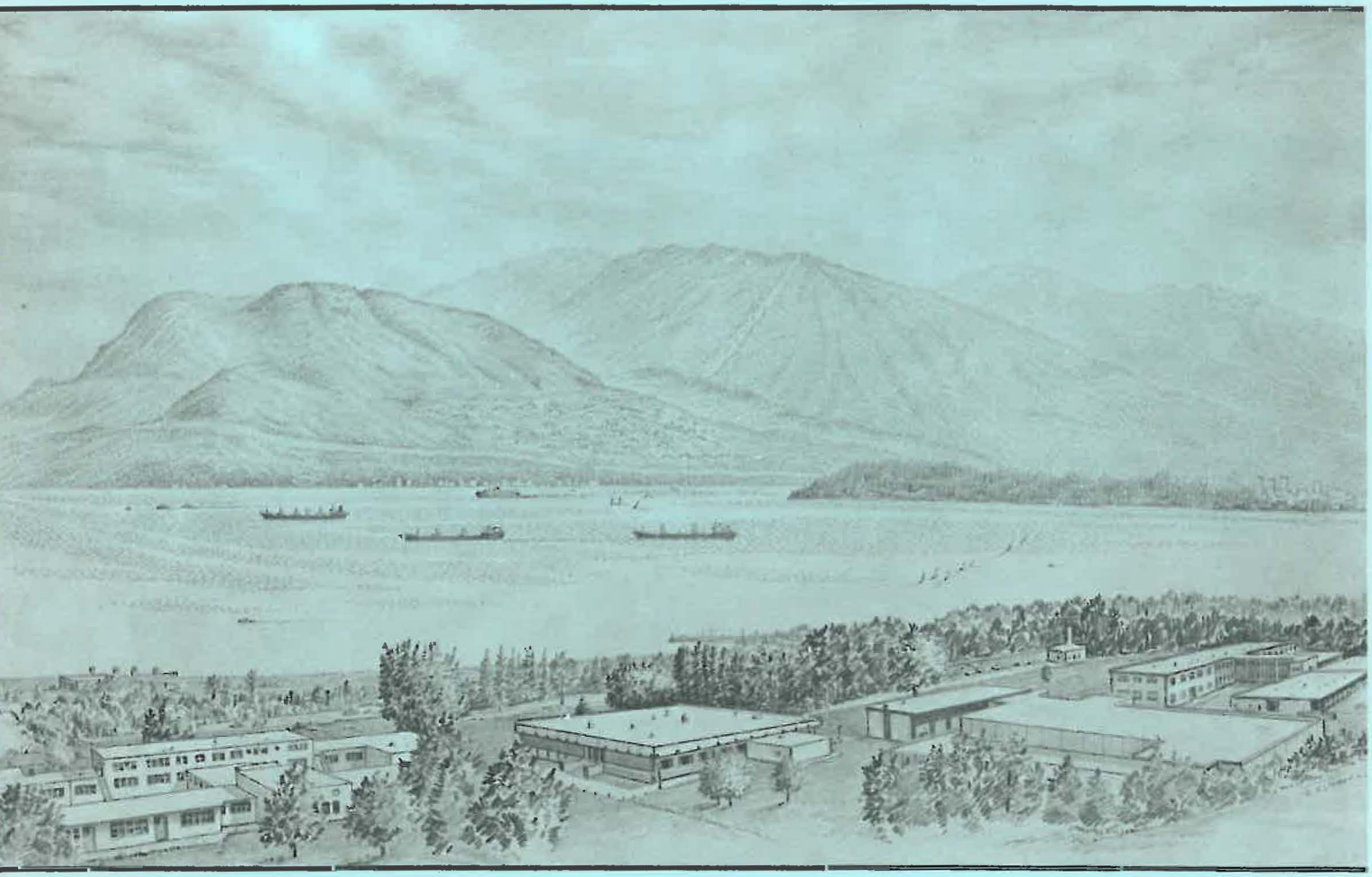
ISSUES OF INTEREST

VOLUME NO. 7



Written by John M. Post
July 09, 1982

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

ISSUES OF INTEREST

(VOLUME NO. 7)

(Written by John M. Post)
July 1982

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COLOUR OF RIGHT

Regina v. Teece B. C. Court of Appeal, April 1982 CA 811197
(Not Yet Reported)

After two years of marriage the accused divorced his wife. It was agreed that Mrs. Teece would get the furniture and the accused his personal affects which, besides his clothing, consisted of a cedar chest, a photo album, a book of poems and a radio lamp.

After the divorce, the accused happened to meet his wife and he asked her for his photo album. She indicated that she would not give it to him. Four days later, the accused removed the screen from a window of the motel unit in which his estranged wife lived and entered. He was rummaging through a drawer in the bedroom when his wife arrived. She told him to get out. He did, but with his photo album. As a consequence he was convicted in Provincial Court of "break and enter a place with the intent to commit an indictable offence therein".

The accused appealed his conviction claiming that although he broke into the motel unit, his sole intention was to recover his personal property which, according to him, does not amount to an indictable offence. To this defence the Provincial Court had responded that the accused's dispute with his ex-spouse ought to have been settled in a Court of law and not in the manner the accused decided to proceed. Furthermore, as long as Mrs. Teece had the property in her possession, then in the absence of a Court holding otherwise, she did have a special interest in the items the accused claimed to belong to him. Depriving her of that interest amounts to theft. This theory, the accused argued before the Court of Appeal, was erroneous in law. Theft, he said, is taking such property without colour of right. He felt his taking the photo album was done with colour of right in that he honestly believed that the album belonged to him or at least that he had a special property or interest in it.

The Court of Appeal said that the trial judge was right in holding that the way the accused had gone about recovering his property was wrong, but had given insufficient consideration to a colour of right in the taking of the album.

To ensure that this issue would receive adequate consideration, the Court of Appeal ordered a new trial.

Accused's appeal allowed.

* * * * *

ASSAULT PEACE OFFICER ON PRIVATE PROPERTY

Forsyth and The Queen County Court of Vancouver Island, March 17, 1982
Victoria Registry 22960 (Not Yet Reported)

Because he had been speeding, two constables pursued the accused into his driveway. The accused jumped out of the car and ran into his home via the rear entrance. The constables went to the front door and were met there by the accused. He willingly produced his driver's licence but refused to show the papers of the car he drove. He questioned what ". . . you bloody jerks" were doing on his property and said (according to the accused and one of the constables) ". . . take off. Get off my property". Then without any further notice the constables were assaulted by the accused and the police car was wilfully damaged by him.

The Provincial Court convicted the accused on two counts of assaulting a peace officer and one of mischief regarding the damage to the car.

The accused appealed, claiming that rather than being in the lawful performance of their duty, the officers were in fact trespassers.

The County Court Judge found that the officers had a lawful purpose for going onto the private property and to the house. They were doing their duty and had licence to go on the private property, as anyone has when he is in the pursuit of a lawful purpose. It is the privilege of the lawful occupier of private property to withdraw that licence and then the licensee may become a trespasser, if after a reasonable opportunity to do so, he does not depart.

The officers were in the lawful performance of their duty and due to not having been given the time to comply with the accused's wish that they leave, their status did not change.

Accused's appeal dismissed.
Convictions upheld.

* * * * *

RETURN OF MONEY SEIZED FOR EVIDENCE

BOOK MAKING

Major v. Attorney General of B. C. B. C. Supreme Court April 1, 1982
No. CC820303 Vancouver Registry (Not Yet Reported)

Mr. Major was arrested and charged with recording bets and unlawfully engaging in bookmaking. He had $2,950 on his person of which he claimed that "$500 belongs to me" and the balance to "the company". Nearly fourteen months later Major entered a plea of guilty in Provincial Court and promptly applied for the $2,950 back. The prosecutor was not objecting to $500 being returned to Major but not the "ill gotten gains".

Mr. Major petitioned the Supreme Court to order the Attorney General to return the $2,450 to him. He argued that the seizure was proper but that the Crown's right to retain the money ended when the charges against him were disposed of. Major sought to have the money restored to him by the inherent jurisdiction of a Court of Superior Jurisdiction and not by any of the provisions under the Criminal Code or any other statute.

The Supreme Court observed that the money was not a proceed of crime, like theft, fraud or false pretence, where the actual owner (the victim) has a superior title to the property. In this case, where persons have placed bets and voluntarily parted with their money, no third person could have a legitimate interest in the funds.

The Court concluded that there is no general rule of law that money intended to be used for illegal purposes should not be returned.

In one case[1] where a person attempted to bribe a government official, the money he had on his person to give to the official was seized but returned to him when he was convicted. Another person[2] was convicted of conspiracy to counterfeit money. Funds to commit the crime were seized but returned to him after the accused was convicted.

No valid ground existed for refusing to return the money (all of it) to Mr. Major.

Seized money ordered returned.

* * * * *

[1] R. v. Kolstad (1959) 123 C.C.C. 170
[2] R. v. Doig (1963) S.C.R. 3 rev'g. (1961) 130 C.C.C. 95 (B.C.C.A.)

DISTINCTION BETWEEN "OBTAINED BY" AND "DERIVED DIRECTLY OR INDIRECTLY FROM"

The Queen v. Geauvreau Supreme Court of Canada April 5, 1982
(Not Yet Reported)

Three men conspired for two of them to take an outboard motor from the third. The two would sell the motor and keep the proceeds and the third (owner) would claim his loss against an insurance policy. The accused, who knew of the scheme but was not a party to it, bought the motor and was convicted of possession of property knowingly obtained by the commission of an indictable offence. The conviction was appealed and the Ontario Court of Appeal (apparently of the opinion that the accused had possession of property "derived from" rather than "obtained by" the commission of an indictable offence) amended the information accordingly and ordered a new trial. The Crown appealed to the Supreme Court of Canada.

The entire issue before our highest Court was whether the Ontario Court of Appeal, upon amending the information, should have affirmed the conviction rather than ordering a new trial. The Crown lost that argument.

Though that issue is no doubt interesting, what police officers are likely to be more curious about is the illustration of the distinction between obtaining by and derived from. Quoting from reasons for judgment by a provincial Court of Appeal the Supreme Court included in its judgment:

> "We are all of the view that the word 'obtained' in the section, refers to things that constitute the subject matter of the crime by which they were obtained. For example, things obtained by theft, false pretences, or extortion. The offence must be committed in respect of the thing obtained. Money, of course, constitutes 'anything' within the meaning of section 312. Money, however, which has been knowingly and voluntarily paid by a purchaser to a vendor with respect to an illegal transaction, which constitutes an indictable offence, is not 'obtained' by such indictable offence within the meaning of section 312. The offence committed in the offence of trafficking in a narcotic drug, or a controlled drug, is not in respect of the property transferred as the consideration for the illegal transaction, but against the public welfare, in the interests of which the transaction is made criminal. The fact that money was derived from the commission of a crime, does not necessarily constitute an 'obtaining' of the money by the crime, within the meaning of section 312".

In any event, in the circumstances, the accused (according to the Ontario Court of Appeal) had knowledge that the motor in his possession had been 'derived from' rather than 'obtained by' the commission of an indictable offence. (This was not contradicted by the Supreme Court of Canada).

* * * * *

ASSAULT AND FALSE IMPRISONMENT

Lang v. B and C Saskatchewan Reports 96 [1981]
Saskatchewan Queen's Bench

Mr. Lang is a cattle buyer and owns a feed mill. As a businessman he spends approximately four evenings per month in the beverage room of a local Hotel to meet his clients and to do business. Being a diabetic he drinks little and it was found as a fact that on the evening in question, he had over a period of six hours, four glasses of beer. At 22:30 he left the hotel with his wife and walked via a lane to where their car was parked. Lang felt a hypoglycemic attack coming on and he leaned with his forehead up against a power pole to cope with the discomfort. Cpl. B and Cst. C were sitting in an unmarked car and believed, from all appearances, that Lang was about to urinate up against the pole. One of them shouted: "that is no place to piss", and Lang, not knowing he was spoken to by police officers, replied "piss off".

One officer was heard to say to the other, "Let's get us a drunk" and they drove up to Lang, who in the meantime was heading back for the hotel. He was handcuffed and placed in the car. Mrs. Lang had not been allowed to accompany her husband unless she wished the cell next to his. She was also told if she wanted the keys to the Lang car she had to collect them at the police station. When she did she told the officers that her husband is a diabetic and in need of insulin by morning. Lang's lawyer was refused access to Lang who was was not released until 7:00 a.m. and was definitely hypoglycemic and unsteady by this time.

Cpl. B., who testified that during his years of service he arrested at least 4,000 drunks, also said he was unaware that diabetics and intoxicated persons may display similar symptoms. The Court described the Corporal as a "bully" who had committed an unforgiveable denial of Lang's rights by refusing Mrs. Lang or the lawyer to see him, or release him in the custody of these "stone cold sober people" to take care of a man who was not belligerent, or violent, or had resisted police. Furthermore, the Court found that Lang was not intoxicated.

The officers sought protection under a Saskatchewan Statute which states that no one who arrests or has an intoxicated person in custody, who was found in a public place, is civilly or criminally liable if he acts in "good faith".

This, the Court held, meant that they required to have "reasonable and probable cause" to believe that Lang was intoxicated. That means:

> ". . . it is necessary that the officer should have a bone fide belief in fact, which would justify his conduct".

The officers did not have such reasonable and probable grounds, held the Court.

The officers (who the Court said had not acted conscientiously and as public servants) were ordered to pay Lang $4,000 - "jointly and severally". Cpl. B. was ordered to pay an additional $1,000 for punitive damages.

* * * * *

ADMISSIBILITY OF STATEMENTS - COMPULSION - OPPRESSION

Regina v. Hall 64 C.C.C. (2d) 463
British Columbia Court of Appeal

Ms. Hall (the accused) was arrested when found counting money while in company of others who possessed heroin. As she was seen "fiddling" with the waistband of her jeans, her hands were cuffed behind her back. When she entered the rear seat of the police car she was seen placing her hands inside her jeans and appeared to be placing something between the horizontal and vertical part of the seat. A search revealed a rubber balloon containing capsules with white powder which was later analyzed to be heroin.

When the constable who found the balloon asked the accused, "How many caps?" (while waving the evidence in front of her) she answered, "Nine or ten". Approximately 30 seconds later, the accused volunteered. "Sixteen".

When the accused was booked, another constable (after having informed the accused of her right to remain silent) asked her, "Is this all you have?" (referring to the balloon and capsules). The accused replied, "Yes".

A voir dire was conducted in regards to these two statements. Police testified that the accused was co-operative, scared, and concerned about having to spend time in jail. Although the trial judge found that there were no threats, inducements or offers of advantage, he said that the circumstances under which the statements were made were 'oppressive'. This was due to the handcuffs, police investigation and the accused being scared. The case the trial judge relied on, of course, was R. v. Horvath* where the psychological overhand the interviewers had over the interviewee created compulsion and oppression which put him in an hypnotic state of mind, according to psychiatric evidence. This resulted in the accused

* (1979) 44 C.C.C. (2d) 385. (This important precedent has been referred to in this publication several times but was never 'written up', as the judgment was handed down in 1979, prior to the birth of "The Issues of Interest". To familiarize the readers with the circumstances, the reasoning and resolves of our highest Court, you will find a synopsis of it on page 22 of this issue).

being deprived of an 'operating mind' and doubt that the statement was voluntarily given. This was a precedent where a statement was ruled inadmissible in evidence for reasons other than hope of advantage or fear of prejudice.

In any event, Ms. Hall was acquitted and the Crown appealed, arguing that the principle established in Horvath had been erroneously applied in this case.

After reviewing the "Horvath principle" and other reasons for which statements have been disallowed (see 1 and 2 below), the B. C. Court of Appeal held:

> ". . . there was no evidence which could, in law, bring these statements within the exclusionary rules . . .".

Crown's appeal allowed
Acquittal set aside and new trial ordered.

* * * * *

[1] R. v. Serack, Braun and Braun [1974] 2 W.W.R. 377 (Suspect was stripped naked and had been wrapped in a blanket for eight hours by the time he was interviewed).

[2] R. v. Wishart (1954) 110 C.C.C. 129 (Accused was intensively interrogated by a three man team while he was very tired).

CHARTER OF RIGHTS AND FREEDOMS

STATUTORY PRESUMPTIONS AND REVERSAL OF ONUS

Regina v. Anson County Court of Vancouver No. C.C.811351 June 4, 1982 (Not Yet Reported)

The accused challenged the constitutional validity of sections 4(2) and 8 of the Narcotics Control Act in view of the Charter of Rights.

Section 4(2) prohibits possession of a narcotic for the purpose of trafficking. Section 8 provides that if a person is charged under section 4(2) and does not plead guilty, then, if the trial judge finds that the accused was in possession of a narcotic, it is up to him (the accused) to show that the possession was not for the purpose of trafficking. If he successfully does so he can only be convicted under section 3 of the Act (ordinary possession).

The accused claimed that the section violates his right to liberty of which he can only be deprived "in accordance to the principles of fundamental justice" (Section 7 Charter of Rights). The reversed onus, he claimed, was such a radical departure from tradition (the burden of proof being solely on the Crown) that any provision that places a burden to rebut a statutory presumption on the accused is a violation of the rights granted under Section 7 of the Charter.

Furthermore, the accused argued that the presumption in section 8 of the Narcotic Control Act compels him to testify and does not presume him innocent until proven guilty (S. 11 Charter of Rights).

These violations of the Charter would render section 8 and potentially all statutory presumptions and reversed onus clauses invalid. The accused submitted that the Court should so declare in respect to section 8. He pointed out that this would be a remedy open to the Court by virtue of section 24(1) of the Charter, which states:

> "Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances".

The Court declined to hold that section 8 N.C.A. contravenes the Charter and gave reasons for judgment which touched on all 26 clauses of the Criminal Code which involve presumptions and reversal of onus and many that exist at common law.

The Vancouver County Court held that section 8 N.C.A. was simply a "procedural section for general application" and did not violate "the principles of fundamental justice". The Court said that fundamental and natural justice are not dissimilar concepts. If the accused had been deprived of giving a full answer and defence, natural justice would not have been done and the process under section 8 N.C.A. would have violated the principles of fundamental justice.

The accused's claim that section 8 N.C.A. created "a burden of establishing innocence" in violation of section 11(d) of the Charter was also unsuccessful. Defence counsel showed that the presumptions and reversal of onus provisions had resulted in a greater rate of convictions than where normal procedures are followed. The Court held that that evidence failed to show that these clauses were contrary to fundamental justice. That argument, said the Court, is equally consistent to say that these provisions were to attain fundamental justice which includes "convicting those properly found guilty according to law".

The Court reminded the accused that the "presumption of innocence" principle now entrenched in the Charter is a "safeguard against wrongful convictions". However, the provision does not say "presumed innocent until proven guilty beyond a reasonable doubt" but rather states, "presumed innocent until proven guilty according to law". To place a burden on the accused "by law" before the proof against him is beyond a reasonable doubt in a fair and public hearing by an independent tribunal, is not contrary to section 11(d) of the Charter. "According to law", means in compliance with enactments of Parliament or established common law and the presumptions and reversed onus clauses are part of that.

Section 8 N.C.A. does presume the accused innocent, but simply places on him a burden to show that his possession was innocent after that possession was proved beyond a reasonable doubt.

Should an accused have to take the witness stand on the second stage of the procedure described in section 8 N.C.A., it is not because of that section but of the circumstances such as quantity or possession by others.

The accused's challenge failed.
Section 8 of N.C.A. does not contravene the Charter of Rights.

Note: It seems the Court applied the principle similar to the well known one in regards to statements and inferences drawn from lack of explanation:

> "A man may be so surrounded by inculpatory circumstances that he either explains or stands condemned".

* * * * *

USE OF POLICE REPORT TO REFRESH MEMORY

Regina v. Stasiuk The County Court of Westminster No. X816820 May 3, 1982 (Not Yet Reported)

A police officer testified that he had made notes when he processed the accused for a drinking/driving offence. He had used those notes to make up the Police Report and never looked at them again. In preparation for the trial some nine months later, he had refreshed his memory from the report and not the notes. Defence counsel applied to examine the notes and the trial judge would not allow it. The accused appealed his conviction on this issue, among others.

The County Court Judge held that the trial Judge had not improperly exercised his discretion and quoted a portion of the reasons for judgment in R. v. Lewis (1968) 67 W.W.R. by the B. C. Supreme Court:

> "There is no absolute rule that in every case a witness must make available to counsel for the opposite side any notes or documents prepared by him relevant to the trial. The question of refreshing the memory from notes goes to credibility and it lies in the absolute discretion of a trial judge to decide whether or not a witness who has referred to notes either during the giving of his evidence or before hand, and in preparation therefor, should be required to produce them to the opposite party.

Accused's appeal dismissed.
Conviction upheld.

* * * * *

ROADSIDE SUSPENSION IN B. C.

The Queen v. Jarron B. C. Supreme Court May 25, 1982 Vancouver No. 820142 (Not Yet Reported)

The accused was convicted of driving, knowing that his driver's licence was suspended under section 214X of the B. C. Motor Vehicle Act. He appealed his conviction on the basis of a precedent set by the B. C. Supreme Court in 1977*. In that case the person was also charged, like the accused, under section 88.1 M.V.A. on account of driving after the driver's licence was suspended by a police officer under the provisions of the then section 203 M.V.A., which read:

> "(1) The driver's licence of a person whose venous blood contains not less than 8 parts of alcohol to 10,000 parts of blood is subject to suspension.
>
> "(2) A Peace Officer, may, at any time or place on a highway when he has reason to suspect that the driver of a motor vehicle has consumed alcohol, request the driver to drive the motor vehicle, under the direction of the Peace Officer, to the nearest place off the travelled portion of the highway and there to surrender his driver's licence."
>
> "(3)(a) On a request being made under subsection (2), the driver's licence of the driver is suspended, and he shall immediately surrender his driver's licence to the Peace Officer, who shall return it to the driver on
>
> > (1) the driver voluntarily undergoing a test immediately that indicates his venous blood contains less than 8 parts of alcohol to 10,000 parts of blood;" etc.

In the Bush case the B. C. Supreme Court held that due to subsections (1), (2) and 3(a) quoted above, the officer who suspends a licence must 'suspect' that the driver has consumed alcohol in such quantity that his blood/alcohol content is in excess of 0.8%.

* R. v. Bush (1977) 2 B.C.L.R. 230

The accused (Jarron) in this case, argued that there was no evidence what the officer who suspended him believed or suspected and therefore he should receive the same consideration.

Since the Bush decision, the section became section 214X and was amended by repealing subsection (1). The Crown suggested that possibly this meant that it no longer had to show a suspicion on the part of the police officer that the accused's alcohol level was above .08%.

The Supreme Court Justice disagreed and held that the Bush case was still good law in spite of the elimination of subsection (1). The Justice said:

> ". . . when subsection (2) and subsection 3(a) of section 214X are read together, the intent of the legislature becomes clear, namely that no suspension is contemplated unless a driver has in his venous blood not less than 8 parts of alcohol to 10,000 parts of blood".

Accused's appeal allowed.
Conviction set aside.

* * * * *

1. ADMISSIBILITY OF STATEMENTS MADE BY A VICTIM WHO DIED OF WOUNDS INFLICTED IN COMMISSION OF OFFENCE ALLEGED AGAINST ACCUSED.

2. ADMISSIBILITY OF SIMILAR FACT EVIDENCE.

Regina v. Henry Supreme Court of B. C. June 1982 No. C.C. 820203 Vancouver Registry (Not Yet Reported)

In a 10 day voir dire during the accused's trial for first degree murder the following events unfolded.

A 24 year old woman had agreed one late evening to go for a ride with a negro in the latter's pick-up truck. She was driven out of town and off the highway into a wooded area. The man disrobed the woman and attacked her sexually. He then stabbed her in the throat and chest and left her for dead. The woman struggled to reach the highway and in the ordeal fell off a 20 ft. cliff. She finally reached the highway and was found by a passer by at 4:00 a.m., naked, wounded, suffering shock and hypothermia. While in this condition she spontaneously said to her "Sameritan" and members of the emergency team who attended her while in a state described as "conscious - but not very conscious", "Are you a cop?" - "I have been stabbed" - "It was a negro". When asked who had done this to her, she had replied, "A black man".

A police officer accompanied the woman in the ambulance and was present during the treatment she received in the emergency ward. Although the victim was "fading and coming back" she identified herself, told from where she was picked up and described the clothes she was wearing, her assailant, and his pick-up truck.

To the attending doctor she related a similar account of events and when asked if she was raped, she had replied that she had been.

The following two evenings, subsequent to surgery and on an apparent path of recovery she gave police long and detailed statements of what she had endured.

Eight days after the incident the woman "suddenly and unexpectedly" died.

A part of the voir dire was devoted to the question what, if any, of the victim's statements were admissible in evidence against the accused.

The prosecutor suggested that the statements were "dying declarations". Such declarations are admissible as an exception to the hearsay rule. The Supreme Court Justice rejected that suggestion as the prerequisite to the exception is a state of mind on the part of the victim of a "settled hopeless expectation that she was about to die immediately". The theory is

that such a state of mind is so awesome that statements made regarding the cause of death and directly or indirectly relevant to the identity of the person responsible, is equally if not more compelling to tell the truth than to do so upon oath in the witness stand. In other words, it is safe to accept the truth of the content of statements made by a victim in such frame of mind.

There was no evidence in this case that the victim believed she was dying when she made the statements.

Another exception to the hearsay rule is statements made which are the res gestae or part of the res gestae. These are statements made during or so closely related to an event that they are part of it. The basic theory here is that if someone witnessed an event, then what he saw is admissible in evidence. Then why should utterances heard during or immediately after the event not be part of that event. One of the tests to determine admissibility of such statement is whether it is so detached or disengaged from the event that what was said may be a concoction.

In this case the key issue was expressed as follows:

> "As regards statements made after the event, it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded".

The Supreme Court Justice held, that in spite of the time lapse between the infliction of the wounds and the making of the statements by the victim, (when found on the side of the road, in the ambulance, and in the emergency ward) all were components of one terrible event she endured. The statements were clearly "spontaneous" and made in "circumstances of involvement" in that event.

Said the Court:

> "It is difficult to imagine a more terrifying series of events or a series of events more likely to still the reflective faculties of the deceased. In all of these circumstances I hold that all of the statements made by the deceased from the time of her discovery on the highway until she was operated on . . . constitute one continuing transaction and are admissible in evidence. In my view these statements are admissible as proof of the truth of their content."

The detailed statements taken by police from the victim after the surgery were found to be detached from the event and not in any catagory which constitutes an exception to the hearsay rule.

It is interesting to note that the Supreme Court Justice remarked that he personally felt that the law should allow the detailed statements to be heard by the jury for them to decide what weight to attach to them.

Similar Fact Evidence:

In 1968 (in eastern Canada) the accused had pleaded guilty to attempted murder. He had (in a "gay hangout") picked up a man who, for the occasion, was dressed in female clothing. What the accused had done to that man was identical to the circumstances in this case except that the victim had survived the ordeal.

The prosecutor sought to present the facts of that case to the jury as similar fact evidence.

Evidence of similar facts must be convincing and compelling and may not be "trifling in weight" while being gravely prejudicial to the accused. Neither is it evidence of previously committed crimes that prove such a character that the accused is likely to have committed the crime for which he is tried. It can only be used and is admissible for the purpose

> ". . . to show design or intent or to meet a defence open to the accused . . .".

When similar fact evidence is adduced "to meet a defence open to the accused" it is usually the defence of identity (Not I . . .). The objective then is to show that the crime previously committed has "peculiarities in common" with the offence charged "so as to support a reasonable inference that the accused committed the crime".

The crime committed by the accused in 1968 had so many peculiarities in common with the circumstances of this case that the evidence of his previous crime was ruled admissible.

On June 23, 1982 the Supreme Court of Canada also considered the admissibility of similar fact evidence in the case of Sweitzer v. The Queen (not yet reported).

One early morning the accused entered the apartment of a woman. She raised

an alarm, police attended and the accused was apprehended. This apprehension apparently ended a period of four and one half years during which at least fifteen similar incidents had occurred in that vacinity, in which women had been raped and indecently assaulted.

The Crown proceeded with one charge of rape only. The accused allegedly entered an apartment occupied by a woman and her child. The woman woke up to a voice warning her not to make a sound lest she wanted the child hurt. The woman was blind folded, raped and forced to perform felatio. After an hour of sexual activities, the perpetrator left. The woman could not identify the accused as the intruder. The Crown, however, proved that the rapist was the accused by means of simlar fact evidence related to the other incidents and the observations of a detective.

The "similar facts" fell in two groups. Eleven of the incidents were in the actions of the intruder and other circumstances nearly identical to the methods used by the perpetrator in this case against the accused. In three other cases there was direct evidence of the accused being the assailant. In addition, the accused was identified by a detective as the man he caught peering through the window of a motel unit in the district where the incidents had taken place. Upon approach, the accused had fled and was not apprehended. The evidence of all incidents was admitted as similar fact evidence and the accused was convicted. He appealed.

The Supreme Court of Canada had the same to say about similar fact evidence as the B. C. Supreme Court and added:

> "Evidence of similar facts has been adduced to prove intent, to prove a system, to prove a plan, to show malice, to rebut the defence of accident or mistake, to prove identity, to rebut the defence of innocent association, and for other similar and related purposes"

However, the Court commented that such evidence should be excluded if it does not have a material bearing on the issues, or on a link between the similar facts and the accused. In other words, a jury must be able to find that the similar facts were acts of the accused.

Due to the lack of evidence of identification in the eleven cases, there was no link between those incidents and the accused. Therefore, the circumstances surrounding those cases were inadmissible as similar facts.

Accused's appeal allowed
New trial ordered.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS
ABUSE OF THE PROCESS OF THE COURT

The Queen and Bruneau Supreme Court of B. C. June 1982
Vancouver Registry No. CC 820767

The accused, charged with "break and enter", claimed that he entered into an agreement with the Crown. The deal was that the charges against him would not proceed if he revealed information regarding a cache of narcotics and entered a guilty plea to a charge of possession of marihuana for the purpose of trafficking.

The accused states that as a part of the bargain he would submit to a lie detector test to ensure that his information related to the cache was accurate. He had given the information and pleaded guilty as promised but had missed his appointment with the polygraph operator. In spite of making himself available for the test later, the Crown went ahead with the "break and enter" charge.

When arraigned on the charge of break and enter, he applied for a judicial stay of proceedings claiming that in view of the "bargain" the proceedings amounted to an abuse of the process of the Court. In other words, he was not prosecuted for committing the crime of break and enter but rather for missing the appointment. The Provincial Court Judge claimed to lack jurisdiction to stay the proceedings and the accused now applied to the Supreme Court for an order to compel that Judge to "consider and determine" such a stay.

Whether or not (in criminal cases) the Courts have the right to stay prosecutions to "prevent the misuse of its jurisdiction" is somewhat questionable. Without discussing the details of the varied opinions on that issue, the interesting part of this case is the Supreme Court Justice's comments on the possible impact section 7 of the Charter of Rights and Freedoms may have on this question. The section simply ensures that we cannot be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice.

The Court declined to say if this section applied in these circumstances. This as the merits of the case had not been heard by the Provincial Court Judge. The circumstances as related above are submissions made by the accused only.

The Supreme Court ordered that

> ". . . the Provincial Court Judge exercise his jurisdiction to enquire into the facts alleged by the accused . . .".

This for that judge to determine if on the facts the process of his Court is abused and if he has the jurisdiction to stay the proceedings.

* * * * *

CONSPIRATORS' EXCEPTION TO THE HEARSAY RULE

The Queen v. Carter Supreme Court of Canada June 23, 1982

A basic rule of law is that what is said by one is not evidence against someone else. Even where persons are charged jointly with an offence, the confessions or admission of the one is not evidence against his co-accused.

Also, what is done by the one in the absence of the other, is not evidence against the absent party.

However, this is not the case if the individuals are parties to a conspiracy. Then, the acts and statements by one is evidence against the others. The part of these exceptions related to the statements is known as the "Conspirators' Exception to the Hearsay Rule".

The accused was acquitted of having conspired with others to import a narcotic into Canada. The Crown appealed claiming that the aquittal was as a result of a direction by the trial judge to the jury which was erroneous in law. The trial judge had instructed that jury that before they could consider the declarations and actions of the other conspirators as evidence against Carter, they had to find that he was a party to the conspiracy. In other words, they first had to find him guilty of the charge and then consider the evidence afforded by the actions and utterances of his co-conspirators. Needless to say that since membership in the conspiracy is the charge, such an exercise is one of total futility. On the other hand, it does not take an expert to realize that grave injustice can result if our rules of evidence allowed the hearsay evidence to be used for proving a person part of the conspiracy, unless there was firstly some direct evidence to show that he was. After all, hearsay evidence is of a kind where the witness cannot vouch for the truth of his testimony (for instance, a witness can vouch for what an accused said to him, but cannot vouch for the truth of the content of the statement). Therefore, the Crown asked a very simple question of the Supreme Court of Canada:

> "Where an accused is charged with a conspiracy, what degree of proof must be adduced that he and a particular actor or declarant were both involved in that conspiracy, before the latter's acts or declarations are admissible against him?"

The Supreme Court of Canada reviewed how this problem is approached in the U. S. Apparently whether or not there are adequate preliminary facts to allow the application of the "conspirators" exception to the hearsay rule" is determined by the judge in a voir dire. The jury then does not have to deal with this complicated issue.

This method was rejected by the Supreme Court and a precedent was set for a "two stage approach" in the charge to the jury.

It was held that "the hearsay exception may be brought into effect only where there is some evidence of the accused's membership in the conspiracy that is directly admissible against him without reliance upon the hearsay exception raising the probability of his membership".

The jury must be instructed to firstly decide if they are satisfied beyond a reasonable doubt if the conspiracy in the indictment existed. If so, then they must decide if, based on the direct evidence (not the hearsay), "a probability is raised" (not beyond a reasonable doubt) that the accused was a member of that conspiracy. If such probability is there, then they may consider whether the aggregate of the direct evidence and the hearsay evidence is proof beyond a reasonable doubt that the accused was a party to the conspiracy. In other words, although they must make three separate decisions, the verdict must be based on all of the evidence.

Holding that the trial judge had imposed a higher burden of proof on the Crown than what is required by law,

the Crown's appeal was allowed and a new trial was ordered.

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POLICE TRESPASSING TO INSTALL MONITORING DEVICE FOR AUTHORIZED INTERCEPTION OF PRIVATE COMMUNICATION

ADMISSIBILITY OF EVIDENCE OF THE INTERCEPTED COMMUNICATION

Regina v. Lyons, Prevedoris, McQuire and Flodgate B. C. Court of Appeal CA 810112 June 21, 1982 (Not Yet Reported)

The Privacy Act (Part IV.1 of the Criminal Code) was enacted to protect the rights to privacy. However, said one Court*

> "It may be more realistic to say that the purpose or effect of Pt. IV.1 has been to regulate the method of breach of any such right. That the right may be subject to frequent lawful breach is clear from the scheme of Pt. IV.1, but the courts must be astute to limit breaches to the extent provided by the Code".

The accused appealed their conviction of conspiring together to import coccaine into Canada. Part of the evidence against them had been obtained by judicially authorized intercepted private communications. To install the monitoring device the police made a surreptitious entry into a residence. The defence claimed that the trespass vitiated the authorization and rendered the direct and indirect evidence obtained by means of the interception inadmissible.

The Court of Appeal agreed with the above quotation but held that if the police committed trespass to install the device as an act ancillary to the authorization, those acts may give rise to civil or criminal proceedings against police, but they do not vitiate the authorization. The evidence was admissible.

* Goldman v. Regina (1980) 13 C.R. (3d) 288 (Appeal by accused dismissed)

ADMISSIBILITY OF STATEMENTS AND EVIDENCE
INTERVIEWER HAVING INTELLECTUAL ADVANTAGE
- HYPNOTIC STATE -

Horvath v. R. 3 W.W.R. 1979 1 Supreme Court of Canada

The accused, a 17 year old youth, took the spare keys to the car owned by his mother's common law husband and went to his "stepfather's" place of employment. He took the car from the employees' parking lot and did some joyriding which included two hit and run accidents.

When the stepfather arrived home from work, he found his common law wife (the accused's mother) in the bedroom from where the keys were taken "with her head bludgeoned into a pulp". The accused was arrested at midnight of the same day and subsequently interrogated from 12:20 a.m. until 3:10 a.m. and from noon until 4:15 p.m. Later, the accused took police to a location where a baseball bat, two socks and gloves were recovered upon directions from the accused. The accused was charged with murder.

The B. C. trial judge had refused to admit in evidence the statements made by the accused and the jury returned a verdict of not guilty. The Crown appealed and the B. C. Court of Appeal ordered a new trial, holding that the trial judge had erred in law. The accused then appealed this decision to the Supreme Court of Canada. Seven members of this Court considered the appeal, deciding with four justices in favor, to restore the acquittal.

The issue involved was mainly the voluntariness of the accused to make the statements that were adduced by the Crown. Since the Supreme Court of Canada added little to what the trial judge had found to be the facts, and his interpretation of them, his (the trial judge's) comments may best describe the circumstances surrounding the issue of voluntariness.

The interview from 12:20 a.m. till 3:10 a.m. was done by two very experienced police officers. Intellectually and in personality, the officers were far superior to the accused and no match for him. They all sat at a table with the officers at the ends and the accused in between. Questions were "fired" at the accused "hot and furious"; he was "hammered with shots from both sides", and told that he was not believed.

To determine the voluntariness on the part of the accused to make the statements, the Crown called a psychiatrist to testify about his opinion of the mental state of the accused towards the end of this interrogation

The trial judge had already at this point indicated that being outmatched as the accused was, may be considered unfair. Despite that fairness is not a test of voluntariness, the statement was ruled inadmissible. The atmosphere of the interview was given to the Court by the officers who, in the judge's view were "particularly honest". The trial judge held that the atmosphere of oppression was so great that it gave the accused a sense of being threatened. Said the Judge:

> ". . .I exclude the first examination on the grounds of the method used, the age of the accused, the circumstances of the day he had been through, the hours of the morning, the length of the interrogation and the technique used."

The interview that took place the same day, between noon and 4:15 p.m. was done by an R.C.M. Police officer, who through training and experience had "great skill in interrogation techniques". Summing up the circumstances surrounding this interview the trial judge had complimented the officer and said that the interview was

> ". . . the most skillful example of police interrogation that has ever come to my attention in 36 years as a lawyer and judge."

The officer was "intellectually adroit" and the interview was like "a cat manoeuvering a mouse". The interview had been taped and was divided in three phases. In between each phase and at the conclusion of the interview, the accused was left alone with the sound recording system left on.

The interview was so intense that during these periods, while by himself, the accused would have a monologue, called a "soliloquy" by the psychiatrist.

During the first chat with himself, the accused vowed vengeance upon the person who killed his mother. During the second monologue the accused related how his mother had begged him to kill her. He had complied after promising her never to reveal the fact that she had requested to be killed. During the last soliloquy the accused begged his mother's forgiveness for revealing her request.

The psychiatrist, called by the Crown, was asked to examine the tapes and to evaluate the affects on the accused's mind by being subjected to this type of interview. This of course, to determine the voluntariness of the statements including the "soliloquies". He was given a week to do this. Having examined the accused and the tapes, the psychiatrist concluded that the officer's skill and superiority over the accused in every aspect had caused "emotional disintegration". The officer had "unwittingly" put the accused "in a mild hypnotic state". The doctor added however, that recounting the painful memories in his monologues had been a voluntary act on the part of the accused and was the truth as he (the accused) saw it.

Nevertheless, the trial judge had not allowed any part of the interview in evidence. He said:

> "Had Dr. Stephenson not given the evidence of an hypnotic state, I would have, with some misgivings, admitted this statement. It is the accumulation of all the factors, and I have dealt with those, plus the factor of the subject having been, for a sizeable part of the interview, in an hypnotic state immediately before the confusion came out, that have caused me to reject the statement. This ruling is given with very real regret that police work as skillful as this should end in frustration of its purpose".

The Crown argued before the B. C. Court of Appeal and the Supreme Court of Canada, that police interrogation is not a sporting event where fairness in relation to the contestants being matched properly is a weighty factor to decide on the validity of the game. It was submitted that the judicial consideration respecting the admissibility of statements, must be confined to a test that they were made by a person free of "hope of advantage or fear of prejudice", and nothing more. The Supreme Court of Canada agreed in part but refused to confine voluntariness to lack of fear or hope.

As mentioned above, there were four Justices of the Supreme Court of Canada out of seven who formed the majority that ruled the statements inadmissible. These four Justices split in duos each with reasons for judgement. The issue they appear to agree on is that the meaning of voluntariness goes beyond the proverbial hope of advantage and/or fear of prejudice.

One part of the judgement sums it up. After reviewing all the well known cases on this issue the Court concluded that these cases:

> ". . . have not and need not be considered to have reduced the words 'free and voluntary' in the test as to the admissibility of a statement made by the accused to meaning only that the statement has not been induced by any hope of advantage or fear of prejudice, and it is my view that a statement may well be held not to be voluntary, at any rate, if it has been induced by some other motive or for some other reason than hope or fear".

It was also held that the matter of hypnosis alone contained an element of moral violence, which by itself rendered the statements involuntary. The other two Justices said that no particular emphasis ought to be placed on the hypnosis. All the cirumstances surrounding the interview must be considered. It is the "emotional disintegration" that rendered the statements involuntary and inadmissible, they said.

In relation to the articles found upon direction of the accused, the Court held that neither the accused's statements or scientific tests could associate the articles with the murder. For those reasons only the articles were not admitted in evidence either

Accused's appeal allowed;

Order for a new trial cancelled.
Acquittal restored.

Comment: It seems that the Supreme Court of Canada was anxious to say that this is not a landmark case which render things like unfairness, unbalanced wits, misconceptions and other matters adverse to the accused, reasons for disallowing statements into evidence.

The Supreme Court of Canada implied that the cases establishing the binding precedents never suggested that only the "hope and fear" formula was

capable of rendering involuntary a statement by an accused to a person in authority. The Supreme Court of Canada said on this point:

> "Although many Courts seem to have done so, I do not regard such an authority as Ibrahim[1] as indicating that the natural meaning of the word 'voluntary' should be confined to cases of hope of advantage or fear of prejudice".

The Court said very much the same about the Boudreau[2] case. Although the language the Supreme Court of Canada used in 1949 in "Boudreau" is strong, it is not too clear in defining the word "voluntary" where it relates to a person's volition when he gives a statement to a person in authority. When statements are adduced as proof of the truth of their content the Supreme Court was and is extremely concerned that fear and/or hope would affect the reliability of statements made to persons in authority. On the other hand, it is equally concerned about abuses by accused persons who may invent some pretty sophisticated reasons why their statements to an authority should not be considered voluntary. Here is the portion of the reason for judgement in Boudreau v. R. which has received the narrow and the broad interpretation by our Courts:

> "The underlying and controlling question then remains: is the statement freely and voluntarily made? Here the trial judge found that it was. It would be a serious error to place the ordinary modes of investigation of crime in a strait jacket of artificial rules; and the true protection against improper interrogation or any other kind of pressure or inducement is to leave the head question to the Court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice."

[1] Ibrahim v. R. 1914 A.C. 599 at 609 P C.
[2] Boudreau v. R. 1949 94 C.C C. 1

This seems to give a discretion to a trial judge to consider all circumstances surrounding the making of a statement to a person in authority and all aspects that may affect the voluntariness of the person who made it. Flexibility to avoid injustice in this regard seems to be emphasized. "Let each situation be weighed on its own merits" the Court seemed to have said.

Consistent with this are the "Judges Rules" which speak of "oppression" in this regard. A quotation from a British case in which the Supreme Court of Canada found support for its views is as follows:

> "What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world."

The Justices favoured the inadmissibility of the statements by Horvath strictly because of the accused's hypnotic state of mind. This is outside the restricted interpretation of voluntariness. Holding that the principle of voluntariness is the sole condition which "inspires the rule", they had to decide firstly on the very same issue as the other two Justices who, with them, made up the majority of the Court. These Justices found that voluntariness being the main issue, not too much attention should be paid to what Judges had to say in other cases. A Judge may only say what is necessary to decide the issue in the case he is dealing with and what he says beyond that is his peraonl view. However interesting that view may be, it is not part of any "judge-made rule" that may be binding on other Courts. Said the two Justices:

> "The principle (voluntariness) always governs, and may justify an extension of the rule to situations where involuntariness has been caused otherwise than by promises, threats, hope or fear, if it is felt that other causes are as coercive as promises or threats, hope or fear, and serious enough to bring the principle into play."

The psychiatrist testified that the accused's confession was voluntary in the sense that a person under hypnosis, whatever its depth, cannot be forced to say or do anything to which he has not already given tacit consent. The Court found that this was not the voluntariness meant by the principle. The two justices held that by certain physical elements

> ". . . such as an hypnotic quality of voice and manner, a police officer gained unconsented access to what in a human being is of the utmost privacy, the privacy of his own mind. . ."

The Court concluded

> ". . . that this was a form of violence or intrusion of a moral or mental nature, more subtle than visible violence but not less efficient in the result than an amytal injection administered by force."

(Amytal is a "truth serum")

All this means that we now have a binding majority judgement by our highest Court that voluntariness goes beyond the "fear and hope" rule.

* * * * *

TID-BITS

It is common that an authorization to intercept the private communications of a person indicates the places at which such communications may be intercepted. As it is unpredictable from what other place that person may communicate, the authorization usually provides that that person's communications may be intercepted at places he may "resort" to. The Supreme Court of B. C. was asked to rule on the meaning of that verb as it is used in the authorizations. The Court said the word means "to frequent, to go to customarily or usually". However, in the context of the authorizations it does not "require habitual attendance before a person can be said to resort to a location". "One attendance is enough".

(The Queen and Newall et. al. B. C. Supreme Court No. 17315-T. Victoria April 20/82 (Not Yet Reported))

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The accused was under demand to give samples of breath. Upon request he was placed in a room by himself with a telephone to phone a lawyer. After 20 minutes he said not to have been successful. He was given a few more minutes and then taken to the breathalyzer. He refused to give any samples.

At trial he testified he had phoned relatives and asked them to get a lawyer for him. He believed that he was entitled to one phone call only and had spent his time at the phone waiting for a lawyer to call him. He had not told the officers this at the time, which would have been reasonable if he had the difficulties he claimed he had. It was reasonable for the officers to demand a sample of his breath after the time he spent trying to get a lawyer. He had no reasonable excuse to refuse in the circumstances.

(R. v. Montgomery The County Court of Vancouver Island February 1982 Victoria Registry 22145)

* * * * *

The accused applied under section 24(1) of the Charter of Rights for a remedy in relation to a denial of his right to reasonable bail (section 11(e) of the Charter). The B. C. Supreme Court found that the bail set for the accused was unreasonable and granted the relief the accused applied for by ordering him released on his own recognizance without the surity the Provincial Court ordered.

The facts that brought this matter before the Supreme Court were particular and unusual. Therefore, this case is not a precedent that this Court will review the "unreasonableness" under the Charter in regards to bail.

R. v. Lee B. C. Supreme Court Vancouver No. CC829618 May 20, 1982. (Not Yet Reported)

* * * * *

Procuring a female person to become a prostitute is a criminal offence (section 195 (1)(d) C.C.). The accused appealed his conviction of attempting to procure an undercover R.C.M.P. officer to become a prostitute. The role the officer was to play was that of a prostitute who had fled a big city to escape its 'baneful influences'. The accused had encouraged the officer to continue her trade and offered to be her pimp. The Alberta Court of Appeal quashed the accused's conviction holding that Parliament meant to prohibit procuring a woman to become a prostitute. There is simply no offence if the woman is already a prostitute. The officer made the accused believe that she was a prostitute and he therefore lacked the mens rea to commit the offence.

R. v. Cline 65 C.C.C. (2d) 214

* * * * *

There is a precedent that testimony that "a standard police demand" was made is not evidence of a proper demand under s. 235(1) C.C.. In other words, the officer must relate to the Court what he said to the accused in making the demand. In this case a constable investigated an accident and discussed the details of it with the accused at the scene. Then the constable questioned the accused on how much he had had to drink. The constable testified at the accused's trial that he had made "a standard breathalyzer demand". The defence on appeal argued that this was no evidence of a proper demand. The Court held that the testimony, coupled with the evidence of the accident and questioning the accused on how much he had to drink, linked that demand to section 235(1) C.C.

(The County Court of Yale March 17, 1982 Vernon Registry 06918)

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The accused gave all appearance to blow in the breathalyzer. His face turned red and his cheeks were puffy from his efforts. However, the three pseudo attempts did not result in any breath getting into the instrument. The officer told the accused he was charged with refusing, upon which the accused said he would give samples and not do anything to prevent the analyses of his breath. The officer did not accept and the accused was convicted of 'refusing'. The accused appealed claiming that his offer negated his actions which the Crown said amounted to refusal.

The Court held that the refusal was complete by the time he made his offer. Conviction upheld.

(The County Court of Vancouver Island, March 22, 1982 Victoria Registry 22319).

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In another case of "refusing" the technician testified that the accused merely puffed his cheeks when going through the motions of giving breath samples. The accused was given a separate mouthpiece to practise on, but gave the same performance as before when putting his mouth to the piece attached to the breathalyzer. He was convicted of refusing and appealed.

The Court held that the Crown should have proved that the mouthpiece the accused used was not blocked. There was evidence that the instrument worked but nothing about the mouthpiece. In view of the evidence, there was a reasonable doubt that the accused's failures were deliberate.

Conviction set aside.

(The County Court of Yale April 1, 1982 Kamloops Registry CCC 286)

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The two breath tests were taken 25 minutes apart and at trial the breathalyzer technician could not explain why the delay. The accused was consequently acquitted of "over .08%" as the "as soon as practicable" applies to both samples and without an explanation, there was no evidence of such practicability. The Crown appealed unsuccessfully. What complicated matters was the evidence of the time of driving being vague and the possibility the second sample was taken outside the two hour limit.

(The County Court of Westminster March 15, 1982 New Westminster No. X81-7013)

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An expert with respect to the rate of elimination of alcohol in humans, testified that the two readings obtained (considering the time period between them) were inconsistent with that rate of elimination. He, in support of the charge of impaired driving, testified that anyone with a level in excess of .10% blood alcohol is impaired. The physical evidence by the officers was 'very weak' and the Crown had to rely exclusively on the readings of ".13" and ".11" to prove impairment. The accused was convicted and appealed, arguing that in view of the expert's evidence the accuracy of both readings is in doubt. The Court rejected this argument and held that Parliament had recognized the possibility of differences in readings and provided that when that occurs the lowest reading must be considered only (s. 237 C.C.). In this case that was in excess of ".10%". The appeal was dismissed and the conviction upheld.

(R. v. Underwood British Columbia County Court January 1982)

Comment: In providing the presumption that a blood-alcohol level determined within two hours of driving is equal to that at the time of driving (s. 237 C.C.), Parliament did not likely intend to say that if two samples of breath are analyzed, then, in all likelihood one of them is correct; and in any event give the suspect the benefit of the lowest reading. It seems more acceptable that Parliament intended the presumption and the benefit of the lowest reading to be considered in relation to accurate analyses. The provisions dealing with the differences in readings obtained are believed to be in regards to the elimination or absorption of alcohol in humans and not to the fallibility of the breathalyzer.

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