by any person other than the switchboard operator".

Since the communication was not private, the evidence of it was admissible without a transcript having been served on the accused in compliance with s. 178.16(4) C.C.

Crown's appeal allowed
Accused ordered to stand trial again.

Comment: What appears unique about this decision is that it was not considered reasonable for the originator of the communication to suspect that his communication would not be intercepted because he telephoned a police switchboard, but rather because of the gravity of its content. The Court actually said that since the accused phoned the police which is tasked with law enforcement, it was reasonable for him to expect that they, because of that mandate, would tape the communication.

If one carries this reasoning through, then, because of its duty and obligation, any person communicating messages related to crime ought to expect that police will intercept his communications if they are on to him. It seems not likely that this case can be seen as a precedent for such an interpretation of the "Invasion of Privacy" enactments, yet that premise is implied.

It would have been very useful if the Court had reasoned that, due to the emergency situations frequently reported to police on their switchboard and playback capability being so important to determine details necessary to respond, it ought to be reasonable for anyone to expect that calls to such a switchboard are recorded. In my view, that is not what the Court said.

* * * * *

HIT & RUN

R. v. Roche (unreported)
British Columbia Court of Appeal, November 20, 1981, CA 810305

The accused backed into another car; he stopped, had a conversation with the occupants of the other vehicle and drove off without identifying himself. There were no injuries.

The accused was convicted of hit and run (failing to give his name and address) under the Criminal Code. On appeal, the County Court ordered a new trial on a simple point of law. Section 233(3) C.C. in essence states that it may be presumed that a person intends to escape civil and criminal liability, when involved in an accident, he fails

1. to stop;
2. to give his name and address; and
3. to offer assistance where anyone is injured.

This suggests that when a person is involved in an accident in which no one is injured, he must both fail to stop and fail to give his name and address before it may be presumed that he had the intent to escape civil and criminal liability. The trial judge had considered that the intent was proved by the failure to give name and address only. This, in view of the above, the County Court Judge considered an error and that is why the new trial was ordered.

The Crown took this issue to the B. C. Court of Appeal and simply asked if the County Court Judge's opinion was the proper interpretation of s. 233(3) C.C. This Court reiterated that where an intent to escape civil and criminal liability is proved, any one of the failures (stopping, identifying oneself and offering assistance) is sufficient to find guilt of the offence created by s. 233(2) C.C. In 1972[1] this B. C. Court of Appeal said and in this case confirmed that:

> "The statutory duty is both to stop and give name and address and in addition, where any person is injured, to offer assistance".

Nevertheless, two of the three justices of the Court of Appeal agreed with the County Court Judge that to rely on the presumption of intent in 233(31) C.C. compliance with anyone of the duties negates the presumption.

[1][1972] 4 W.W.R. 129 R. v. Sture

The Court reasoned that subsections (2) and (3) of section 233 C.C. serve entirely different purposes and that the only similarity between them is the wording. The former creates the offence of hit and run and the latter provides the presumption of the intent prerequisite to conviction.

About the apparent inconsistency to give different interpretations to similar worded enactments the Court said:

> "This prima facie inconsistency disappears, however, in my opinion, on a comparison of the syntax[1] of two subsections. I think the correct meaning of subsection (2) is that Parliament intended an accused should be guilty of an offence unless all of the described statutory duties be performed, provided, of course, intent to escape liability is proved. On the other hand, I find no absurd, unintelligible or meaningless result when the word 'and' in subsection (3) is read conjunctively as prima facie it should be in accord with its usual normal meaning".

This means that the duties imposed by law on a driver involved in an accident are alternative to find guilt of hit and run, but conjunctive when we want to presume the intent to escape on account of failure to meet these duties.

Crown's appeal dismissed
Order for new trial upheld.

Note: The presumption of intent in subsection (3) of section 233 C.C. is not exhaustive. This means that the intent to escape can be proved by means other than this statutory presumption.

It is of interest that the Saskatchewan Court of Appeal dealt with the very same question in R. v. Adler[2]. This Court held that intent to escape civil and criminal liability may be presumed where a person fails to do any one of the things mentioned in section 233(3) C.C.

[1]The way in which words are put together to form phrases, clauses or sentences.

[2](1981) 59 C.C.C. (2d) 517.

Adler had been acquitted in Provincial Court of hit & run. He had collided with a car containing two occupants. Both were slightly injured. The accused stopped and remained at the scene. He did not come out of his pick-up truck and the injured parties were cared for by witnesses of the accident who also checked with the accused for injuries. Adler supplied, on request, some material to take care of the injured. The accused, who, no doubt, was under the influence of liquor, finally came out of his truck, leaned on the car he collided with and after saying "What do you figure"? walked home leaving his truck where it was.

In spite of finding in favor of the Crown on the interpretation of s. 233(3) C.C., the majority of the Court of Appeal refused to set aside the acquittal holding that there was in the words of section 233(3) C.C., "evidence to the contrary". This simply because:

> ". . . in leaving the scene of the accident, the appellant did not have the intent to escape civil and criminal liability".

It is not easy to pin down, but something does not seem legally "kosher" with the reasoning adopted here.

Assuming that section 233(3) C.C. had not been enacted, would drunkenness then have been capable of being a defence to hit & run? Only if the offence is one of "specific intent" as opposed to "general intent". This Court did not decide on that issue and simply held that the accused's inebriation was "evidence to the contrary" to presume that he left the scene and failed to identify himself and render assistance to the injured to escape civil and criminal liability.

Statutory presumptions do not shift the burden of proof on the accused in spite of what they appear to say, but seem to have been created to assist the Crown in meeting its burden to prove all elements of an offence beyond a reasonable doubt. In this case it appears to have done the opposite. If the offence of hit & run is one of general intent, drunkenness would not be a defence, but due to the presumption in s. 233(3) C.C. by the reasoning of this Court, it would be "evidence to the contrary" preventing intent from being presumed. If the views of the Saskatchewan Court of Appeal are correct, then considering that in the real world a very large percentage of the drivers that "run" when involved in an accident, do so because of inebriation, s. 233(3) C.C. is a presumption the Crown can do without.

* * * * *

REFUSING TO GIVE A SAMPLE OF BREATH

RIGHT TO COUNSEL

R. vs. Eddy (unreported)
County Court of Westminster, October 21, 81 Chilliwack Registry C.C. No. 214/81

The accused was encountered on the highway driving his car. He was weaving and displaying all symptoms of impairment. A proper demand was made of him and when the accused arrived at the breathalyzer he refused to give the sample until he had spoken to a lawyer.

He was given the use of a phone and privacy and in a matter of 25 minutes managed to place six calls, two to Vancouver (approximately 90 km. away) and four to local lawyers. The accused, according to his own testimony, requested advice from the police officers about the local lawyers, particularly which one they recommended he call. Needless to say, he was shown the list of lawyers in the phone book and no such recommendation was made.

At the conclusion of the 25 minutes the officers made a demand and informed the accused that failure to give a sample at this time would result in charges. As the accused refused to give a sample of breath until he had spoken to a lawyer, a charge of refusing was preferred and the accused was convicted. The Provincial Court Judge ruled at the conclusion of a trial that considering all the circumstances "every reasonable step was taken on this occasion to put you in touch with counsel". This meant that his failure to contact counsel could not serve as a "reasonable excuse" to refuse to give a breath sample, and the accused was convicted.

The accused appealed the conviction to this County Court, claiming that when the final demand was made of him to give a sample of his breath, he was still in the process of seeking legal advice. The "improper haste" of the officers prevented him from receiving counsel. His argument that the "now or never' demand was improper was based on the fact that therr was ample time left before the two-hour time period from the time of driving lapsed and that he was not stalling or procrastinating.

The accused, of course, relied heavily on the Supreme Court of Canada judgement in the well known Brownridge case[1], the relevant portion of which states:

> ". . . unless it is apparent that the accused person is not asserting his right to counsel bona fide, but is asserting such right for the purpose of delay or for some other improper reason, the denial of that right affords a 'reasonable excuse' for failing to provide a sample of his breath as required by the section".

This County Court Judge found, as many of his colleagues have, that there simply is "no definitive answer to what constitutes a reasonable length of time to contact counsel". However, with considerable sympathy to busy police officers who cannot afford to spend inordinate amounts of time waiting for a suspected impaired driver to contact counsel, the Court found in favor of the accused.

The Court said:

> "When a person is in custody and that person is facing possible criminal charges he is clearly entitled to contact counsel of his choice . . . The police investigation was not being thwarted in any manner by the appellant in further attempts to contact counsel. It follows therefore, that the police officers did not act reasonably in insisting upon the appellant taking a breath test at the time that they did while the appellant was still attempting to contact a lawyer".

Accused's appeal allowed
Acquittal directed

Comment: To the best of my knowledge, Brownridge was arrested for impaired driving and then the demand for a breath sample was made. The judgment was based on the interpretation of section 2(c)(ii) of the Bill of Rights, which stipulates that no law in Canada shall be construed or applied so as to deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay. The cases decided on the Brownridge precedent appear to be a mixture of situations where some

[1]Brownridge v. The Queen (1972) 7 C.C.C. (2d) 417 (S.C.C.)

suspected impaired drivers were arrested while others simply were demanded to accompany the officer and supply samples of breath for analyses.

It seems clear from judicial opinions that a person who is obligated to accompany is not under arrest or in custody. The offence of refusing is complete when he does refuse, wherever that is. The question then remains if a suspect "under demand" is detained. This very question was posed in the Supreme Court of Canada[1] in relation to the roadside test. The Court did not say that in this regard the roadside demand is distinct from the demand to accompany, but held that citizens are by statute and common law in many situations compelled to obey and follow the directions of authorities and that when complying with such direction does not mean that the person is detained.

If this argument was raised in a case like this one, where the accused was seemingly not under arrest, one wonders if the Court could hold that it is distinct from the Brownridge case.

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[1] Chromiak v. The Queen 49 C.C.C. (2d) 257
(A synopsis of that case may be found on page 3 of the first issue of this publication).

TRAFFIC VIOLATION REPORTS

R. and Van Mulligan (Not reported)
County Court of Vancouver, Vancouver Registry CC810496

According to the 1979 amendment to section 121 of the Motor Vehicle Act, only those who produce a B. C. driver's licence only be served with a T.V.R., and will be subject to the procedures described in the Motor Vehicle Act.

Mr. Van Mulligan was served a T.V.R. for driving without due care and attention when he rear ended a car that was stopped to turn left as soon as the oncoming traffic cleared. The T.V.R. was entered as an exhibit at the hearing to determine if the violation took place. The officer who issued and served the T.V.R. did not testify, but the details of the accident were given by the driver of the car that was struck by Van Mulligan.

The Justice of the Peace found that Van Mulligan did drive without due care and attention and an appeal was launched.

Mr. Van Mulligan argued that it was not proved that he produced a B. C. driver's licence. He said that the number on the exhibit (T.V.R.) was inadequate to infer that he had produced a B. C. Licence, and that, therefore, the Justice of the Peace, should not have assumed jurisdiction.

The County Court Judge held that proof that the alleged violator produced a B. C. driver's licence is "the starting point to founding jurisdiction for a T.V.R. hearing".

Holding that filing the T.V.R. as an exhibit with a B. C. driver's licence number displayed on it, was unable "to fill the gap created by failing to call the officer to prove this fact" (that Van Mulligan produced a B. C. driver's licence). Said the Court:

> "In my opinion that omission of the Crown to produce affirmative evidence of the demand for and production of a valid driver's licence creates a flaw in its case, the failure to establish jurisdiction in the traffic court to embark on a T.V.R. hearing".

Appeal allowed
Finding that violation was committed was set aside.

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JUDICIAL NOTICE OF RESULTS OF CONSUMPTION OF ALCOHOL

R. v. Trithardt (unreported)
County Court of Westminster, July 28 1981

The accused drove into a parked car. According to an experienced police officer attending at the scene, the accused was simply "drunk". He was convicted of impaired driving. There was apparently evidence that the accused was under the influence of half a bottle of whiskey.

The trial judge held that in today's society it was common knowledge what effect the consumption of alcohol has on a person. This knowledge, coupled with the large quantity of liquor consumed by the accused, permitted him to take judicial notice of the fact that such is "obviously more liquor than a person should consume if he is going to be working with any kind of machinery or operating any kind of vehicle".

The trial judge agreed that he could not take judicial notice in regards to the blood-alcohol content such consumption would result in, but could in regards to the condition of a person who drinks some 13.5 oz. of whiskey.

The accused appealed his conviction arguing that the trial judge could not take judicial notice as he did and should have made his conclusions on expert evidence on the issue.

The Crown raised an interesting argument to show that there was a precedent for the Judiciary to take such notice. An accused[1] who had taken "a good drink of vodka" after he drove, had claimed that this was evidence to the contrary to presume that his blood alcohol content at the time of analysis was the same as at the time of driving.

The B. C. Court of Appeal agreed with that accused saying:

> ". . . if the taking of that drink could have any effect whatever on the proportion of alcohol to blood, it must surely be to increase the proportion of alcohol in the blood after the time of the alleged offence and before the test".

This, submitted crown counsel, was a judicial notice of the effects of alcohol consumption on a person.

As in this case there was no indication what the effect of alcohol intake would be. The County Court held that the issue here was distinct from that in the Kazan[1] case.

Appeal Allowed
Verdict Set Aside

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[1] R. v. Kazan Court of Appeal CA 80091

IMPAIRED DRIVING AND FAILING TO GIVE SAMPLE

ADMISSIBILITY OF STATEMENT DENYING DRIVING ON CROSS EXAMINATION

R. v. Milne (Unreported)
County Court of Prince Rupert, September 4, 1981

The accused was charged with impaired driving and refusing to comply with a demand for a breath sample.

The accused and another occupant of the car testified that not the accused but the other occupant drove the car at the time.

As a consequence, the trial judge had a reasonable doubt if the accused was the driver and acquitted him. However, he held that the officer had reasonable and probable grounds to believe that the accused had committed the offence of impaired driving and therefore the demand was justifiable. This meant that the accused had no excuse to refuse giving a sample and he was convicted. The accused appealed.

The accused had, prior to the demand and after, denied driving. This, of course, was very important to determine if the officer had reasonable and probable grounds. The trial judge had, however, blocked this from being adduced in evidence.

Defence counsel was refused to bring out in cross examination the evidence of what the accused said to the officer before the arrest was effected. This, held the trial judge, would have adduced a self serving statement which had not been led by the Crown[1]. Although this is the law, there are exceptions to that rule. One is the statement a person makes at the time of arrest. It was simply important for the Court to know what was said between the accused and the officer when the accused was confronted with accusations. To deprive the defence from bringing this conversation out if the Crown does not, particularly in a case where it may determine if the officer had the requisite grounds to make the demand, is an error in law.

Conviction quashed
New trial ordered

Note: In the Graham case the accused was found to be in possesion of stolen jewelry. When asked at the scene about the goods, he said he had never seen them before. After a couple of hours in cells, he asked to speak to the detectives and gave them a statement the content of which

1 See R. v. Graham (1972) 7 C.C.C. (2d) 93

would make the accused's possession an innocent one. Crown counsel selected not to put this statement in evidence but defence counsel attempted to extract the statement when cross examining the detectives. Whether or not he could do so, or if the Crown was obliged to put the explanatory statement in evidence, ended up in the Supreme Court of Canada. This, particularly so, as the Crown relied on the doctrine of recent possession to prove that Graham knew that the goods he had in his possession were obtained by the commission of an indictable offence. An accurate description of the doctrine is that it is a common law presumption that someone who is in unexplained possession of goods recently stolen, did steal them or has knowledge that they were so obtained. In other words, when you are in possession of such goods, you either explain or may stand condemned.

Graham did explain and he argued therefore that either the Crown was obliged to adduce the evidence of his explanatory statement or he should have been able to introduce it through cross examination of the detectives. The Supreme Court of Canada disagreed with the accused and held that this would only be so if the statement was given contemporaneously to being found in possession. In the alternative, the accused could testify and give his explanation to the Court. The statement Graham made after two hours was self serving and given after time to possibly concoct an exculpatory explanation that then would be introduced in evidence by a person (detective in this case) who could only be cross examined on the fact that the statement was made rather than on the truth of its content.

This means that the Crown was only obligated to give the contemporaneous statement in which he claimed he never saw the goods before, but not his detailed statement a couple of hours later.

The exception to the general rule of evidence then is that a voluntary statement of an accused when first taxed with incriminating facts is vitally relevant to his reaction and ultimately to his guilt or innocence.

Another one of these exceptions is where a witness identifies an accused in Court and has made a previous identification of that person. The evidence surrounding that previous identification is subject to the same exception.

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CREDIT CARD

R. v. Costello (Unreported)
County Court of Vancouver (No. CC801422 June 5 1981)

Costello found a credit card which he simply placed on a shelf in his kitchen. When he ran short of funds while entertaining friends, the accused went home and picked up the card and used it to pay for his expenses for the rest of the evening. Hotel security officers apprehended the accused, who, when defending himself on a charge that he used a credit card he knew was obtained by means of an indictable offence, claimed that he had obtained the card innocently.

This Court agreed, but held that "obtaining" is not restricted to getting or gaining possession of something. When it comes to the criminal intent it includes what a person does with it. This, the Court said, was supported by the content of section 283(4) C.C. which stipulates that to prove theft, it is not important if something was not taken for the purpose of conversion or if it was in the lawful possession of a person when he converted it. The Court said that when the accused used the innocently obtained credit card he then obtained it by theft. "On the formation of this intent he crossed the threshold from innocent obtaining, to theft.

The accused's conviction was upheld.

Comment: In view of my comments on page 22 of our Volume No. 3, the findings of this Court are interesting. They seem more in line with the apparent intent of Parliament than the views expressed in R. v. Martin.

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PROCEDURE BY WAY OF INFORMATION AGAINST OWNER OF MOTOR VEHICLE THE DRIVER OF WHICH ALLEGEDLY VIOLATED A TRAFFIC RULE

Regina v. Levae (Unreported) Fort St. John Registry No. CC13/81
County Court of Cariboo September 21, 1981

The accused was charged under the provisions of section 76 of the B. C. Motor Vehicle Act that he was the owner of a car, the driver of which failed to yield the right-of-way. In spite of the fact that this is a violation of a traffic rule the Crown proceeded by means of an information and a summons in accordance with the provisions of the B. C. Offence Act.

At the commencement of trial the Judge held that the information was a nullity as the Crown should have proceeded via a Traffic Violation Report.

Upon appeal, the County Court, in essence, reasoned that the liability of the owner of a car with which a violation of the Motor Vehicle Act (and some other Acts and By-laws) is committed, is created by section 76 of the Act, which is in Part I.

The prohibition to proceed by information in the case of a traffic rule violation is in section 122 and refers to procedures prescribed in that section and those following, up to and including section 129. These sections are in Part III of the Act. It is well established in law that nothing is an offence unless the law specifically says it is. When a charge for an offence is preferred the person is charged under the penalty section, the section that creates the liability. Therefore, a person charged as the owner of a motor vehicle is charged under section 76 M.V.A. Except as specifically provided in section 127 M.V.A., the Offence Act and the procedures prescribed therein apply to all offences. This includes offences under section 76. Therefore, the Crown was obliged to proceed by way of information rather than by Traffic Violation Report.

Crown's Appeal Allowed

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ASSAULT - DEFENCE OF NECESSITY
PREVENTING WIFE FROM ALIGHTING WHILE DRIVING ALONG AT 60 M.P.H.

R. v. Morris 61 C.C.C. (2d) 163
Alberta Court of the Queen's Bench

The accused drove his intoxicated wife home at 1:00 a.m. While they were going along the highway the wife demanded to be returned to town. She wanted to tell police how displeased she was with the way they treated "Lillian". Lillian, who was prohibited for life from attending the tavern where Mrs. Morris managed to get in her drunken condition, had showed up anyway and every table she (Lillian) joined was cut off from service. This had resulted in protest by Mrs. Morris, police attendance and Lillian's removal.

To prevent his wife from stepping out of the truck while driving 60 M.P.H. and grabbing the steering wheel to make the necessary U-turn to return to town, the accused had put his spouse of 19 years and the mother of his five children in a headlock while driving the remaining miles home. This resulted in a charge of common assault.

The Court disbelieved the wife when she claimed she had been beaten several times while being driven home. It found that, allowing his wife to alight or walk back in the dark in her condition would have amounted to criminal negligence on the part of the accused had anything happened to her. Furthermore, she was his spouse and he was under a legal duty to provide the necessaries of life to her (s. 197 C.C.). Seeing her safely home in these circumstances "could" be a necessary of life said the Court.

Finally the Court explored the possible application of section 199 C.C. which stipulates:

> "Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life".

Said the Court:

> "To have allowed his wife to get out of the vehicle in her intoxicated condition could have endangered her life in contravention of the section".

In the emergency situation the accused found himself in, he could not assess the "nicety" of his legal position. He had to act and he did in good faith.

Accused Acquittal was Upheld.

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CAN A FEARFUL SUSPECT GIVE A VOLUNTARY STATEMENT?

R. v. Griffen (1981) 59 C.C.C. (2d) 506
Ontario High Court of Justice

The accused, charged with murdering his wife, gave four separate statements to police which the Crown sought to have admitted in evidence.

On the voir dire the accused did not claim that he was treated wrongly by police in any way. He testified that there had been no threats, promises or any improper, unreasonable or oppressive conduct on the part of the officers.

However, the accused claimed that he had wanted to be left alone, and had given the statements after he had been informed that his wife had succumbed to the wounds he inflicted on her. He claimed that from then on he feared that the officers would beat him to get information.

The defence argued that a statement given in these circumstances is as unsafe to rely on as a statement extracted by wrongdoing on the part of police. Voluntariness, it was submitted, must receive a subjective test, as it is the state of mind of the accused that determines it, and not simply the actions of others that may have affected it. In other words, the fear, regardless of its cause, renders the content of the statement unreliable.

The question the Court had to answer therefore, was whether the existence of the accused's fear rendered these statements inadmissible in evidence, in spite of the fact that the fear was not caused by anything the police officers did.

The Justice of this Court observed that the Canadian Judiciary seem divided on the issue. He suspected that Judges who view the rules of evidence regarding admissibility of statements to be "primarily" to prevent unreliable evidence from being admitted, would agree with the submissions made by the defence in this case. However, judges who view these rules primarily to "protect the integrity of the criminal justice system" would reject the defence arguments. The latter opinion is, no doubt, predominant in the Commonwealth, and has as a consequence that a statement will not be excluded unless there is wrongdoing on the part of the persons in authority.

After considerable legal soul searching the Court held that where a statement is made out of fear, that fear must be the result of acts on the part of the authorities.

The first statement the accused made was at the scene shortly after the murder took place. There was no problem with this statement and it was ruled admissible in evidence.

After eight hours of custody without being spoken to, the accused was questioned and made the other statements.

The Court found that the accused did fear that police would beat him if he gave no information. The hours of custody without being given any information had added to that fear the Court held. For that, police were responsible and therefore the statements, other than the one given at the scene, were inadmissible.

Comment: There was a lot more to the reasons for judgment than what shows in this synopsis. In his legal soul searching the Justice of the High Court of Justice seemed to remind himself that inconsistency in law results in injustice. Although the issues in the case are distinct from those in this Griffen case, the Justice seemed bothered by possibly being inconsistent with the precedent established in the Rothman[1] case. The major issue in that case was whether an undercover agent (who, needless to say, lied to the accused about who and what he was) is a person in authority even when the accused did not know when he made the statement to that agent, that he was a person and can effect the path of prosecution. The Supreme Court sat with a "full house", meaning that all nine Justices gave their opinions on the issue. Six of them agreed with each other and rendered a majority judgment, which, for the time being at least, is the law in Canada. These six Justices reiterated that whether or not a person is a person in authority in respect to the admissibility of a statement made to him or her depends on what the accused, at the time he made the statement, believed that person to be. Rothman believed the officer to be a fellow prisoner, who is hardly a person in authority. In other words, to determine the status of the person who received the statement, a subjective rather than an objective test must be applied. (As it may be interesting to understand the various judicial views of this issue, the dissenting reasons for judgment are explained below).

The Justice in this Griffen case (in view of the Rothman decision) considered if the belief of the accused determines whether or not the person to whom he made a statement is a person in authority, perhaps the same test

[1]Rothman v. The Queen (1981) 59 C.C.C. (2d) 30 S.C.C.

ought to be applied to determine voluntariness. In other words, if his fears were real (although not caused by anything the person(s) in authority did) the statement should not be allowed. With some apparent reluctance, this Justice rejected that reasoning seemingly for practical rather than for philosophical reasons.

Synopses of Dissenting Reasons for Judgment:

One Justice who gave a separate reason for judgment agreed with his six brothers in regards to the subjective test. He further suggested that statements made to a person in authority should not be admitted in evidence if an inducement by that person may render the statement untrue (note it must be the inducement that may make the content of the statement untrue and not a voluntary lie on the part of the accused) and/or if a person in authority, whether or not the accused knew he was such a person, has used such "shocking" methods to extract the statement that the Judiciary should disassociate themselves from such conduct to preserve the reputation of the justice system.

The two remaining Justices, dissenting, held that the statement should not be admissible in evidence by the application of an exclusionary rule. They observed that the accused had told police he wished to remain silent. He was then placed in cells with a person in authority, regardless of whether or not he knew who or what his cellmate was. In other words, the justice system employed tactics which amounted to tricks and lies, with the specific purpose "to subvert the accused's expressed decision to remain silent". These methods bring the system into such disrepute that the statement ought not to be admitted in evidence.

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Legal Tidbits

Milne v. The Queen (unreported) (1981) County Court of Westminster No. X80-5253.

The accused was involved in an accident at approximately 2:45 and he arrived at the police station at 2:58 for the purpose of analyzing samples of his breath. At 3:04 he requested to phone counsel and made contact with him at 3:22 for a 15 minute conversation. By this time the breathalyzer was in use and unavailable. As a consequence, the samples were taken at 4:11 and 4:28.

The accused claimed that the readings obtained were not proof of his blood-alcohol content at the time of driving as the samples were not taken "as soon as practicable" (section 237(1)(e)(ii) C.C.).

The County Court Judge applied the precedent set by the B. C. Court of Appeal in R. v. Carter 55 C.C.C. (2d) 405 which established that "as soon as practicable" means "as soon as feasible" and not "as soon as possible".

The delays were reasonable and justified.

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Joynt v. The Queen (unreported) (1981) County Court of Westminster No. X80-5499

The accused, convicted of over ".08%" appealed, claiming that the constable who operated the breathalyzer was not a "qualified technician". The designation by Attorney General of B. C. was put in the record but no evidence was adduced that the designation was published in the B. C. Gazette.

In many provinces these designations are gazetted, but in Ontario, Saskatchewan and British Columbia, they are not. Whether or not gazetting is required to validate the designation is not clear, although many Courts have held that gazetting is not essential. The B. C. Courts, including the Court of Appeal, have held that the fact of designation and not gazetting is essential.

Accused's appeal was dismissed

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Good Try!

Re Dozois and The Queen 61 C.C.C. (2d) 171
Ontario Court of Appeal

Dozois, when still having to serve 738 days of a 10 1/2 year sentence for various crimes including manslaughter, was gven a pass to attend a funeral. He failed to return and while unlawfully at large he committed crimes in California and was sentenced in California to serve a period of 3 years and 8 months. A year and a half later he was returned to Canada under the provisions of the Transfer of Offenders Act.

Dozois claimed that the time he served in the California gaol should count against the unserved portion of the sentence in Canada. The Court of Appeal rejected Dozois' views and held that the sentence handed down by the California Court must, for the purpose of release, mandatory supervision, parole or remission, be treated as though it was imposed by a Canadian Court.

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R. v. Thieriult 61 C.C.C. (2d) 175
County Court of Ontario

The accused lady walked into a bank, placed an empty paper bag in front of the teller and said: "Put the money in, this is no joke". The teller said, "You are at the wrong wicket", to which the accused responded, "I don't care". When charged with robbery she claimed that she had uttered no threat of any kind and that therefore her action did not amount to robbery.

The Judge agreed with the reasoning of a Provincial Court Judge in Victoria, B. C.[1], that any demand for money outside normal banking transactions includes "or else . . .".

However, being fully aware that from now on bank robbers may speak friendly and will not make any threats to escape a charge of robbery, the Judge said to have reasonable doubt whether the tone of the accused's demand included a threat. She was, therefore, acquitted of robbery but convicted of the lesser and included offence of theft over $200.

Comment: Perhaps subconsciously, some facetious consideration was given to the tone and consequences of demands made by the banks when exercising their claims on the goods and chattels of others. Although in a different way, some of these must sound far more threatening than the utterances of this lady.

[1] R. v. Ketrensky (1975) 24 C.C.C. (2d) 350

Wilfully Abandoning Child

R. v. Reedy (No.2) 60 C.C.C. (2d) 104
District Judge's Criminal Court - Ontario

The accused, a person apparently problemed with drug abuse, who had been "totalled" by glue sniffing and beer drinking the night before, was asked to babysit the three children of the couple he lived with. The children were 1, 2, and 3 years of age. The parents promised to be back in one hour but stayed away five hours. The accused became ill and phoned the place where the parents were and threatened to leave the children to go to the hospital. When the parents did not return after five hours, he carried out his threat.

The children left the house and one of them was killed by a car on a highway. The accused was charged under section 200 C.C., wth wilfully abandoning children under the age of 10 years.

The Court said that "wilful" means deliberate and purposeful conduct with recklessness and indifference to consequences of acts or omissions: in this case a complete and utter disregard for the safety of the children.

The Court acquitted the accused commenting that there was a duty on the parents who knew the accused's condition of health. They should have returned within the promised time. In view of the accused's state of health when he left the home, it could not be said that he wilfully left the children.

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Effect of Changing One's Mind After Refusing to Blow

Sagh v. R. [1981] 6 W.W.R. 370
Alberta Queen's Bench

The accused refused to give a sample of his breath as: "I didn't think I would have to blow cause I didn't have that much to drink". When he was told he would be held overnight the accused changed his mind and said, "Okay, I'll blow then". According to the accused, the response was: "We don't baby sit around here. We don't ask guys twice . . . . . You had your chance and blew it".

The accused was convicted of refusing to give a sample of breath. He appealed this conviction.

The Justice of the Queen's Bench observed that the evidence revealed that the refusal and the subsequent willingness to comply with the officer's demand was all part of one continuous conversation accompanied by an "uninterrupted flow of events". All this had to be considered in its entire context, or else the "true meaning of it is lost".

Although agreeing with precedents which state that there is no such thing as a final refusal and that the offence is complete when the refusal is uttered or conveyed, this Justice held that in view of his findings about "the flow of events", the refusal and the subsequent willingness to comply were all part of this one conversation. There was, therefore, no "unequivocal refusal".

Accused's appeal allowed
Conviction quashed

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