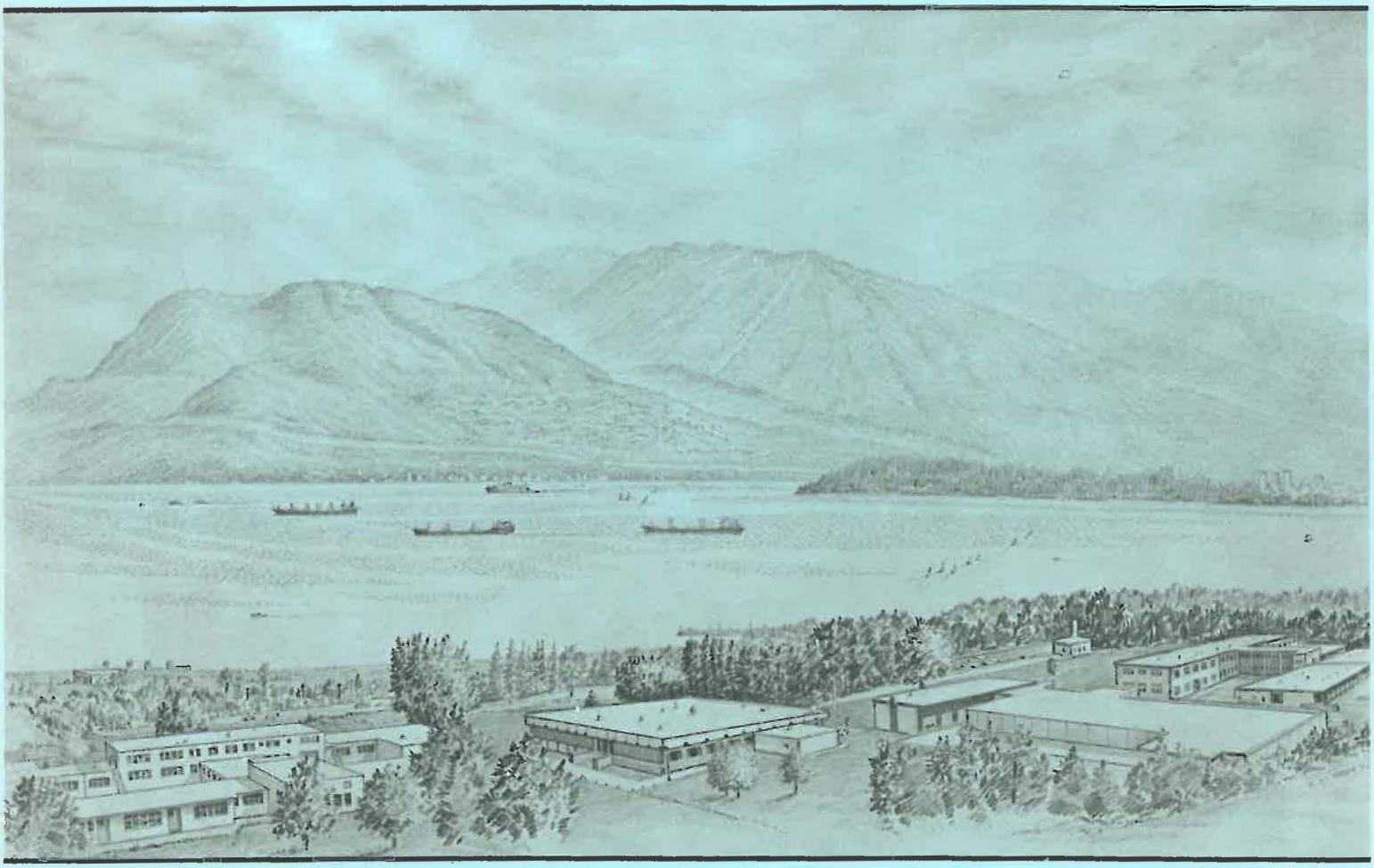
ISSUES OF INTEREST

VOLUME NO. 6



Written by John M. Post

05-21-82

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

ISSUES OF INTEREST

(VOLUME NO. 6)

(Written by John M. Post)
May 1982

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IS STREET-HAWKING BY PROSTITUTES WITHIN THE LEGISLATIVE JURISDICTION OF A PROVINCE AND A MUNICIPAL COUNCIL?

Regina v. Westendorp Alberta Court of Appeal, February 1982

On page 13 of Volume No. 5 of this publication we gave a synopsis of this case in the Alberta Provincial Court. The Assistant Chief Judge of that Court held that Ms. Westendorp would have been convicted of contravening a Calgary City by-law had that by-law been within the legislative jurisdiction of that city's council. Ms. Westendorp had approached a plain clothed police officer and offered him her company and all its privileges for a price.

The Provincial Court Judge had held that prohibiting such behaviour required criminal law sanctions within the purview of the Federal Government.

The Crown appealed Ms. Westendorp's acquittal to the Alberta Court of Appeal. Although this case may later be considered by the Supreme Court of Canada, the Alberta judicial views are particularly of interest to us as the City of Vancouver has embarked on an approach not unlike Calgary to curb the prostitute nuisance on the city streets.

At the courtesy of Mr. R. Vogel, B.C.'s Deputy Attorney General, we received a copy of the reasons for judgment of the Alberta Court of Appeal and here is its "pith and substance".

The Municipal Government Act of Alberta authorizes incorporated municipalities to make by-laws to prevent disorderly conduct in public places, including drunkenness, offensive language, fighting, etc. Considering this to be the enabling legislation, the Calgary council added to its "street by-law" a prohibition for anyone to remain on a street for the purpose of prostitution or to approach anyone on a street for such purpose. The by-law defines prostitution as the offering for sale or purchase of sexual services. Such service includes sexual activities for amusement, gratification, pleasure, stimulation or titillation of anyone. To prevent semantics in relation to the word "offering", the by-law stipulates it to include "the holding out, proposing, making available or expressing willingness to participate in" a sexual service with a person for payment.

The Crown claimed that "street hawking" for the purpose of prostitution is disorderly conduct in that it shocks the public sense of morality and is a public nuisance.

The Alberta Court of Appeal was very quick to point out that supression of public immorality is exclusively the legislative jurisdiction of the Federal Government. However, public nuisance falls squarily within the ambit of the provinces.

The preamble to the Calgary by-law in question states that activities by prostitutes "are a source of annoyance, and embarrassment" to the public and interfere with peaceful and free movement on public streets. The evidence adduced by the Crown of practices by prostitutes in plying their trade and prospective customers seeking those prepared to supply sexual services, showed that they indeed amounted to a public nuisance, which was defined as follows:

> ". . . a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken as the responsibility of the community at large".

An additional ingredient, which had also been met by the Crown during the trial of Ms. Westendorp, was to show that a representative cross section of the public or a class of persons, has been injuriously affected.

The Court hastened to add that proof of such public nuisance need not be adduced for every trial under the by-law, but was only necessary in this test case to prove validity of the by-law.

Since "public nuisance" is within the legislative jurisdiction of the provinces, the enabling legislation (Alberta's Municipal Government Act) was therefore valid and hence the Calgary by-law was intra vires that City's Council. "The wisdom or expediency or likely success" of the by-law is simply not any of the business of the judiciary, reiterated the Court of Appeal.

Having dealt with the aspect of validity, the Court had to decide if the by-law conflicts with the Federal law respecting prostitution to suppress public immorality. After all, if the Federal Government had wanted to prohibit the practices the by-law embraces, it could have done so. Sometimes it is very vague whether the provinces or the central government have jurisdiction. Furthermore, if the Federal Government creates law it is constitutionally entitled to enact and a province (also within its legislative jurisdiction) makes law that conflicts with it, then the "paramountcy doctrine" dictates that the Federal law prevails.

However, if provincial and federal law deal with the same matter, that does not mean that they are in legislative conflict with one another. Gambling, for instance, is a good example. By-laws dealing with "machines" and ages of players, etc. have been tested on the same grounds. On the surface, they seem to be covering grounds similar to the provisions of the Criminal Code. Another example is the provincial classification of movies (called censoring by many) and the Federal prohibition to publish obscene material. The Courts have held that these provisions can co-exist as they are provided for different purposes. The Federal Government can create criminal law for "peace order and good government", in matters such as these to deal with the evil aspects of it. The constitution (s. 92 of the B.N.A. Act) may well, for regulatory purposes, or to prevent public nuisances, give the provinces jurisdiction to legislate in the same area. The conflict then arises if both levels of government legislate in the same area for the same purpose, and the test to determine the validity of each is not "the similarity between the federal and provincial enactments but whether the provincial enactment is about a matter falling within the scope of s. 92" (B.N.A. Act).

Regulating traffic on its streets and preventing public nuisances is about such matters, held the Court of Appeal.

The defence had also submitted that the by-law was no more than "a colourable attempt to invade the area of criminal law". Although Calgary council had added an eloquent preamble to their by-law to pretend innocence to so invade, it is public knowledge that our largest Canadian centres are unhappy about the inability to deal with prostitution on the public streets due to inadequate provisions in the Criminal Code. It seems fair to say that the defence implied that the preamble and the other parts of the by-law which indicate an intent to remain within council's purview, are no more than camouflage. It was a colourable attempt to deal with the evil of prostitution and not a public nuisance. The Court agreed that it had to go to "the heart of the matter" to discover the "pith and substance" of the by-law. Colourable legislation smacks of dishonesty as the legislators, by analogy, come onto the property of a neighbour feigning a lawful purpose to do so, while in fact their intent is to trespass.

The Court of Appeal however concluded respecting the intent of the by-law:

> "In my view, it is about a nuisance on public streets in the City of Calgary, a matter of merely local nature and therefore a fit subject for legislation by a province".

Furthermore the Court held that:

> ". . . the by-law does not strike at prostitution as such; it does not seek to suppress the market for sexual favors; it seeks only to protect the citizens who use the streets from the invitation and embarrassment of being unwilling participants in the market".

Soliciting for the purpose of prostitution is a criminal offence, while the by-law creates the offence of accosting members of the public to carry on the business of prostitution. Considering the definition of each the objectives of the enactments are distinct though they overlap in the practice they prohibit.

The Court held that there was no difference in this kind of overlap and that of dangerous driving under the Criminal Code and careless driving in the provincial motor vehicle statutes.

Quoting from a judgment by the Supreme Court of Canada,* the Court of Appeal agreed that where the Parliament of Canada has not exercised some incidental power, that does not sterilize the provinces from doing so, as long as it is within their legislative competence. However, the provincial or the legislation by a municipality may only complement and not collide with federal law.

In this case, the Calgary by-law only overlapped with the Criminal Code provisions but does not collide with it.

Furthermore, when Parliament repealed the law that created an offence for a prostitute to be in a public place without being able to give an account of herself (vagrancy) it decided that such activity as "street hawking" is no longer a crime. If that section (175(1)(c)) would still have been effective, then it could have been said that the Calgary by-law was in conflict and collided with the criminal law.

Said the Court of Appeal, "In conclusion the by-law is authorized by provincial legislation", which is valid and operable.

Ms. Westendorp's acquittal was set aside and a conviction substituted.

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* Dupond v. The City of Montreal (1978) 19 N.R. 478

POSSESSION OF A WEAPON DANGEROUS TO THE PUBLIC PEACE
SELF PROTECTION

Regina v. Smith The County Court of Vancouver Island
December 3, 1981 (As Yet Unreported)

In 1978, a man was found to be in possession of a sheath knife in a Vancouver beer parlor. He explained that the knife was carried for self defence but found himself charged with possession of a weapon dangerous to the public peace. The County Court of Vancouver held that there was no evidence that the man would have used the knife "for a purpose other than provided in the self defence sections of the Criminal Code". The charge was dismissed.

In this case Mr. Smith had in his possession a starting pistol "which is a fair imitation of a .38 calibre revolver". He also explained that he carried this object in the event of trouble to "scare people off". In addition the accused carried an R.C.M.P. badge which he said he would use to prevent being beaten up. When the accused found himself charged with possession of a weapon dangerous to the public peace, he drew the Court's attention to the case involving the sheath knife claiming that there was no difference between that case and his situation.

The Judge of County Court of Vancouver Island expressed respect for his brother Judge who decided in the 1978 case, but obviously disagreed with him. Carrying the imitation revolver was for "a purpose calculated to give rise, in a threatening situation, where violence is pending or imminent, to an escalation or exacerbation of that violence . . ."

Mr. Smith was convicted

* * * * *

OBTAINING A U-DRIVE CAR BY A FALSE PRETENCE

Regina v. Gravelle The County Court of Vancouver Island June 1981 No. CR114 Port Alberni (As Yet Unreported)

The accused applied for a U-drive vehicle and although he gave his proper name and driver's licence particulars, he lied about his address and his place of employment. The car was to be back at 10:00 a.m. the following morning, but the accused drove to Calgary where he was apprehended nearly two weeks later. The U-drive company billed the accused for the time he had the car and that obligation was satisfied.

The Crown alleged that the accused obtained the car by means of a contract obtained by false pretences, the misrepresentations being his address and place of employment. If one does not return a U-drive car in accordance with the contract arrangement, it will not mean that one commits the crime of obtaining the car by a false pretence. Therefore, it was important to view the failure to return the car together with the misrepresentations to determine if the accused had the prerequisite knowledge and criminal intent. In addition, it was important to find that the car was let to the accused as a result of a reliance on the accuracy of the information the accused gave to the company.

There was no doubt that the information the accused supplied was false and that he had knowledge of that. Neither did the Court have any doubt that the accused intended to keep the car for an extended period of time, however, there was no evidence of any kind that the accused intended to gain or did gain property interest in the car.

The offence section (s. 405 C.C.) creates an offence for obtaining (by means of a false pretence) anything capable of being stolen. The predecessor to this section was differently worded and it was then requisite that the Crown did prove possession as well as the gaining of some interest in the property obtained.

This, the Court held, is considering the wording of the current definitions of theft and false pretences, no longer the case.

The accused was found guilty

* * * * *

BREAK, ENTER AND THEFT

DRUNKENNESS

Regina v. Robertson, County Court of Vancouver Island Nanaimo No. Cr. 2528 October 1981 (As Yet Unreported)

A store was broken into and an Indian mask was stolen. A few hours later the accused was picked up by police from his home and taken to the police station. There he saw a constable he was quite friendly with, and putting his arm around the constable's shoulder the accused asked, "to talk to his buddy".

The constable told the accused, "You better tell me where the mask is, you've been seen running from the store". This was in fact not true. The accused then took the Police to a spot next to his house and produced the face mask. No evidence was adduced that he confessed to police, but he had apologized to the store owner for breaking in. There was no further evidence to prove that the accused broke into the store. The charges against the accused were break-enter and theft and possession of stolen property. The Crown relied on the doctrine of recent possession to prove that he broke into the store.

In regards to the accused's sobriety, the officers testified that although they had no difficulty conversing with the accused, he was intoxicated when picked up and while at the police station. The accused testified that he is an alcoholic and could not remember breaking into the store.

Defence counsel drew the Court's attention to a case that seemed similar in circumstances and which was decided by the B. C. Court of Appeal in 1975*. The accused in that case was convicted of being in a dwelling house with the intent to commit an indictable offence therein. They, while in the home, had helped themselves to food, and their dinner was interrupted by police who testified that the accused were clearly drunk. The B. C. Court of Appeal held that in view of their intoxication the accused had been unable to form the specific intent to commit an indictable offence.

The County Court Judge held that this case was distinct from this Robertson case. However, even if he was satisfied that it was the accused who had broken into the store, he would hold that he was too drunk to form the specific intent to commit the theft.

* R. v. Johnnie and Namox Volume 30 of Criminal Reports (new series) Page 202

In regards to the possession charge, the Crown had only proved that the accused had knowledge of the location of the mask. In respect to the doctrine of recent possession, the Court held that in spite of the fact that the accused had not given an explanation, possession could not be found. He had simply said that he could not recall due to drunkenness.

Accused acquitted

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SERVING "A TRUE COPY" OF A CERTIFICATE

Regina v. MacKenzie, County Court of Yale, B. C., December 1981
No. 51/81 Penticton Registry - (As Yet Unreported)

At the conclusion of the breath tests the certificate of analyses was prepared and photocopied. Then the technician signed the original and the copy which was subsequently served on the accused.

Section 237(5) C.C. provides that such a certificate is not evidence unless a copy has been served on the accused. There are numerous cases to show that such a copy must be a "true copy". In this case of course, there was an argument to say that what was served on the accused was, because of the signature being added after the copying, not a true copy of the original certificate.

The Provincial Court Judge disagreed with the accused and convicted him of a charge of "over .08%".

The accused appealed unsuccessfully to the County Court advancing the same argument respecting the certificate. The Court was not necessarily enthusiastic about the practice followed by the technician and considered the trial judge's comment that there "was not one shred of evidence to indicate that the original was not the same" as the document served on the accused, an over statement. However, the County Court Judge held that there was evidence which allowed the trial judge to conclude that the document served on the accused was sufficient a copy of the original certificate to be within the meaning of "copy" as used in section 237 C.C.

Accused's appeal dismissed
Conviction upheld

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EVIDENCE OF IMPAIRMENT

Regina v. Langlois, County Court of Yale, B. C., December 1981
No. 205/81 Penticton Registry - (As Yet Unreported)

A police officer observed the accused in a store. He showed symptoms of impairment such as: "smell of liquor, unsteady stance, eyes watery and bloodshot". The accused was, when he drove away from the store, immediately stopped and additional symptoms such as difficulty to extract licence from the wallet and slurred speech were noted. The accused's breath was analyzed and a reading of .26 and .24 resulted. Due to the certificate filed in evidence (being the replacement of an earlier one) an argument ensued at trial if there was any evidence of the accused's blood alcohol level at the time. As the accused was charged with impaired driving and "over .08%", the trial judge held that since there was sufficient evidence to convict the accused of impaired driving without evidence of blood alcohol content, the question of whether the certificate had any evidentiary value was academic. He convicted the accused accordingly.

The conviction was appealed and the accused argued that for the following reasons there was insufficient evidence to convict him of impaired driving:

1. There were no sobriety tests conducted;

2. The Crown did not establish that the constable had sufficient experience to be considered an expert on degrees of impairment;

3. There was no evidence relating the symptoms of impairment to the intake of alcohol; and

4. There was no evidence of erratic driving.

This County Court Judge did not consider all of the above, points for validity. However, he held that a binding ruling by the B. C. Supreme Court established the proposition that:

> ". . . evidence of a blood alcohol content over .08% is circumstantial evidence that alcohol was ingested before the test, it cannot be evidence of impairment in the absence of expert opinion evidence as to what effect such a reading would have on the subject's ability to drive".*

* Re Quiring 6 Criminal Reports (3rd) 289

The Court held that without the certificate to show the excessive blood-alcohol content, there was in this case insufficient evidence to prove beyond a reasonable doubt that the accused drove while his ability to do so was impaired by alcohol.

As there was no evidence from an expert to interpret the readings obtained, it was also academic in the appeal proceedings whether the certificate was admissible or had any evidentiary value. If this Court held that it was admissible and was evidence of readings of .26 and .24% it would still not assist the Crown without the requisite expert evidence.

Accused's Appeal Allowed
Conviction Quashed

Comment

Please note that this Court did not hold that, without an analysis of breath and the interpretation of an expert, a charge of impaired driving cannot result in a conviction. The symptoms by themselves, and the investigation by the officer were simply inadequate to amount by themselves to proof beyond a reasonable doubt that the accused's ability to drive was impaired by alcohol.

* * * * *

USING FORCE TO TAKE FINGERPRINTS
TRESPASS TO PERSON

B. v. Baugh and Attorney General of B. C. 2 W.W.R. [1982] 126
British Columbia Supreme Court

"B" is a juvenile who was arrested for a delinquency which would be an indictable offence if he was an adult. While in lawful custody, Cst. Baugh used force to obtain B's fingerprints.

B sued Cst. Baugh and Attorney General claiming that the use of force was a trespass to his person. Before the trial started the following question of law had to be determined:

> "Is a peace officer in whose lawful custody is a juvenile charged with a delinquency under the J.D. Act which relates to an indictable offence under the Criminal Code authorized by the Identification of Criminals Act or by common law or otherwise to use reasonable force in taking the fingerprints of the said juvenile, where the juvenile does not consent to the taking of fingerprints?"

Firstly the Supreme Court Judge held that the provisions of the Identification of Criminals Act did not apply. B was charged with a delinquency and not an indictable offence. Therefore, there was no statutory provision authorizing the actions of the officer.

There are a number of cases which seem, on the surface, similar to this one but are distinct in that the issue was not whether the officer was civilly liable for the taking of the fingerprints by force, but if the evidence of the prints so taken was admissible.

In one B. C. Case* the Court of Appeal held that the taking of the fingerprints of juveniles was illegal but that the evidence was relevant and probative and therefore admissible.

Since Cst. Baugh lacked statutory authority to take the fingerprints by force the Court addressed itself to the question whether a common law authority for such action exists. Reviewing the law on this issue the Court concluded that no common law justifies the use of force to take fingerprints in spite of there being "much good sense in authorizing police

* R. v. A.N. [1978] 3 W.W.R. 222

officers to use reasonable force for the purpose of taking fingerprints of juveniles".

Said the Court:

> "Who can authorize the use of force in the taking of fingerprints? Certainly it should not be the courts. Parliament has already justified the use of force for the purpose of taking fingerprints from persons charged with indictable offences. Parliament can, if it is so advised, extend that authority to cases of juveniles who are in custody charged with having committed delinquencies".

The question of law quoted above, was answered in the negative.

* * * * *

MURDER

BY ACCIDENT OR MISTAKE MURDERING A PERSON OTHER THAN THE ONE THE PERPETRATOR INTENDED TO KILL

R. v. Droste 63 C.C.C. (2d) 418
Ontario Court of Appeal

The accused wanted to kill his wife and shared various plans to do so with co-workers. He told one colleague how he would put gasoline soaked rags under the seat of his car and when out with his wife, drive into an abutment. He then would hit his wife over the head rendering her unconscious and set fire to the car. He told how he had filled a pipe with zinc to hit his wife with.

An accident occurred involving the accused, his wife and two children, the circumstances of which were very similar to the plan the accused revealed to his co-worker. The accused did not manage to knock his wife unconscious and both escaped from the burning car. The couple's two children in the back seat were not so fortunate and lost their lives in the incident. The accused was convicted on two counts of first degree murder: this in spite of his testimony that he did not intend to kill his wife and did not tell his co-worker of any such plan.

The trial judge had instructed the jury that if they found that at the time the accused caused the death of his children, he intended to kill his wife, then second degree murder had been proved. In addition, if they were satisfied beyond a reasonable doubt that the intention to murder his wife was planned and deliberate, then the murder of the children was first degree murder.

In other words, the trial judge combined sections 212(b) and 214(2) of the Criminal Code to define first degree murder. He, in essence, held that planned and deliberate murder does not have to be in relation to the person the murderer intended to kill.

This, the accused claimed, was erroneous in law.

The Ontario Court of Appeal agreed with the trial judge and said:

> "We are also of the view that the transference of a planned and deliberate intention to kill one person to the actual victim is in accord with the general principles of the criminal law".

What is punishable as first degree murder is the planning and the deliberate killing of a human being even if by accident or mistake the victim is a person other than the one the perpetrator intended to kill.

Accused's appeal dismissed.
Convictions of first degree murder upheld.

Note: Leave to appeal this decision to the Supreme Court of Canada was granted last December (1981).

Comment

What the Ontario Court of Appeal held seems uncomplicated. It simply said what makes a murder first degree murder is to kill another human being having planned and committed the murder deliberately whether or not the person killed was the intended victim. That, the Court held, was consistent with the principles of criminal law and that opinion seems to make a lot of sense.

Defence counsel's objective apparently was to show that by virtue of section 222(b), that if the accused committed murder, it was second degree murder. After all, he planned to murder his wife and not his children.

There seems to be a third alternative in these circumstances, if this does run afoul of the res judicata dictum. In the process of attempting to murder his wife he murdered his children. If the view has to be taken that the provisions of 221 (b) and 214(2) C.C. cannot be combined to find murder in the first degree, then perhaps a conviction of attempted murder and two counts of second degree murder should have been appropriate.

* * * * *

CONFESSIONS AND ADMISSIONS

STATEMENT TAKEN AFTER COUNSEL INDICATES ACCUSED WISHES TO REMAIN SILENT

R. v. Dinardo 61 C.C.C. (2d) 52
County Court Ontario

The accused's "mandatory supervision" was cancelled and he was to report to a Solicitor General's agency. Before he did so he dropped in at his lawyer's and, on account of criminal activities which caused the cancellation, he was urged not to answer any questions put to him by police. One lawyer accompanied the accused and made it known to the agent and a police staff sergeant assigned to that office, that his client wished to exercise his right to remain silent. He left his business card and home phone number and instructed that any police officer who wished to question his client had to call him first so he could be present.

The staff sergeant had at one stage of the conversation said that he had no need to question the accused. He had known "Joe" (the accused) for 20 years and it would be quite futile to ask him any questions.

The message, the lawyer's card and the specific instructions were apparently not passed on and the accused was questioned in respect to an armed robbery after being informed by two officers of his right to remain silent. At his trial for allegedly being an accessory after the fact to the offence of robbery and possession of stolen property, counsel for the defense argued that the two statements the accused gave police were inadmissible.

He argued that, although the statements were made voluntarily, they came as a result of "an unjustifiable invasion of the relationship between a solicitor and his client and the right to retain and instruct counsel".

In view of the specific instructions left for police, the Court did not "subscribe as appropriate" the conduct by police in these circumstances. However, disapproval of methods used by the authorities is no justification to exclude a voluntary confession from evidence. Interrogation is a proper method of investigation and the accused was quite aware of his rights.

Statements admitted in evidence.

* * * * *

APPLICATION FOR ATTENDANCE OF BREATHALYZER TECHNICIAN

Regina v. Yurko County Court of Vancouver No. CC810929 February 1982

Defence counsel, who had been "involved in the case very early in the game" said at the trial of the accused for charges of impaired driving and "over .08%" that he would apply for the attendance of the breathalyzer technician who had analyzed the accused's breath. The trial judge demanded to know "why haven't you done this earlier?" and refused to grant an adjournment to accommodate the accused in this regard.

The accused was acquitted of impaired driving but convicted of "over .08%" and appealed the conviction.

The Crown had relied on the certificate evidence to prove the blood alcohol-content and the accused argued that in fact three samples of his breath were taken. The second sample had been taken moments after the first one and the second and third analyses were recorded on the certificate.

The only witness who could clear up this matter was the technician and he should have been called.

Quoting precedents, the County Court Judge held that there is no requirement to apply before trial for the attendance of the technician. As a matter of fact the application can be made as late as when the certificate evidence is adduced. If there are some bases for that attendance, the Court has no alternative but to grant the application.

Accused's appeal allowed
Dismissal ordered

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UNEXPLAINED INCULPATORY CIRCUMSTANCES

THEFT

Sherett v. The Queen B. C. Court of Appeal 1/23/81 February 1982

The accused and a co-worker were janitors in a company office. The accused cleaned the office of the president of the company and found a sealed envelope containing money ($2,367.57) on the desk. The accused showed the envelope to his partner and said it had money in it. Later on he revealed that it had "lots of money" in it. His partner swore he never touched the envelope.

The following day the accused excused himself from coming to work and said he had to visit a sick relative in the interior of B. C. However, police found him home when they attended at his apartment.

The accused had apparently nothing to say and no money was found on him or in his apartment.

At the conclusion of his trial for "theft over $200" the trial judge observed that the accused had not given any explanation to the police or in the form of testimony. The trial judge quoted the well known words:

> . . ." there comes a time when circumstantial evidence having enveloped an accused in a strong and cogent network of inculpatory facts, the accused is bound to make some contradiction or explanation or stand condemned and face the risk of conviction."

The trial judge was of the opinion that the absence of an explanation in these circumstances was sufficient to draw the inference that the accused had stolen the money.

The accused appealed his conviction claiming that the trial judge had imposed a duty on the accused to testify while the burden of proof was on the Crown to prove the theft. It had been his right to remain silent and not to call evidence in his defence. The Crown simply did not have a case, claimed the accused.

The Court did not reverse the dictum that there comes a time that an explanation is in order and that the lack of it may condemn an accused.

However, the Court of Appeal did not feel this could be applied to this case. It found the Crown's case, "not a strong one" and there simply was no evidence "one would expect the appellant to contradict".

For one thing, showing the money to his partner tends to show a lack of intent to steal.

The failure of the accused to testify was not part of the Crown's proof in this case.

Accused's appeal allowed;
New trial ordered.

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ADMISSIBILITY OF "EXTRA JUDICIAL IDENTIFICATION" WHERE WITNESS IS UNABLE TO IDENTIFY ACCUSED DURING TRIAL

Regina v. Swanton B. C. Court of Appeal C.A.810605 February 1982 (As Yet Unreported)

A doctor advertised his car and a bearded man came to view it. This person returned with another man (believed to be prospective purchasers) and were invited into the doctor's home. Instead of selling his car the doctor was tied up, gagged and robbed. Shortly after the doctor identified the bearded man in a line-up and again during a preliminary hearing respecting a charge of robbery.

During the trial, 1 1/2 years later, the doctor said (when invited to identify the clean shaven accused as one of the men who robbed him) "I see someone that resembles him. But . . .".

To remedy the matter of "no identification" the Crown suggested to compliment the doctor's testimony of previous identifications, with police evidence that the person identified in the line-up and at the preliminary inquiry and the accused at trial, were one and the same person.

Following a precedent* which establishes that "if at trial, the person does not identify the accused, evidence that he did identify him on an earlier occasion cannot be admitted", the trial judge acquitted the accused and the Crown appealed.

The B. C. Court of Appeal decided to "reconsider the correctness" of that law and concluded that:

> "evidence of extra-judicial identification is admissible not only to corroborate an identification made at trial but as independent evidence going to identity".

The Court of Appeal agreed with another judicial decision which established:

> "The failure of the witness to repeat the extra judicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances".

Crown's appeal allowed;
New trial ordered

* * * * *

* R. v. McGuire (1975) 29 C.R.N.S. 282

DEFECTIVE BREATHALYZER CAUSING DELAY - TWO HOUR TIME PERIOD - CONTINUING DEMAND - REASONABLE EXCUSE TO REFUSE

Regina v. Lavery County Court of Prince Rupert (No. 2937-Z Smithers) (Unreported)

The accused was stopped by Cst. G. at 10:30 p.m., arrested for impaired driving and demanded to supply a sample of his breath. A breathalyzer was available approximately 3 miles away. However, due to it malfunctioning the accused was turned over to Cst. P. and taken to a location "some distance" away which took one hour to cover. Upon arrival there at 11:40 p.m., another client was being processed and the accused was asked to wait. By now it was midnight. At this time the accused called his lawyer and he and the constable had a conversation with him. The actual call took 7 minutes but it was not clear how long it had taken to place the call. After this the accused refused to give a breath sample and was convicted accordingly in Provincial Court.

Appealing the conviction the accused firstly argued that the Crown had not proved that his refusal came within the two hour time period. He claimed that when he failed to supply the sample the 2 hour period had elapsed. At least it was doubtful that it had not and he should have the benefit of that doubt. Apparently Crown evidence did not include the actual time of refusal and the matter hinged on time calculations. The County Court Judge (upon close examination of the transcript) was not prepared to agree with the defence argument and supported the trial judge's finding that the refusal was within the 2 hour limit.

Then the accused argued that there had only been one demand made of him and that was by Cst. G. and he had not refused to comply with that one. He had refused to give Cst. P. a breath sample and he had not made any demand of him. In other words, the accused challenged if, in the circumstances, a demand is continuing.

The evidence revealed that after his telephone conversation, Cst. P. had said to the accused: "Are you going to provide breath samples or not?" The accused had replied: "No, I refuse". This, the trial judge had found to be a renewal of the demand Cst. G. made of the accused. He could, upon the reasonable and probable grounds he had as a result of information he received from Cst. G., have made a fresh demand. However, nothing occurred to disrupt the demand made by Cst. G.; it had continued and was renewed by Cst. P.

Accused's appeal dismissed
Conviction upheld

Comment

It is incorrect to deduce from these reasons for judgment that all demands continue and that renewal will keep them current for the two hour period after driving. When a demand is refused, the offence of refusal is complete. When the refusal is ignored by the peace officer(s), it may well be that the demand expires.

The defence in this case has brought the well known Kosteniuk* case to the attention of the Court. Kosteniuk (charged with refusing to give samples of breath) had refused at the scene, and at the police station. As both refusals were ignored, Kosteniuk demanded to phone his lawyer. He was denied an opportunity to do so and a third demand was made with similar results. The Crown had argued that the offence of refusal was complete long before Kosteniuk was denied to retain and instruct counsel. In other words, it was conceded that the accused had a reasonable excuse to refuse the last demand but not either one of the first two. In that case the County Court had held that the refusal to be considered for a prosecution is the last refusal.

For Lavery, there had only been one demand which was renewed and there was only one refusal.

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* 1981 issue of B. C. Decisions, number 5645-04

BICHROMATE AND DICHROMATE BREATHALYZER

Regina v. Taylor County Court of Prince Rupert No. C.C. 59/81 (Unreported)

The accused appealed his conviction on a charge of "over .08%". The Crown had called the breathalyzer technician who had identified the content of the ampoule used to analyze the accused's breath, as potassium bichromate. One of the certificates, either that of the technician or analyst, had called the same substance "potassium dichromate".

Although it was conceded in previous cases on this point that there is no difference between potassium dichromate and potassium bichromate, the Court could not accept that without expert evidence substantiating it.

The differece in the description of the substance used for the analyses left the Court with a reasonable doubt in respect to the identification of the ampoule.

Accused's appeal allowed
Conviction set aside.

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SERVICE TO A PRISONER OF REASONABLE NOTICE THAT THE TECHNICIAN'S CERTIFICATE WILL BE ADDUCED IN EVIDENCE TO PROVE BLOOD-ALCOHOL LEVEL

R. v. Braulin County Court of Vancouver Island Victoria No. 19121 November 1981 (As Yet Unreported)

The accused appealed his conviction of "over .08%", claiming that he had not been given reasonable notice of the Crown's intention to introduce the technician's certificate in evidence to prove his blood-alcohol content at the time of driving.

The technician had served a copy of the certificate on the accused right after the analysis and had explained its content and intent. Then the accused was booked in cells and all his property, including the certificate, was taken from him. It is assumed that when he received his property back this included the certificate but there was no evidence to show this.

The County Court Judge's ruling in response to the accused's submission was simple

> "To give a copy of a certificate to the accused and then take it away is not to give it to the accused".

He said the giving of the copy to the accused must not be assumed and concluded that, therefore, no technical service of the copy on the accused was proved.

New trial ordered

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REASONABLE EXCUSE TO REFUSE TO GIVE SAMPLES OF BREATH

R. v. Ryan County Court of Vancouver No. CC810444 January 29, 1982 (As Yet Unreported)

The accused rolled his car and he and his passenger were just crawling out of the windows when police arrived. There were no apparent injuries and a demand for samples of breath was made. The accused responded by saying that he wanted to see a doctor. After 20 minutes of questioning and tests the accused said: "I have enough of this" and attempted to leave. He had, just previously to this, told the officer that he was feeling sick.

The accused was restrained, handcuffed and brought back into the interview room. The accused then demanded to phone a lawyer. The officer supplied a phone, removed the handcuffs and left the accused alone so he could speak privately with his lawyer although he could be observed.

The accused got the answering service when he dialed the lawyer's office and the operator told him to "hang on". This came after several tries to make contact and periods of waiting. According to the accused, one of the officers took the phone away, told the person at the answering service who he was and that he was holding the accused for impaired driving, and then hung up. This was denied by police. Their version was that the accused terminated the call himself and accompanied police to the breathalyzer. No further mention of contacting a lawyer was made. The trial judge did not say who he believed, but convicted the accused of failing to provide breath samples.

The accused appealed the conviction and claimed that the denial of medical treatment (a mild concussion was diagnosed subsequently) and failure of police to provide an opportunity to consult counsel gave the accused a reasonable excuse to refuse giving samples of his breath. Furthermore, it must be presumed that the trial judge had accepted the police version of the circumstances surrounding the telephone call. Thus, he held that the accused's requests had been complied with and that no further requests to consult counsel were made. This, the accused claims, was an unreasonable conclusion considering the evidence. The County Court Judge, however, held that the finding was not unreasonable.

Four subsequent demands were made of the accused and each was refused for reasons other than firstly consulting a lawyer. He refused because he wanted to have his "brains x rayed", or he wanted to learn how his passenger was doing and "I don't like the way you are handling things".

After police realized that any further attempts to obtain breath tests would be fruitless, they took the accused to a doctor. The doctor found that the accused had no neurological deficit and that he showed no symptoms of loss of memory or confusion. In other words the accused's refusal was a conscious act.

Accused's appeal dismissed
Conviction upheld

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ADMISSIBILITY AND WEIGHT OF EVIDENCE OF A LICENCE NUMBER READ OUT TO A THIRD PARTY BY A PERSON WHO CANNOT AT TRIAL, VOUCH FOR ACCURACY OF NUMBERS

Regina v. McRae County Court of Vancouver - No. C.C.820023 April 1982 (As Yet Unreported)

At 2:00 a.m. a tenant saw a man expose himself at her window. The landlord was alerted and observed a man running to and then drive away in a pick-up truck. The landlord called the licence number out to his wife who noted it down at the time. The recorded licence number was given to police who, shortly after, stopped the accused in a pick-up truck bearing that licence number.

The tenant could not identify the accused. The landlord could not remember the numbers he called out to his wife, vouch that whatever he called out to her was accurately recorded, or how information of the licence number was passed to police. All he could testify to was that the numbers he called out were those on the licence plate of the departing pick-up truck. His wife did not testify, nor was her note produced in evidence.

In spite of the accused's arguments that the licence number evidence was hearsay and that no witness could be cross-examined as to the accuracy of the information passed to police which lead to the arrest, he was convicted of trespass by night. The accused appealed the conviction.

The County Court Judge held that the licence number evidence was hearsay and inadmissible to prove the truth of its content.

In this case, the evidence would have been admissible had the landlord's wife testified that she had accurately recorded what was called out to her and if her notation was checked and affirmed by "the actual witness" (the landlord) at the time or shortly after it was made.

As there was a good deal of other evidence which well may support a verdict of guilty, a new trial was ordered instead of quashing the conviction.

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THE MEANING OF "CONSUMED"

Bushchlen and The Queen B. C. Court of Appeal C.A. 811174 April 30, 1982
(As Yet Unreported)

The accused had consumed an alcoholic beverage which, according to a letter from a university pharmacology professor, ought to have produced 45 milligrams of alcohol in 100 millilitres of his (the accused's) blood. Yet when breath tests were taken by a breathalyzer technician, the analyses resulted in readings of 210 and 200 milligrams respectively.

The accused was convicted of driving a motor vehicle while having consumed alcohol in such quantity that the proportion thereof exceeded 80 milligrams of alcohol in 100 milligrams of blood. He appealed this conviction.

The accused did not question the accuracy of the analyses, but argued that the alcohol in excess of the 45 milligrams, was not due to consumption of alcohol, but rather from inadvertent inhalation of alcoholic vapours. He had worked for several hours prior to being apprehended with a spray 60% of which was alcohol.

The Court of Appeal, for technical reasons, could only deal with the question of fact if the evidence of the inadvertent inhalation raised a reasonable doubt. The court found that with 175 and 165 milligrams over the legal limit by means of such inadvertance, leaves no room for reasonable doubt. Said the Court of Appeal:

> "Clearly this is not a marginal case where the theory of the defence might give rise to a reasonable doubt".

Therefore, it was and had been found as a fact that the accused had consumed alcohol that caused his blood-alcohol content to exceed the legal limit.

The accused's leave to appeal was refused.
His conviction was upheld.

Note: The defence theory the accused raised in this Court of Appeal was on a question of law, to which he was not entitled. He had previously appealed his conviction unsuccessfully to a B. C. County Court. The

findings of facts in the trial court and the County Court did simply not support the question of law the accused raised in the Court of Appeal.

The B. C. Court of Appeal did, however, consider the defence unique and was prepared to "assume" what the word "consumed" means in s. 236 of the Criminal Code. The court held that in spite of the fact that this was not the case to determine that question:

> "... the use of the word consumed in section 236 is confined to the drinking of alcoholic beverages in the conventional sense and does not extend to the inadvertent inhalation of alcoholic fumes. However, if such fumes are deliberately inhaled to produce intoxication, that might well be regarded as falling within this use of the word "consumed", as it would have the element of mens rea. I am prepared as well to assume, in this context of the use of the word "consumption", that it would include the eating of food which has fermented into alcohol or has been cooked in or flavoured with alcoholic beverages, but not the mere savouring of its redolence".

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AS SOON AS PRACTICABLE

Regina v. Hay, County Court of Vancouver Island No. 22603 Victoria January 1982 (As Yet Unreported)

The officer made a demand for a sample of breath from the accused at a location where he was 7 minutes from one breathalyzer instrument and 20 minutes from another. He decided to take the accused to the latter location. The accused appealed his conviction of "over .08%" claiming that the evidence of the analyses was not admissible as the samples were not taken as soon as practicable.

The Court held that it was the constable's perogative where to analyze the breath of the accused. However, if the Court concludes that the detour caused the samples not having been taken reasonably prompt, the evidence of the analyses may not be admissible.

In this case, the detour caused a delay of 13 minutes. In view that the law calls for the sample to be taken as soon as practicable and not as soon as possible, the delay in this case was not significant.

Accused's appeal dismissed
Conviction upheld

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LEGAL EXECUTION OF DUTY
OBSTRUCTION OF A PEACE OFFICER

The Queen v. Mather County Court of Kootenay
Rossland CC106/81 February 16/82

In the late evening a police officer on patrol spotted a car parked on the highway without any lights on and another vehicle in front of it but parked on the side of the road. When the officer pulled up behind the car on the roadway the accused got out and ran to the car in front and sat in its back seat. Upon the request of the officer the accused stepped out of the car and when asked for identification she used foul and obscene language to tell the officer to depart and stop the interview. After being told she would be arrested if she failed to comply with the demand for identification, she would be arrested, the accused went as far as saying her first name but declined to give any other details. The officer "then arrested her and placed her in the back of the police car".

At trial, the constable said that he was of the opinion that the accused was impaired but none of his options under the Criminal Code in respect to drinking drivers were exercised. With the exception of "obstruction" because she refused to give her name, no charges were laid and it was held that the officer did not find the accused committing any offence.

Although her behaviour was "reprehensible" the trial court acquitted the accused. She was not found committing any offence and she was under no obligation to identify herself. The Crown appealed the acquittal.

The County Court Judge held that the police officer was engaged in the execution of his duty, however, in this case the obstruction was not "wilfull" in that it was done with lawful excuse. Wilfull does not only connote "intentional" but also "something done without lawful excuse". The Court concluded:

> "On the authorities, therefore, while the conduct of the respondent is to be viewed with disgust and revulsion, I am unable to come to the conclusion that her obstruction was without lawful excuse".

Crown's appeal dismissed.
Acquittal upheld.

Comment

The now famous Moore* case seems on the surface somewhat similar to this

* 1978) 43 C.C.C. (2d) 83

case. Moore also failed to identify himself, and the Supreme Court of Canada held that this had amounted to wilfull obstruction. However, there is quite a distinction between the circumstances in Moore and this case. Moore went with his bicycle across an intersection against a red traffic light. When stopped he refused to identify himself and if allowed to do so, would have stiffled the summary conviction procedure as without his name it was difficult to proceed against him.

Furthermore, the Moore case is, in my view, inclined to give police officers an inflated view of the authority the precedent actually gives them.

The Supreme Court of Canada zeroed in on the actual and restricted issue. Said the Justice giving the majority judgment:

> "I am confining my consideration of this matter to the actual circumstances which occurred, that is, that a constable on duty observed the appellant in the act of committing an infraction of the Statute and that that constable had no power to arrest the accused for such an offence unless and until he had attempted to identify the accused so that he might be the subject of summary conviction proceedings."

Both the B. C. Court of Appeal and the Supreme Court of Canada referred to the provisions of the Criminal Code of Canada in relation to the powers of arrest and public interest. Some are of the opinion that the decision authorizes police to arrest a person when found committing any summary conviction offence, including those under Provincial statutes. This opinion seems mainly to find its source in the Supreme Court of Canada quoting section 101 of the B. C. Summary Convictions Act (now called Offence Act) which provides that the Criminal Code applies mutatis mutandis, where it (the B. C. Summary Convictions Act) has not made express provisions: it should be remembered that in relation to the powers of arrest the B. C. Summary Convictions Act does not make any provision, but the individual Provincial statutes do. The Supreme Court alluded only to the definition of public interest, which includes establishing the identity of the accused and concluded that in these circumstances, where the power of arrest was not provided for, that it would be justified to arrest upon "finding committing" only to establish the accused's identity.

I do not believe it can be read in these reasons for judgement that the Supreme Court of Canada held that the provision of the Criminal Code

(section 450) authorizes arrests for Provincial Summary Conviction offences, especially not where the Provincial Statute expressly provides for and restricts such authority for certain offences only. It must be remembered what the issue was in the Moore case. The police officer found the accused committing a Provincial summary conviction offence which was not included in those for which a police officer may arrest without warrant. When the accused refused to identify himself, the officer arrested the accused not for the offence he found him committing, but for obstructing him in the lawful performance of his duty, which is an indictable offence under the Criminal Code of Canada. The Supreme Court held that it was the officer's duty to determine the accused's identity as otherwise the process against him could not commence. The Court seemed only persuaded by and found comfort in the fact that Parliament considered the identity of a person part of the public interest (section 450(2) C.C.). The Supreme Court held that the officer's actions and the arrest he effected for obstruction were proper and nothing more.

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TID BIT

The accused appealed his conviction of refusing to give a sample of his breath on the basis that the trial judge had admitted the words he spoke in refusing without holding a voir dire to determine the admissibility of them in evidence. The Saskatchewan Queen's Bench Justice held that holding a voir dire was quite unnecessary as the words spoken constituted the very offence alleged against him. In other words, the entire trial was to determine the admissibility, the evidentiary value and the meaning of those words.

([1982] 2 W.W.R. 514 Friesen v. R.)