ISSUES OF INTEREST

VOLUME NO. 11

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TABLE OF CONTENTS

BILL C-127

In our booklet dealing with Bill C-127, some comments are made on pages about begging as contained in section 244 of the Criminal Code. The comments are valid but should have included the hardly noticeable but significant change to subsection 244(1)(c) C.C.

We did not notice this obscure change until the day after we published the booklet.

In respect to "assault by begging" the section now reads:

> "A person commits assault when . . . while openly wearing or carrying a weapon or an immitation thereof, he accosts or impedes another person "OR' begs.

The capitalized and underlined "OR" used to be "and" in the old section. This change is significant in that the elements of the offence used to be conjunctive and are now alternative. This means that begging while openly carrying a weapon now amounts to assault where before the begger had, in addition, to impede or accost another person.

Although this is subject to judicial interpretation, it is now constructive assault for someone to openly carry or wear a weapon or an immitation thereof and

1. accost another person;
2. impede another person; OR
3. beg.

This means that while armed as described above and accosting or impeding someone is assault as is to beg while so armed.

* * * * *

REFUSING TO GIVE BREATH SAMPLE UNTIL HAVING CONTACTED THE COUNSEL OF THE ACCUSED'S CHOICE - REASONABLE EXCUSE

The Queen v. Davignon County Court of Cariboo Williams Lake Registry No. 22/82

A police officer who was directing traffic at the scene of an accident was alerted about the unsteady driving of the accused who had just passed by (he was not involved in the accident). The officer caught up to the accused in about 600 yards and stopped him at 8:35 p.m. Noticing some symptoms of impairment, a demand for breath samples was made and the accused arrived at the police station at approximately 9:08 p.m. The accused, who had already indicated at the scene that he was only too willing to do what was demanded of him, stipulated that he firstly wanted to speak to his lawyer. He made phone calls to his lawyer's office and home but was not successful in reaching him. It was suggested to the accused that he should phone another lawyer but he insisted on contacting this particular lawyer before complying with the demand. At 9:28 the accused was urged to comply but refused and was again given the opportunity to try to phone his counsel. As he was simply not getting anywhere the breathalyzer operator entered a refusal in the log book.

At trial in the Provincial Court the accused, of course, claimed that in view of his right to counsel, he had a reasonable excuse to refuse giving the samples of breath. The trial judge had responded that:

> ". . . there is no evidence that allowing more time would have accomplished anything useful, in my opinion anyway. The conclusion is inescapable that there was a refusal and no reasonable excuse".

The accused appealed his conviction and argued his case on the basis of a decision by the County Court in Chilliwack in October of 1981* where the circumstances were nearly identical to those in this Davignon case. In the Eddy case the County Court Judge had said (speaking to police being busy and having other functions to perform other than sitting by while the suspect makes exhaustive attempts to contact his lawyer):

> "However, be that as it may, a person's right to

* R. v. Eddy Chilliwack Registry Number 214/81.

> contact counsel cannot be treated lightly. When a person is in custody and that person is facing possible criminal charges he is clearly entitled to contact counsel of his choice".

In essence, it was held that Eddy was acting in a bona fide manner while trying to contact counsel and as far as the County Court in respect to Mr. Davignon (the accused) was concerned, so was he.

Appeal allowed
Conviction set aside.

Note:

Although this was not an issue in this case the County Court Judge explored whether there were reasonable and probable grounds for the officer to make the demand for breath samples. He held that, had this been a ground for the appeal, he would have allowed it. The officer, the Judge said, had only some information from another person. He then jumped in his car, went 600 yards and stopped the appellant". The lack of evidence of improper driving, incoordination, or difficulty in producing documents coupled with an apparently insignificant observation that the back of the accused's shirt was out of his blue jeans, left the evidence woefully short of persuading the Court that the demanding officer had reasonable and probable grounds to make his demand.

Comment: There are matters in this case that should cause some concern. The reasons for judgment indicate that the Court assumed that the accused was in custody. There is no reason given for this conclusion. One need not to have been arrested to be detained, but detention does require physical control or restriction*. A simple demand and a compliance without being locked in the back of a police car or being handcuffed, or other indications that there was "compulsory or actual physical restraint" does not by itself cause a suspected impaired driver of whom a demand for breath samples is made to be detained or arrested. Right to counsel is guaranteed to arrested or detained persons only.

Another major problem created by precedents of this kind is that it forces police to use alternative methods to remove impaired drivers from the road. It compels, for purely practical reasons, that the

* Chromiak v. The Queen 49 C.C.C. (2d) 257. See also page 3 of Volume 1 of this publication.

discretion the peace officers will exercise is not based on the level of impairment or gravity of circumstances, but simply if they can afford the time to process the suspect. Discretion, based on such consideration, is an abuse of the principles on which the exercise of original and discretionary authority is based.

It is also a matter of concern if the right to counsel is extended to counsel of one's choice. When a certain lawyer simply cannot be located, after reasonable attempts have been made, then the Brownridge* decision by the Supreme Court of Canada seems applicable. It clearly points out that where an accused has been given an opportunity to contact a lawyer but is unable to do so after repeated attempts through no fault of the police, refuses to provide a breath sample he does not have a reasonable excuse for refusing. One could argue that since the Brownridge decision the Charter of Rights became effective and that it invalidated this precedent. However, the Right to counsel existed at common law and was codified in 1960 in the Bill of Rights. Even at the time of the Brownridge decision in 1972 the Right was so basic and judicially supported that it was suggested that the Right to counsel would have caused Brownridge to be acquitted for refusing to give a breath sample even if the section had not specified that the refusal had to be without reasonable excuse. Some Justices of the Supreme Court said that a denial to counsel "vitiates a conviction for this offence". Furthermore the decision in the Eddy case (in which the County Judge found support for his views) was well before the Charter coming into effect. Although the Courts are likely to pay more attention to a Right included in an entrenched constitution than one existing at common law and codified in an ordinary statute (as the Bill of Rights is), it seems that the application of it was as stringently enforced by the Courts before the Charter as they have since this constitutional document came into effect.

In 1970, the beathalyzer laws were enacted as a partial remedy to the slaughter and maiming of people on our highways which we do at a rate which would be called civil war if it was the result of a national dispute. It worked reasonably well and was of assistance to prove various elements to the drinking/driving offences. Far be it from me to advocate oppressive procedures or excessive measures or anything that violates the principles that ensure a fair and impartial trial, however, we have managed over the years to convert something that was designed to assist in combatting a serious social ill into an obstacle. Innovative legal philosophies and bureaucratic servitudes are well on their way to render these Criminal Code provisions a legislative tiger with severe dental problems.

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

In addition there are grave doubts if legislation alone can remedy this problem. Impaired driving is socially considered an act of indiscretion; something like a virus we all are susceptible to. Shoplifting, which does not physically jeopardize anyone, may mean social devastation and irreparable harm to our credibility, and giving intoxication as an excuse will no doubt aggrevate the social adversities to our reputation. That Pete was roaming around a department store in a state of intoxication and did not pay for merchandise is socially unacceptable; that he had attended a retirement party, had a few too many and wiped out his fellow man on the way home, calls for understanding and compassion. After all, that could happen to all of us.

History contains an abundance of proof that law is seldom remedial unless there is social disapproval of the act it prohibits. As a matter of fact social disapproval is often remedial by itself. It reduced pollution while social acceptance increased dissolvement of families. Although these examples are simplistic and involve other considerations, they are basically sound to support that social rejection and disapproval often precedes legislation and supersedes it in effectiveness. Perhaps we have to have an all out propaganda campaign to expose the drinking/driver as a public enemy; a person who perhaps violated the law but more importantly was so incredibly inconsiderate, so egotistical, so utterly negligent that he is quite prepared to randomly maim, kill or just jeopardize his fellow citizen for the sake of getting home and being spared the inconvenience for not having his car available to him when he must get to work tomorrow with that terrible hangover.

* * * * *

THE MEANING OF "PLACE"
SEARCHING A PERSON UNDER THE FOOD AND DRUGS ACT (SECTION 10) OR NARCOTIC CONTROL ACT (SECTION 37)

Recently a B. C. municipal constable stopped a known drug trafficker on the street and detected a strong smell of hashish on him. He searched the man and found a paper bag. The suspect grabbed the bag out of the officer's hand and ran. He was later apprehended and charged with obstructing a peace officer in the lawful performance of his duty. The bag, which he conceded in testimony contained the prohibited mushrooms, was not found. The accused raised a technical defence and submitted that the officer's search for drugs on his person was unlawful as it was unauthorized by statute or common law. The incident occurred on a public street. The accused argued that section 37 of the Food and Drugs Act did not apply.

The applicable portion of Section 37 of the Food and Drugs Act reads as follows:

> "A peace officer may at any time
>
> (a) without a warrant enter and search any place other than a dwelling-house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling-house in which he reasonably believes there is a controlled drug by means of or in respect of which an offence under this Part has been committed;
>
> (b) search any person found in such place; and
>
> (c) seize and take away any controlled drug found in such place and any other thing that may be evidence that an offence under this Part has been committed;"

The accused submitted that the section authorizes the searching of persons only in "any place" the officer "may enter and search without warrant" upon reasonably believing there are controlled drugs by means of which an offence under the Act is committed.

The section implies that "any place" is a constitutionally protected place; a place police have no right to enter if it is not for the reasonable grounds for believing that drugs are present. Only in "any place" like that entered by police upon prerequisite grounds to do so, may any person found "in such place" be searched, the accused claimed.

A public place is not included in the "any place" as used in the section, argued the accused, hence the officer was not in the lawful performance of his duty. The Provincial Court Judge agreed and gave the Crown a couple of weeks to show this defence wrong. In the absence of doing so the accused would be acquitted.

To assist, a search was done of cases on this issue. It seems of sufficient interest to include it in this volume.

The B. C. case in which this very issue was decided in 1977 is Regina v. Hamilton (County Court). The reasons for judgment can be found on page 146 of Volume 7 of the British Columbia Law Reports.

This Hinds case was decided on a charge under the Narcotic Control Act. Section 10 of that Act, with the exception of some necessary differences in subsection (c), is identical to section 37 of the Food and Drugs Act.

In the Hinds case, a police constable encountered a car parked in a peculiar position off the highway. Upon checking it he found marihuana on the ground next to the car. He determined that the narcotic belonged to the passenger. He then turned his attention to Hinds, the driver, who submitted himself to a body search. When the officer reached under the belt line he felt a plastic bag adjacent to Hinds' shorts. When the officer attempted to pull it out the accused objected and resisted the officer. A passing motorist assisted and Hinds was subdued, arrested and charged with resisting a peace officer in the lawful performance of his duty. Hinds raised arguments identical as related above. They were to no avail in the Provincial Court and he appealed his conviction to the County Court. He even had a more restricted view of what "place" should include and submitted that the section implied by saying that "entering" may be done without warrant, that it referred only to a building or structure. This particularly since in the next breath it mentions a dwelling house as an exemption to such entering unless there is a writ of assistance.

The County Court disagreed with Hamilton's views and concluded that one can enter any place whether this be a field, a garden, a street, lane or building. Therefore, the words in section 10 of the Narcotic Control Act do not have the limitations Hamilton suggested.

Hamilton's appeal was dismissed and his conviction upheld. This case has not been overruled and is to the best of my knowledge still the law in B. C.

* * * * *

CREDIBILITY

THE WORD OF THE ACCUSED VS. THAT OF A POLICE OFFICER

R. v. Scoville County Court of Cariboo No. 1/82 Ashcroft Registry October 1982

The patrol car and the vehicle pulled over by it, stopped simultaneously. When the officer came to the driver's door the accused alighted from it. The officer did not ask if the accused was driving and the accused did not indicate whether he was or not, but was nevertheless convicted of impaired driving.

The accused testified that his girlfriend was driving and that they had switched places the very moment they had come to a stop. He gave no reason for having done so. This meant that there was no direct evidence that the accused had been driving other than the officer's testimony that the accused came from behind the wheel.

The accused appealed his conviction on the grounds of the precedent[1] that

> ". . . an explanation given by an accused that could reasonably be true, despite the fact that the tribunal was not convinced that it was true, entitles the accused to the benefit of reasonable doubt and accordingly, acquittal".

This argument was quickly defeated by the Crown who brought to the attention of the Court that this must only be applied in cases where the accused must explain or else stand condemned. For instance where a person is in possession of goods recently obtained by crime. He must explain right away or by means of testimony or else the inference may be drawn that he committed the crime by which the goods were obtained or did have knowledge that they were so obtained[2]. It does not apply in all cases where an accused, in his defence, decides to come up with some version of the events in issue that would exculpate him criminally.

[1] R. v. Gavrilovic (1974) 18 C.C.C. (2d) 287.
[2] R. v. Sugiyoma [1976] 2 B.C.L.R. 164

The County Court found that the constable's evidence was limited but

> ". . . that in terms of time and proximity, the appellant was most certainly the person in the operator's position as the appellant's vehicle and the police vehicle came to a stop . . .".

The verdict of the Provincial Court Judge was not unreasonable and was supported by the evidence.

Appeal dismissed
Conviction Upheld.

* * * * *

CREDIBILITY

SECTION 12 OF THE CANADA EVIDENCE ACT AND THE CHARTER OF RIGHTS

R. v. Jarosz B. C. Supreme Court Vancouver Registry CC 820820 September 1982.

Section 12 of the Canada Evidence Act allows a witness to be cross examined on whether he has been convicted of any offence. This, of course, to discredit him and thereby shed doubt on his testimony. If an accused person selects to testify at his trial, the same rule applies.

Section 11(d) of the Charter of Rights guarantees us to be presumed innocent until proven guilty. Although this presumption was alive and well prior to the Charter coming into effect, the accused, when cross examined at his trial re his previous conviction, claimed that since the entrenchment of this right in the Charter, section 12 of the Evidence Act is now invalid. In other words he claimed that having 'constitutionalized' the right, it carries now more weight and has greater impact than what it did previously.

For good measure, the age old argument was thrown in that when a jury hears that the accused has a record it will not be able to use that evidence exclusively to deal with his credibility (whether to believe his testimony). The jury will inevitably be influenced (particularly when the convictions include a crime similar to the one for which he stands trial) to believe that the accused is guilty of what is alleged against him.

The Court concluded that credibility is critical in many cases and that both the Crown and the defence must have the ability to test credibility within the limits of the law. When a jury is properly instructed on this issue it will not result in an unfair trial or affect the presumption of innocence.

Application to rule section 12 Canada Evidence Act
Invalid was denied.

* * * * *

REASONABLE EXCUSE

BREATHALYZER

Barr v. The Queen County Court of B. C. Rossland Registry CC 102/82

The accused was involved in a single vehicle accident on an abandoned stretch of road. A passer-by gave him a ride to the next town and dropped him off at the police station where the accused was promptly subjected to sobriety tests followed by a demand for samples of breath. The accused who had sustained very minor personal injuries (hand and forehead) refused to give samples of any kind until he had received some medical treatment. Although the officer had expressed that the injuries were too minor to serve as an excuse to refuse to give samples, he drove the accused to the hospital where "some treatment" was given. The accused was convicted of failing to give breath samples and appealed claiming that his request for medical attention was bone fide, secondly that the officer had lacked the reasonable and probable grounds to make the demand.

The accused did not lead any evidence about his injuries while the onus was on him to show on the preponderance of evidence that he had a reasonable excuse because of

> "circumstance which rendered compliance with the demand either extremely difficult or likely to involve a substantial risk to his health . . ."*

The County Court Judge could not find anything in the evidence that gave the accused such an excuse.

In regards to the second ground the evidence showed that the accused arrived at the Police station fast asleep on the back seat of his benefactor's car. When awakened with difficulty the accused said he was alone when he had the accident 1 1/2 hours ago. Furthermore he volunteered that he had nothing to drink since he drove his car.

Therefore, the officer had the grounds prerequisite to making the demand.

Appeal dismissed.
Conviction upheld.

* * * * *

* Regina v. Nadeau 19 C.C.C. (2d) 199

IMPAIRED DRIVING

REFUSING TO GIVE SAMPLES OF BREATH

Regina v. Melgaard County Court of Vancouver Island Vancouver 1982
Duncan Registry 044682

The accused was seen driving a car that 'wandered' within its own lane. He was given a roadside sobriety test and a demand for samples of breath was made. The accused responded that he did not mind to give the samples but objected to have to go with the officer. It was pointed out to him that that amounted to 'refusal' and an appearance notice was prepared for impaired driving and refusing to blow. While this was done the accused 'demanded' to have his driver's licence returned to him and was not willing to wait until the notice was completed. The accused was then arrested for being drunk in a public place. The following morning, approximately six hours later, the accused was released and the appearance notice then served on him. During his custody he was not given the opportunity to provide the demanded samples of breath.

The accused was convicted of both impaired driving and 'refusing' and appealed these verdicts.

The County Court Judge was very critical of the way police handled the case. He considered the arrest for drunkenness "spurious" and said someone could be excused for inferring that the officer had limited experience in dealing with impaired drivers. Comment was made of the fact that no opportunity was afforded the accused to redeem himself and give the samples and that none of the station officers were called to verify the accused's condition when booked. Furthermore the County Court Judge seemingly reluctantly accepted the facts as they had been found by the learned trial Judge, "although I think my reaction to the evidence would have been different..." he said.

The County Court Judge found the Crown's case flimsy and far short of meeting the burden of proof; the drunkenness charge was "trumped up"; the role of 'the other constable' very passive and his evidence of a kind that added nothing to the Crown's case; the lack of an opportunity to give samples of breath after the arrest was deprivation

of "natural justice"; and since the administration of justice begins with the police, the handling of the case was unfair and improper. Furthermore the County Court Judge observed that the place where the accused had done his drinking was no more than 5 minutes away from the accused's home (what bearing this has is anyone's guess) and that the work the accused had been doing "might well explain in part at least the condition of his eyes and perhaps his balance".

In respect to the accused's belligerent attitude at the scene the Judge observed that the officer "became very irritated with the accused's behaviour, who admittedly was abusive and upset, for which there could be a number of explanations".

The accused's appeal was allowed.
The two convictions were quashed.

* * * * *

CRIMINAL NEGLIGENCE - DANGEROUS DRIVING

R. v. Stebbing County Court of Westminster January 1983 No. X828307 New Westminster Registry

At 1:00 a.m. there were four cars on a one mile stretch of a four lane highway and death and serious injuries resulted from a head-on collision. Three of the cars were proceeding north and the fourth in a southern direction.

The three cars were two vehicles side by side doing in excess of 160 k.p.h. while the speed limit was 70 k.p.h. and the third was a police car following at nearly a 1/2 mile distance. The accused was in the curb lane. After he had entered the stretch of road he had accelerated very quickly as had the other (cutting out all the descriptive niceties, they were simply drag racing although the reasons for judgment do not say so). The Court said, "An unspoken challenge and acceptance of that challenge might be inferred. I do not do so". The two cars touched one another slightly and the accused headed for the ditch while the other car in the center lane headed for a terrible head-on collision, death and destruction. The police officers witnessed the actions leading up to the collision and the accident itself.

As the police officers had not activated the emergency lights on the police car, the Court inferred that the officers did not apprehend any danger from driving at a high speed in view of the road conditions or density of traffic. The Court held that the major collision was of only peripheral relevance to the proceedings. In other words, the accused was not to blame for the collision. Therefore, the necessary moral element for criminal negligence driving, alleged against the accused, was lacking.

However, the Court held that dangerous driving is an included offence in criminal negligent driving and concluded:

> "Driving at a speed far above the limit which either eliminates the ability to manoeuvre safely when the unexpected occurs or which leads directly to loss of control when there is an intervening event, the potential for which event is recognizable although not be expected, is dangerous within section 233(4), particularly where there is a real danger to at least one other person then the driver, in this case Mr. Smith" (the accused's passenger).

Convicted of dangerous driving

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JUVENILES - CHARTER OF RIGHTS

R. v. S.B. W.W.R. [1983] 1 W.R.R.
British Columbia Supreme Court

S.B. was a 12 year old charged with three delinquencies, to wit breaking & entering with intent; mischief and setting fire to material which could likely cause a building fire. Under the provisions of the Juvenile Delinquents Act the Court is authorized to sentence S.B. to an Industrial School until he reaches the age of 21 years. Considering his present age, that means that the maximum imprisonment to which S. B. is liable is 9 years - in any event, a period in excess of 5 years.

Section 11(f) of the Charter of Rights states:

> "Any person charged with an offence has the right to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment".

Defence counsel made a preliminary objection in Provincial Court challenging the Judge's jurisdiction to try S.B. without a jury. As the Judge rejected the submission the issue was taken to the Supreme Court.

The Crown took the position that section 11 of the Charter does not include delinquencies. Furthermore, the proceedings are, according to section 5 of the Juvenile Delinquents Act, to be summary in nature. Hence, there is no provision for a juvenile to elect how he wishes to be tried unless he is transferred to adult court.

The Supreme Court Justice had to consider if the Charter of Rights renders these provisions of the Juvenile Delinquents Act of no force or effect insofar as they are inconsistent with one another. Secondly, if section 1 of the Charter which, in essence, tells the Judiciary that they must not apply the Charter beyond the reasonable limits as can be demonstrably justified in a free and democratic society, exempts the Juvenile Delinquents Act from being consistent with the Charter.

The Supreme Court of B. C. concluded:

1. That a juvenile charged with an offence known as a delinquency for which he can be sentenced to more than five years to an industrial school, is entitled to elect trial by jury if he so desires;

2. That the Juvenile Delinquent Act's denial of juveniles being tried by a jury, is not merely a reasonable limit which is demonstrably justified in a free and democratic society; and

3. The Juvenile Delinquents Act is of no force or effect to the extent that it is inconsistent with section 11(f) of the Charter.

This simply means that a juvenile, in many if not most cases, will have the right to a jury trial.

Comment: This is another delay in the pursuit of the objectives of our juvenile laws which were designed to get on with the most important aspect of preparing the "generation in the wings" to cope with and to be constructive members of society. The laws which were intended to be a practical means to an end are becoming the end in itself.

It is important to demonstrate to our young citizens, that the system which determines their guilt or innocence is fair and just. However, manipulative legal maneuvering has no place in a juvenile justice system; it is too damaging to the impression it leaves with the young person; their sense of justice is still too basic, the co-existance of factual guilt and legal innocence in our system is too complex for them. Therefore, we hardly impress the next generation or do anything constructive for them with implementing all our legal luxeries in their justice system. What is necessary or appropriate in the adult system is capable of being superfluous and inappropriate when we deal with young waywards, particularly in view of the stated objective of the juvenile procedures.

Our proposed Young Offenders Act places a heavy emphasis on access to counsel at nearly every stage of the juvenile's involvement in the procedure. Instead of doing the customary scoffing of this, we must not underestimate the dilemma this places on conscientious counsel. His ethical obligations to look after the legal interest of his client and the pedagogical objectives of the juvenile law to deal with the

child as one who requires help, guidance and proper supervision, are diabolically opposed to one another. A delinquent youth with his basic understanding of justice and unawareness of procedural niceties, who is witness to the tactics rendering him legally innocent while he is factually guilty, has an experience with our legal system not unlike the child taken to a brothel to introduce it to the beauty of love. The ethics and precedents which compel our lawyers and judges to act as they do when dealing with juveniles is surely inconsistent with the guidance and help Parliament had in mind for those we are to prepare to become responsible members of society.

Another thought that one cannot help to surface is the legal submissions when a jury is selected. The jury history dates back to the Magna Carta of 1215, which determined in article 39 that no one shall be imprisoned or penalized other than by the judgment of his peers. It will be interesting if those by statute eligible for jury duty are seen as his elders rather than his peers. Perhaps a jury of citizens of his own age may well have a concept of justice that is more fair, fundamental and in line with the delinquent's understanding of it than ours. Another solution to the juvenile procedure problems may well be to adopt the inquisitory system instead of the adversary one we now use.

* * * * *

Note:

Since writing all these comments, the B. C. Court of Appeal rendered judgment on this case (February 12/83, CA 821306). The Justices unanimously decided that the purpose of the Juvenile Delinquents Act is not to punish but to provide treatment to a child in need of guidance and supervision. Confinement in an industrial school does, therefore, not constitute punishment. Hence, section 11(f) of the Charter does not provide for a juvenile to have a jury trial if he, due to his age, is eligible to be committed to an industrial school for 5 years or more. . . .

"PLOP-PLOP, FIZZ-FIZZ, OH WHAT A RELIEF IT IS"

"PROCEDURAL SIDE TRACKING"

Anson v. The Queen B. C. Court of Appeal #821310 - February 18, 1983
(Also see page 9 of volume 7 of this publication)

Anson was charged with possession of heroin for the purpose of trafficking. At the very outset of the trial the accused asked the Judge to rule if section 8 N.C.A. was still operable now that the Charter of Rights calls for the presumption of innocence and stipulates that the fundamental principles of justice must be adhered to in processes by which persons can be deprived of property or liberty. When the trial judge ruled that section 8 N.C.A. can co-exist with section 7, 11(d) and 52 of the Charter, the accused was granted an adjournment so he could ask the Supreme Court the same question. When he also lost there (see reasons in Volume 7 of this publication) he took the matter to the B. C. Court of Appeal.

Section 24(1) of the Charter of Rights states:

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

It was feared that this section would cause what is known in the U.S. as procedural sidetracking. Every time a Charter issue would be raised and the trial court's ruling would not be to the liking of one of the parties, the proceedings would have to come to a stop until the matter is decided by a higher court. There were also some questions raised as to what level of court has the competent jurisdiction to deal with disputed Charter issues. To avoid the "side tracking" it should be the Court that has jurisdiction to try the accused for the offence alleged against him.

The B. C. Court of Appeal held that the point of law the accused raised was premature. He firstly had to be found guilty of possession of heroin before section 8 N.C.A. would arise.

The Court also said that:

> "If every case is to be interrupted each time a constitutional point arises while prerogative relief is sought, while appeals are taken to this Court and to the Supreme Court of Canada, then the administration of justice would be chaotic, the cost to the accused would be oppressive, and the cost to the public unjustified".

The Court of Appeal ruled that each level of court should, in nearly all cases, rule on the constitutional point and continue and complete the trial. If the verdict is guilty then the accused can include that point in the grounds for his appeal.

Accused's appeal dismissed

Note: The Alberta Court of Appeal has ruled similarly in November of 1982 in The Queen v. Kendall.

During the month of February the Supreme Court of Prince Edward Island and the Court of Appeal of Ontario held in the Queen v. Carroll and The Queen v. Oakes respectively, that section 8 N.C.A. is unconstitutional and inoperative.

It may be of interest to explore what the Ontario Court of Appeal had to say about section 8 of the N.C.A., the most severe reversed onus clauses on the statute books. The Court reiterated that a reversed onus' clause is contrary to "the presumption of innocence" provision in the Charter, if

(a) it places a burden of proof on the accused beyond proving something on a balance of probabilities; or

(b) it requires the accused to prove something that is unreasonable to expect him to be able to prove.

This has always been the test applied to determine the propriety of reversed onus clauses. The Ontario Court of Appeal considered it necessary however, that since the presumption of innocence and the right to remain silent are now entrenched in our constitution, another safeguard had to be added.

Every presumption of fact has a proven fact as a prerequisite. For instance, to presume the fact that a person had care or control of a motor vehicle, the Crown (if it relies on the presumption in S. 237 C.C.) must first prove the fact that he occupied the seat ordinarily occupied by the driver. The Court held that from here-on-in "rational connection" between the proven fact and the presumed fact must be considered to determine if the presumption can co-exist with the Charter. It said that such rational connection only exists where one can say that the proven fact makes the presumed fact a probability and possession of a narcotic does not mean that trafficking it is probable. Hence, S. 8 N.C.A.'s presumption is unconstitutional, in Ontario and Prince Edward Island at least.

Not having had the opportunity to read the reasons for judgment in its entirety, the quantity of heroin Oakes had in his possession I do not know.

It seems tempting to deduce that if section 8 N.C.A. is struck down and inoperable, the only way to prove the charge of possession for the purpose of trafficking is by the possessor admitting that purpose or showing that he did traffic. (Of course, if the latter is the case "possession for the purpose" may only be the back-up charge).

It also seems reasonable to assume that the allegation against Oakes afforded the Ontario Court of Appeal to deal with the constitutionality of section 8 N.C.A. and that it ruled the section inoperable in all circumstances and not just in circumstances as they were in the Oakes case. A lot of common law surrounds section 8 N.C.A. and it should not have been weighed against the Charter without putting all that common law on the scales with the section to see if the aggregate tips it in favour of the constitutionality of the presumption. However, losing the section is not as devastating as it seems. To put it like one very experienced drug law enforcer "it is a non issue".

In other words, the section was not abused and was not all that helpful.

If the section is inoperable the common law is still valid, but the burden to prove will be on the Crown to prove beyond a reasonable doubt that the purpose for the possession was to traffic. It seems not inaccurate, that in most cases where there is no direct evidence of the intent to traffic, evidence of packaging, documents and the quantity of the contraband rather than section 8 N.C.A. dictates whether the charge will be possession or possession for the purpose. The judges of the facts (juries or judges sitting alone) will still be instructed of their right to draw an irresistable inference from inculpatory evidence that so surrounds the accused that either he explains or stands condemned or convict on evidence that is consistent with guilt and inconsistent with any other rational conclusion. If this were not so, and particularly where the accused is a known trafficker, the law would be as absurd as to be compelled to assume that the driver of a bread truck carries his lunch until we actually see him making deliveries.

Please note that this Ontario decision (Oakes v. The Queen) is not binding on the B. C. Courts

* * * * *

POSSESSION OF A NARCOTIC

The Queen v. Sinclair County Court of Westminster New Westminster Registry X81-7537

The accused, the registered owner and sole occupant of a car, was stopped by police. A paper bag protruded from under the seat and was found to contain five different kinds of narcotics. When questioned, the accused denied any knowledge of the bag or its content. Due to this and the fact that the car had been stopped a few weeks earlier with a woman driving it caused the County Court Judge to be very concerned about concluding that the accused (charged with five counts of possession for the purpose of trafficking) was in possession of the narcotics.

The Crown invited the Court to follow a decision by the New Brunswick Supreme Court* where the circumstances were similar, but where, instead of saying "I don't know" like this accused, Vautour said, "I'm fucked" and when asked what he said, replied: "That really fucks it". This the County Court Judge held was an indication of guilt on the part of Vautour and, therefore, the cases are distinct from one another.

Although it could be said that the accused had control over the bag and its content, none of the other ingredients in the definition of "possession" in section 3(4) C.C. had been proved. This being the case left "personal possession" the only means to show possession. Common law states that for personal possession, one must have knowledge (not only of the presence of the contraband but also in the case of prohibited items knowledge what it is) must manually handle it, and must have a measure of control.

The County Court concluded:

> "Under the circumstances, if I were directing a jury at this time, I would be forced to the conclusion that there is no evidence upon which they could come to the conclusion beyond a reasonable doubt that this man was guilty of the possession of these drugs, or that such evidence was so deplorably weak it would not be worthy of them to consider a further aspect of the case".

* * * * *

* R. v. Vautour 1 C.C.C. [1970] 324

CHARTER OF RIGHTS

DRIVING WHILE UNDER SUSPENSION

B. C. Court of Appeal February 1983 C.A. #821013

Section 7 of the Charter of Rights reads:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Recently (September 1982) section 94(2) of the Motor Vehicle Act became effective. This subsection, was no doubt, aimed at the defence of "no knowledge" in regards to a "driving while suspended" charge. The Courts have consistently held that a person cannot be convicted of this offence unless the Crown showed the accused had knowledge that his driver's licence was under suspension. Apparently, to circumvent this, subsection 94(2) stipulates that the offence is one of "absolute liability".

A reference was made to the B. C. Court of Appeal (a rare procedure that can only be exercised by the cabinet) to offer an opinion on the constitutional validity of the subsection.

The B. C. Court of Appeal assumed more jurisdiction under section 7 of the Charter than what was anticipated. It was and is believed that section 7 only refers to procedural laws and issues only and not substantive law. Section 94(2) M.V.A. is substantive law and yet the B. C. Court of Appeal concluded that it had jurisdiction to strike it down. The reasons for judgment are confusing and leave numerous questions unanswered. However, subsection 94(2) M.V.A. is invalid legislation and everything, including knowledge of the suspension on the part of the accused must be proved.

* * * * *

DRINKING AFTER DRIVING BUT BEFORE BREATHALYZER TEST

"EVIDENCE TO THE CONTRARY"

R. v. Sloney County Court of Yale Kamloops Registry CCC 404

The accused had a motor vehicle accident near "Joe's Cabaret". Before police arrived to investigate, the accused ". . . had one at Joe's". At trial the Crown relied on section 237(1)(c) which provides that, in the absence of evidence to the contrary, a certificate showing blood alcohol content at the time of analysis is proof of the alcohol in theaccused's blood at the time of driving. The trial judge found that the "one at Joe's" was evidence to the contrary and there was, as a consequence, no proof what the accused's blood alcohol content was at the time of driving.

The Crown appealed the accused's acquittal of a charge of "over 80 mg". The prosecutor argued that the only B. C. case* similar in facts to this Sloney case, and decided by the B. C. Court of Appeal in favor of the accused's position here, had been superseded by the Supreme Court of Canada.

The cases cited by the Crown all addressed the meaning of "evidence to the contrary" but none were similar in fact to this case or Kozan's.

The Supreme Court of Canada had this to say in a case where the defence showed a possibility of more than one centigrade difference in temperature between the room air and that of the standard alcohol solution:

> "Mere possibility of some inaccuracy will not assist the accused. What is necessary to furnish evidence to the contrary is some evidence which would tend to show an inaccuracy in the breathalyzer or in the manner of its operation on the occasion in question of such a degree and nature that it could affect the result of the analysis to the extent that it would leave a doubt as to the blood alcohol content of the accused being over the allowable maximum".

It was the underlined portion of the quote the Crown claimed changed the law as established in Kozan. The accused's breath analyses

* R. v. Kozan 58 CCC (2d) 444

resulted in readings of 180 and 170 mgs. Would the one drink "at Joe's" with these readings, leave doubt that the accused's blood alcohol level was over 80 mgs. at the time of driving?

The "practical question" was whether, because of the "presumption of equalization" (Section 237(1)(c) C.C.), the accused had to show that his blood alcohol level at the time of driving, because of "the one at Joe's" was below 80 mgs., or does the burden of proving that it was over 80 mgs. remain with the Crown in these circumstances.

The County Court answered that, by enlarge, the Courts have placed the burden of proof on the Crown and said that in these circumstances, the certificate is only evidence and not proof of the blood/alcohol level at the time of driving.

In other words, the Crown should have called an expert to interpret the reading, taking the "one at Joe's" into consideration.

Not having done that, the trial Judge had found as a fact that there was doubt what the level was at the time of driving. The appeal court could not disturb such a finding.

Crown's appeal dismissed
Acquittal upheld

* * * * *

TESTIMONY OF AN ACCOMPLICE
CORROBORATION

Vetrovec v. The Queen; Gaja v. The Queen [1983] 1 W.W R. 193
Supreme Court of Canada

The accused and several others were convicted of conspiracy to traffic in heroin. At their trial a witness who had smuggled heroin from Hong Kong into Canada for them, had testified how these two accused had strapped the heroin on him and had paid him for his efforts.

The trial judge, in his six day address to the jury (after a one hundred day trial which resulted in a transcript of over nine thousand pages) had warned that it was dangerous to convict the accused unless the evidence of the accomplice was corroborated. Then the Judge had listed a number of items seized from the accused which were capable of corroborating the accomplice's evidence, such as the passports of both accused showing that they were in Hong Kong when the accomplice said they were, paraphernalia related to the drug trade, large sums of money, etc.

The defence argued before the Justices of the Supreme Court of Canada that the evidence the trial judge considered to be capable of corroborating the accomplice's testimony was no such evidence as it only related to the drug trade generally and not specifically to the transactions between the accused and the accomplice. Nothing corroborated the "overt acts" the acomplice claimed to have taken place, claimed the defence. The fact, for instance, that they were all in Hong Kong at the same time was too remote to corroborate all the things the accomplice said happened.

The Supreme Court of Canada decided to reassess the general principles relating to the law of corroboration respecting the testimony of accomplices and concluded that it was in need of reform.

In 1820 the English courts adopted a real common sense approach to the acceptance or rejection of the testimony of an accomplice. One sentence in an address to the Jury in that year said it all:

> "You are, each of you, to ask yourself this question . . . 'Do I upon the whole, feel convinced in my conscience, that this evidence is true, and such as I may safely act up it?'"

However, prior to and since that time, there has been a lot of soul searching about this issue. It was perceived that there is something "unsavory" about a person who participates in a crime and then, often for gain, accuses his partners in that crime. This resulted in the "accomplice warning" by Judges to the juries as early as the 18th century which actually, like the one quoted above, amounted to: "Beware when you consider his testimony, he was an accomplice".

In reasons for Judgements and books, a lot has been said about this, such as:

> ". . . the main reason for the rule was that an accomplice may try to save himself from punishment by procuring the conviction of others".
>
> "The danger is, that when a man is fixed and knows that his own guilt is detected, he purchases impunity by falsely accusing others".
>
> ". . . an accomplice cannot be trusted because he will want to suggest his innocence or minor participation in the crime and to transfer the blame to the shoulders of others".
>
> "It often happens that an accomplice is a friend of those who committed the crime with him, and he would much rather get them out of the scrape and fix an innocent man than his real associates".
>
> ". . . an accomplice is not to be believed since he is a self confessed criminal and is morally guilty". etc.

Some of these things were said before and after 1916 when a precedent setting decision was made by means of which "corroboration" was defined and added to the "accomplice warning" and later by statute and common law to other evidentiary essentials.

The British Lord said:

> "We hold that evidence in corroboration must be independent testimony which affect the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular not only that the crime has been committed, but <u>also that the prisoner</u> committed it".

We have since strictly applied the definition to the extent of ignoring the real issue, whether or not the accomplice is credible and can be believed. A recent trend has relaxed the application somewhat, and law reform recommendations are to limit its use and in certain circumstances, it has been legislated that it is no longer required for the testimony of victims of certain crimes (Bill C-127).

The Supreme Court of Canada reviewed that trend and the opinions of learned authors and posed the question: "Why have a special rule for accomplices at all?" It reasoned that the Courts do not have to issue warnings when shady, untrustworthy, and disreputable witnesses testify. "Why then should we automatically require a warning when an accomplice takes the stand?"

The Court concluded that the theory of corroboration is unsound and over cautious and has created an incredible body of complex law. "The result is that what was originally a simple common sense proposition - an accomplice's testimony should be viewed with caution - becomes transformed into a difficult and highly technical area of law". The result is that what ought to be simple does now, because of its complexity, go right over the heads of a jury and when they get to the jury room, they will, despite judicial instructions, approach the matter with common sense.

The Supreme Court of Canada held that accomplices must be treated like any other witness. In some circumstances it may be appropriate for a Judge to issue a clear and sharp warning of the risk of accepting the evidence of any witness, whether an accomplice or not.

The jury had, in this case, obviously believed the testimony of the accomplice.

Accused appeals dismissed.

Comment: Perhaps to soften the blow for the defence bar who must love the labyrinth of law surrounding corroboration (which makes it difficult for a judge to instruct a jury without a flaw somewhere) the Supreme Court of Canada pointed out how harmful the practice was to the accused. While all of the common law around corroboration was there to protect the accused, he discovered to his horror that at the conclusion of his trial, when the judge is supposed to warn the jury to be careful in accepting the accomplice's testimony, he was obligated to sum up all of the evidence harmful to the accused, which may serve to corroborate the accomplice's evidence. All of the damaging aspects that were sprinkled all through the evidence, are now all synopsized like a reminder to the jury of everything inculpatory in the evidence.

It must not be forgotten that this case only addresses the narrow question if "corroboration" must be included in the "accomplice warning" to a jury. The ruling does not seem to strike down all the other common law and statutory provisions dealing with corroboration.

* * * * *

RECOLLECTION OF EVENTS - USE OF NOTEBOOK

CALLING INFORMANT AS WITNESS TO QUESTION HIM ON REASONABLE AND PROBABLE GROUNDS FOR SWEARING INFORMATION

The Queen v. Jolliffe County Court of Westminster April 1982 No. X816154 New Westminster Registry

On the 20th of April, the accused was apprehended by police for impaired driving and refusing to give samples of his breath. The two count information was sworn on the 6th of September. The trial was held 23 months after the date of the alleged offence. The officers could not recall the details of the incidents and relied on their notebooks for their testimony. The officer who prepared the R.C.C. had a "specific independent recollection of preparing that report". This caused defence counsel to apply to have the informant called as a witness to assess the reasonable and probable grounds he swore he had to believe that the accused committed the alleged offences. The trial judge refused to grant the adjournment necessary to call the witness and the accused was convicted. He appealed on the grounds that he should have been allowed to question the informant as the law* states that the onus is on the defence to show on the balance of probabilities that the informant did not properly inform himself. He had been deprived of this opportunity.

The County Court Judge agreed that the defence can call the informant for the purpose stated above. However, it applied to do so when the Crown closed its case. It is a judicial discretion whether to adjourn for the calling of additional witnesses. The defence had plenty of time to do so and the cases on this issue show that the appearance of informants are commonly applied for before or at the onset of trial, or with reasonable notice and not causing unnecessary delays. When informants are called by the defence, it is to challenge the jurisdiction of the Court as a fundamental issue; after all, if the information is a nullity, the Court has nothing to act on as this document is the foundation of the charge and justifies the proceedings. In this case there was no allegation that there was no proper basis for laying the charge. Accordingly, the appeal was dismissed, and

Conviction upheld.

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* R. v. Peavoy 15 C.C.C. (2d) 97

CARE OR CONTROL OF A MOTOR VEHICLE

Toews v. The Queen B. C. Court of Appeal CA 801099 February 1983

The accused was found asleep in the cab of his pick-up truck on private property. His head was near the passenger door, his buttocks under the steering wheel and his legs reaching the floor. The lower part of his body was in a sleeping bag. The accused had attended a party in the house situate on the property where he was found. As he had too much to drink, he had arranged for a friend who also was at the party, to drive him home. At around 1:00 a.m. he entered his truck, placed the key in the ignition so his stereo would work and went to sleep. At 5:15 a.m., police spotted the accused and took him in for breath tests which resulted in readings of 160 and 170 mg. This resulted in a conviction for "care or control while over 80 mg." which the accused appealed.

A decision by the Supreme Court of Canada on the meaning of care or control* established that an intention to drive was not an essential element of the offence of "over 80 mg.". But the question raised in this case is: "Can a person have care or control of a motor vehicle if his intention is to sleep in the vehicle rather than to drive it?" In regards to this, the Supreme Court of Canada said in the Ford case that intent to set the motor vehicle in motion was not an essential ingredient to prove care or control. However, apparently, in view of Ford having started the car several times to stay warm, the Supreme Court had added:

> "Care or control may be exercised without such intent where an accused performs some acts or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion creating the danger the section is designed to prevent".

The B. C. Court of Appeal concluded that the accused Toews did not have the care or control of his truck. The Crown failed to establish

* Ford v. The Queen (1982) 65 C.C.C. (2d) 392.

the inference the accused intended to use the truck as a motor vehicle - that is to have the care of control of it. As this mental element was not established,

the appeal was allowed
conviction was quashed.

Comment: It is regrettable that the helpful Ford decision by the Supreme Court of Canada had to be tampered with and watered down. When reading the reasons for judgment it seems not unreasonable to assume that the B. C. Court of Appeal did all the maneuvering it could to avoid a conviction based on the application of a statutory presumption provision in circumstances for which it was apparently not intended. Well enough, should perhaps have been left alone. Nothing constructive seems to have resulted from this dispute of the application of the Ford decision; on the contrary, it has it less clear and, in B. C. at least, an unknown quantity.

* * * * *

EVIDENCE CODE

Canada and most of its provinces have legislated Evidence laws which stipulate specific rules of evidence. However, considering all the rules of evidence one will discover that what is contained in the Evidence Act is miniscule as most evidence rules exist at common law crystalized from judicial precedents or rules of the court.

The Law Reform Commission of Canada addressed itself to the multitude of evidence rules and recommended an Evidence Code for Canada. This was nearly a decade ago and, although the idea of a Code was supported, particularly by the Bar Association, the suggested content came under heavy criticism.

The idea did not gather dust and the Conference of Uniformity Commissioners were given a mandate to come up with a new draft. The work is now finished and is a report on evidence and is available in most court house libraries.

Some fear that an Evidence Code is another step towards codification of all law and leaving less and less to common law. Codified law is simply not flexible enough while common law can adapt itself to contemporary society through judicial precedents. With codified law, issues based on semantics often cloud merits and facts. The reports on the common law system really did not justify codification. It seems consistent with the bureaucratic philosophy that in the absence of a written rule or policy, the matter cannot be dealt with.

Nevertheless, reports indicate some interesting changes in the proposed rules of evidence as they relate to criminal law, particularly in the areas of statements, corroboration, alibi, expert evidence, and competence and compellability. The following are predictions made by knowledgeable people of the interpretation of the new rules, in respect to rules surrounding the admissibility of statement.

It is proposed that a "person in authority" be defined. To determine if a person to whom a statement is made was in fact a person in authority, the belief of the accused at that time is important. The courts apply a subjective rather than an objective test. As long as the accused did not believe that the person to whom he spoke was a person who had authority with respect to prosecution, then, regardless of his position, the recipient of the statement is not a person in authority.

This subjective test has been criticized on many occasions, and it seems that the proposed definition is a compromise between the two tests and it "includes someone whom the accused could reasonably have believed had authority with respect to the prosecution".

In relation to voluntariness, the proposed rules seem to make the test less severe. Its definition seems to suggest that the "operating mind" test established by the Supreme Court of Canada in Horvath v. The Queen (see page 22 of Volume 7 of this publication) will no longer apply.

The proposed evidence rules also call for a lesser burden of proof to show that a statement was voluntarily given. It provides that it must be proved on the balance of probabilities rather than beyond a reasonable doubt.

When an accused testifies during a voir dire or in his defence, it is permitted that he be asked in cross-examination if the statement he made is true. The proposed Evidence Code prohibits this question. The argument has always been that when the Crown selects to adduce a statement in evidence, it does so to prove the truth of its content. If the statement is exculpatory and not believed, then it is possibly harmful to the accused's credibility. But it is the Crown's prerogative whether or not to adduce the statement. If the accused testified during the voir dire in the absence of the jury (the ones who must determine if the content of the statement is to be believed) he does so in relation to the "voluntariness" only. The question at that stage is irrelevant. If he is asked the question when he testified in his defence, and the statement is inculpatory, then he is in a position of having to incriminate himself or commit purjury. In other words, the question deprives him from testifying on his own behalf.

It is also suggested that Courts are allowed to consider the contents of statements to determine if they were made voluntarily.

* * * * *

More to follow in our next volumes.

POSSESSION OF HOUSEBREAKING TOOLS
REVERSE ONUS AND THE CHARTER OF RIGHTS

Regina v. Fugard County Court of Vancouver No. CC820806 Vancouver Registry December 1982

The accused was found in possession of a pair of socks, a screwdriver, and a flashlight, in circumstances that gave rise to believe that these things were to be used for house-breaking.

At the onset of his trial the defence counsel asked the Court what its obligation was under section 309(1) C.C. which states that in circumstances like these the proof lies with the accused to show (on the balance of probabilities) that the tools were not intended for such use. Counsel, of course, submitted that the reverse onus was contrary to the presumption of innocence (s. 11(d) Charter of Rights).

In Ontario and Manitoba a County Court Judge and a Provincial Court Judge respectively*, found that it is too ambiguous for an accused to determine what evidence gives reasonable rise to the presumption. In other words, when does an accused have to prove a contrary intention?

The County Court Judge held that whether the presumption arises is a question of law. If the accused is in doubt if there is sufficient evidence for him to have to rebut the presumption, he simply makes a motion of "no evidence" at the conclusion of the Crown's case. If there is enough evidence for the trier of facts to draw the inference that house-breaking was the intended use, the motion will simply be denied.

The Court held that section 309(1) C.C. does not abrogate the Charter of Rights and Freedoms.

* R. v. Holmes and R. v. Kowdezuk - to the best of my knowledge unreported.

POSSESSION OF STOLEN PROPERTY

Regina v. Horsfield and Muir Vancouver County Court, September 1982
Vancouver Registry CC820642

Three days after a break-in of a home, by a party unknown, the two accused attended at the apartment of a friend. Horsfield brought a colour T.V. set that was taken during the break-in. The accused Muir and the friend stayed at the apartment while Horsfield went out to replenish the beer stock. His driving caused police to chase him. Horsfield went to the apartment block and used the intercom to alert his friends to get rid of the T.V. as the police were on his heels. Muir took the T.V. down some back steps and secreted it at the rear of the apartment building among the trash cans.

When caught, Muir admitted to have hidden the T.V. in response to Horsfield's request. He admitted to knowledge that Horsfield had taken the set in a break-in and had hidden it in a park from where both accused retrieved it on their way to the apartment.

The accused were charged jointly with Break and Entering and possession of stolen property with a value in excess of $200.00.

Firstly the Crown did not prove the value of the T. V. set and as a consequence, the charge was reduced to "possession under $200."

Then the evidence adduced by means of Muir's statement that Horsfield had told him that he had committed the break-in, had no evidentiary value against Horsfield to prove the truth of its content. It is a well established dictum that whether or not persons are charged jointly, the confession or admissions of the one is not evidence against the other. This meant that there was no evidence that either of the accused had committed the break-in. However, the statement had full value to show knowledge on the part of Muir that the T. V. was stolen.

Muir's defence counsel raised an interesting argument. He questioned whether his client's physical possession of the T.V. set (when he carried it out of the apartment and hid it behind the building) was a form of possession prohibited by law. Basing his arguments on previous judicial decisions, counsel submitted that possession for the purpose of disassociating oneself from a possession imposed upon him, is not an unlawful possession. For example, if there was a smash and grab and the pursued culprit forces the proceeds of his criminal act into the hands of an innocent bystander then if that bystander disassociates himself from the possession by discarding these proceeds, his temporary possession is not an unlawful one.

The Court agreed with the views of defence counsel but held that where it is found as a fact that the purpose of the discarding was to assist the culprit, then the possession is culpable.

Said the Court:

> "I am satisfied from the circumstances that when Muir carried the television set from the apartment block and secreted it behind the building he did so in order to aid and abet Horsfield, to evade detection by the authorities and to secrete the item. This was not a circumstance where possession was imposed upon him unwillingly".

Both accused acquitted of B & E
Convicted of possession of stolen property

* * * * *

IS THE "WARNING" A CONDITION PRECEDENT TO ADMISSIBILITY?

Regina v. McKenna County Court of Westminster November 1982 New Westminster Registry No. 81-7014

During the trial for a drinking/driving offence, the Judge would not admit a statement made by the accused to the police officer because there was no evidence of a warning. Said the trial judge: "But if the accused is not warned, the Court must have some doubt in its mind . . .".

The accused was acquitted and the ruling on the admissibility was one of the grounds for appeal by the Crown.

The County Court Judge said:

> "In my opinion that is incorrect. There is no basis for that conclusion. There is a basis for stating that it is desirable to give a warning, and the fact that a warning was not given is a factor to be considered in determining voluntariness".

As there was no coersion, promise, or threats, the conversation was voluntary and the statement was admissible.

* * * * *

FAILING OR REFUSING

Regina v. Bell County Court of Prince Rupert - December 1982 Prince Rupert Registry No. 79/82

The accused was tried for "refusing" to comply with a demand for samples of his breath. He had accompanied the officer and did put his mouth on the mouth-piece and apparently did blow. The samples he gave were simply inadequate to make an analyses. The accused was convicted and appealed claiming that perhaps he had "failed" to supply an adequate sample of breath but he had not "refused" to comply with the officer's demand.

The semantics about the distinction between these two verbs is as old as the section itself, and has been argued over and over again and reached several times the Courts of Appeal. Here are some of the phrases used in response to defence submissions that there is a distinction:

> "They create a single offence, that is one offence of non-compliance . . ."[1]
>
> ". . . it is difficult to see any difference between such 'refusal' and 'failure' . . ."[2]
>
> "Section 235(2) in our opinion, creates an offence, that is the failure or refusal to comply with a demand . . ."[3]
>
> ". . . only one single offence was created by the section and that the word 'refuses' is fully comprised within the word 'fails' so that a refusal was a failure".[4]

The County Court Judge held and agreed that 'refusal' includes 'failure' but not the other way around; and that the words are not synonimous in circumstances as they were here. Therefore the information alleging that the accused refused to comply, did not seem to provide the particulars of the incident which was the basis for the charge. The Court held not to be compelled to follow the precedents quoted above as the facts were distinguishable from those found in this case.

Appeal allowed
Conviction set aside

* * * * *

1 R. v. Kitchemonia (1973) 12 C.C.C. (2d) 225 Saskatchewan Court of Appeal
2 R. v. MacLennan (1973) 13 C.C.C. (2d) 217 Nova Scotia Supreme Court, Appeal Division.
3 R. v. MacNeil (1978) 41 C.C.C. (2d) 46 Ontario Court of Appeal.
4 R. v. MacLennan (1973) 13 C.C.C. (2d) 217. B. C. Court of Appeal.

ASSAULT - TRESPASSING NEWS REPORTERS

Regina v. Silber and Silber County Court of Vancouver September 1982
Vancouver Regstry CC820556

Mr. Hicks (representing a T.V. station) phoned Silber Sr., (one of the accused) at his picketed furniture store. The labour problems were apparently news worthy and Hicks suggested to televise the strike activities and interview customers. Silber Sr., made it abundantly clear that he did not want Hicks on his property. Despite this, Hicks showed up three hours later with Mr. Chu, his camerman, and did as he had proposed over the phone. After alerting police, Silber went out and grabbed the microphone out of Hicks' hands and said: "I told you to get off my property". Hicks replied: "I told you I was not going to accept your deal". A tussle ensued between the accused Silber Sr., and Hicks and the accused Silber Jr. and Chu. The object of the latter was to remove the film from the camera. As a result, father and son were charged with counts of assault and were acquitted. The Crown appealed.

The trial judge had found that Hicks and Chu were trespassers; Hicks directly as he was told not to come onto the property and Chu impliedly. The Judge had described the scene as a powder keg and said that the defiance by Hicks and Chu of the owner's wishes could well have provided the proverbial spark. He had found the actions by the two accused not surprising as "the law cannot expect them to wait and judge with nicety whether or not they should wait for their lawyers".

The trial judge held that it was hard to imagine a more flagrant and blameworthy trespassing and that the actions by the Gilberts were understandable. When the Crown submitted that the accused never gave the trespassers a chance to comply with their instructions, the Court replied that they were given a three hour chance when Hicks was told not to come onto the property.

The County Court Judge defined trespassing as unlawful entry or stay on another man's land. He noted that improper use of someone else's land is included in trespassing. Section 41(1) C.C. provides that a trespasser may be removed if no more force than necessary is used, and if the trespasser overtly resists he assaults the person who is authorized to remove him.

The Crown contended that the object of the struggle was not exclusively to remove the trespassers but predominently to seize their equipment. In such circumstances said the prosecutor, section 41(1) C.C. is not available. In other words, the Crown argued that the accused had ulterior motives and were after the equipment rather than the removal of the trespassers.

The County Court held that had the sole objective been to interfere with the property of the trespassers then the owners (accused) would find themselves not protected by the sections of the Criminal Code. However, where such interference is justified and simply ancillary to the removal of the trespassers, the protection of the law is available to them.

With a warning that landowners cannot rip film out of the cameras of trespassers and seize them, and will find themselves facing criminal charges if they do so without just cause, the County Court Judge held that in the circumstances as they presented themselves in this case, the accused were entitled to the protection provided by section 41 C.C.

Appeal dismissed
Acquittals upheld.

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CARE OR CONTROL

McIlwaine v. The Queen County Court of Vancouver Island, January 1983. Victoria Registry 22317

The Supreme Court of Canada decided in February 1982* that it is not necessary to prove that a person had any intention of putting a motor vehicle in motion to be found having the care or control of that vehicle. Nor is s. 237's definition of care or control exhastive and the only means to show care or control.

The accused McIlwaine parked in a park and drank beer with his brother. He was found by police asleep and slumped over the wheel. He was taken to the police station and "blew 1.4". He was convicted and appealed.

The accused had testified at his trial that, realizing he had too much to drink to be driving, he decided to stay right where he was and sleep it off. Therefore he had no intention to put his pick-up truck in motion.

One Justice of the Supreme Court of Canada had in the Ford case elaborated a little more on the meaning of care and control. He said that the person had to exercise the care or control in such a way "that the vehicle may unintentionally be set in motion creating the danger the section is designed to prevent". The County Court Judge concluded this to mean:

> "Put in another way negligence in the care or control leading to or likely to lead to motion is the basis of the offence but there is no need to prove the accused intends to put the vehicle in motion".

The accused being asleep when found, could hardly have had any intentions to drive. Therefore he had successfully rebutted the presumption of care or control under s. 237 C.C. The question remaining then is if the accused had care or control in these circumstances. To answer that, the Court had to consider if unintentional setting in motion was applicable here, despite the fact that the accused claimed that the ignition key was in his back pocket.

Regardless of the location of the keys, the circumstances were such that it was possible that the truck was unintentionally put in motion.

Appeal dismissed.
Conviction upheld.

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* Ford v. The Queen (1982) 65 C.C.C. (2d) 392

INVASION OF PRIVACY - BUGGING A CELL BLOCK

Regina v. Johnny, B. C. Court of Appeal - March 1983 - CA810711

The accused and one "Billy" were charged with second degree murder of a woman but convicted of manslaughter. They appealed.

The Crown had adduced conversations between the two suspects while they were held in a cell block. The interception was authorized by a Judge under the Criminal Code provisions (s. 178 12 C.C.).

The accused Johnny based his appeal on the cell-block being a place where interceptions of private communications are prohibited and for which no authorization can be granted (s. 178.13 C.C.). He claimed that the cell-block was a "place ordinarily used by a solicitor or by other solicitors for the purpose of consultation with clients".

Two of the three Justices agreed with the trial judge and found his observations reasonable. He had said that the days the two accused were in the cell-block no solicitor used that part of the premises to interview the accused or anyone else. Furthermore, he held that cells are normally utilized to detain persons and not for lawyers to interview clients.

The third Justice said that the normal utilization of the cells to detain persons did not preclude them being used for lawyers to interview detainees. He questioned the interpretation the trial Judge had given to the term "any other place ordinarily used by a solicitor". He felt that frequency of use was not necessarily a means to establish if the place was "ordinarily used" for something. "Ordinary use" is a fluid concept, he said. Although he felt that there was a wrong interpretation, he did not feel that his perceived error in law resulted in an error to admit the evidence obtained. He joined his brothers in

dismissing the accused's appeal.

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CROSS EXAMINATION ON CLAIMED GOOD CHARACTER

The Queen v. Wilson B. C. Court of Appeal - March 1983 CA 821147

It is a basic rule that where an accused claims good character the Crown may lead evidence to show bad character. When an accused puts his character in issue he is wide open to rebuttal evidence and/or cross examination related to the subject of character.

The accused was charged with rape and his aggressiveness became an issue. He called witnesses to say how free of violence he was, drunk or sober. When the accused took the stand he was questioned about him slapping around a woman who had resisted his sexual advances. However, the Crown did not call this woman as it had concluded that she would be an untruthful and unreliable witness.

In other words, the prosecutor did not have "reasonable grounds for thinking that the imputation conveyed by the question was well founded or true".

The Court of Appeal was of the opinion that there is a rule that overrides the basic rule mentioned above. The cross examiner who makes a suggestion of prior wrong doing on the part of the accused must have a proper basis for doing so". If this was not so "there is a risk of unfair prejudice to the accused through a powerfully persuasive innuendo being wafted in to the jury box".

In this case the prejudice was so grave that no direction of the trial judge could cure it. The Court suggested that in some cases a voire dire should be requested to avoid cases like this.

Two of the three justices of the B. C. Court of Appeal directed a verdict of acquittal.

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REFUSING TO PRODUCE DRIVER'S LICENCE - OBSTRUCTION

Regina v. White and White County Court of Prince Rupert December 1982
No. CC196/82 + CC173/82

A police officer found a car parked on private property (a lot belonging to an auto body shop) with several occupants. A dance was ongoing in a nearby community hall and the officer's sole reason for checking the car was his concerns about the possibility that there was liquor being consumed in a public place and that the person behind the wheel (care or control) was impaired. (At trial, there was no evidence adduced of either these offences).

The officer asked the accused Morris White who was sitting behind the wheel to produce his driver's licence. While he was in the process of complying, the accused Henry White, told Morris not to do so. Morris accepted Henry's advice and both were arrested for obstructing a peace officer in the lawful performance of his duty. They appealed their convictions by the Provincial Court.

The trial judge had found that the car was a public place under the Liquor Control and Licensing Act and that the lot was one the public resorted to. He had also said, that under the Motor Vehicle Act, he would have to strain the definitions to hold that the car was on a highway. However, in view of the grounds for believing an offence under the Liquor Act was committed, the officer was justified in what he did.

The County Court Judge held that there was no evidence that either one of the accused had driven or operated the car on a highway. Therefore, considering the wording of section 30 of the Motor Vehicle Act, the officer had no lawful reason to ask for the driver's licence. The trial judge had found as a fact that the lot was a public place in respect to the liquor laws, but not a highway so as to demand the inspection of a driver's licence. Therefore, there was no obligation on Morris White to produce his driver's licence and Henry White's advice was proper. Therefore neither accused obstructed the constable.

Appeal allowed
Convictions quashed

Comment: It seems an exercise in semantics to make a distinction between the definition of "public place" and that of a "highway" under our liquor and traffic laws respectively, and circumstances as they are in this case. The vehicle was clearly in a public place and on a highway. The only obstacle is that the obstruction was not based on a refusal to identify

oneself to an officer who has reasonable and probable grounds to believe that an offence was committed, but whether or not in these circumstances a person in care and control of a motor vehicle is obliged to produce his driver's licence. Assuming that the courts had found that the lot was a highway, would their views in regard to that obligation have been any different? It seems clear that the County Court Judge would have held that there was no such obligation in that section 30 M.V.R. only compels this for a person who is driving or operating the motor vehicle while it is on a highway. It seems that "care or control" should be added to the section, particularly in view of all the other documents that need only be produced when one drives or operates his car on the highway.

A similar problem may be encountered with section 62 M.V.A. which also places all responsibility to remain at the scene of an accident on the driver of the cars involved. An example of that is seen in Regina v. Kirby County Court Vancouver Island February 1983 Victoria Reg. #60668.

Returning from a picnic, Mr. Kirby and his wife stopped at a friend's home. When they entered the friend's home the Kirby's saw that their car continued its journey without them. The car rolled across the street into a parked motor cycle. The accused (Kirby) had been drinking at the picnic and the owner of the motorcycle was far from amused when he viewed the remains of his motorized steed, as a matter of fact he was "angry, distraught and belligerent". At the advice of his wife, the accused went into the friend's home and claimed to have done this as he feared the cyclist would become violent.

The trial court had convicted the accused as he had failed, as the driver of a motor vehicle to have complied with section 62(2)(b) M.V.A. (colliding with an unattended motor vehicle and not locating and notifying in writing the owner of name, address, etc.). The Court had found that the accused's fear was restricted to the cyclist calling the police and the probable discovery that the running away of the car and the accused's drinking had causal connections.

The accused appealed his convictions and argued:

1. that he was not the driver when his car collided with the motor cycle; or if he was the driver;

2. that he had complied with section 62 M.V.A. as far as the belligerence of the cyclist permitted; and

3. that he had acted in due diligence.

The trial judge found that the accused was the driver by any definition. He had parked the car improperly and was responsible for it rolling away on

its own. The County Court Judge found this finding erroneous in law. Subsection (2) of section 62 refers to the driver specifically. If the Crown had charged the accused under subsection (1), it would have far more to argue about. It places the obligation not only on the driver but also the "operator or other person in charge of a vehicle".

Needless to say, some sections of the Act require a little more attention from the drafters of legislation. Furthermore the Court ought to more often apply that section of the Interpretation Act (Federal and Provincial) which states that enactment must be given the broad and liberal interpretation it requires to meet its object.

It is difficult to judge, by reading the reasons for judgment, whether the charge was justified or not. However, these cases do set precedents that have devastating affects when the sections are used in circumstances for which they were designed.

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CAN EXCESSIVE USE OF FORCE IN SELF DEFENCE AMOUNT TO MANSLAUGHTER?

PROVOCATION

R. v. Faid Supreme Court of Canada March 1983

The accused and another known drug trafficker (W.) lived in a trailer together. W. was known to have "a violent temper". During a party the accused was told that W. had or was going to put a "contract" out on him.

When the accused arrived home he asked W. if what he had heard was true. A struggle resulted. The accused testified that W., after some blows being struck had attacked him with a long bladed boning knife. During the fight, to disarm W., the accused ended on top of W. on the chesterfield with the latter "growling like a wild animal". The accused hit W. on the back of the head to render him unconscious. This only increased W.'s rage. Finally the accused got the knife away from W. but lost control over him. On the side of the chesterfield was a spear gun and W. was heading for it. To prevent this and its obvious consequences the accused stabbed W. twice that he could remember. The wounds caused W.'s death. The accused had removed all evidence of the homicide scene; he had the rug cleaned, took the chesterfield to the dump and burned the body of W. at the side of an abandoned road. Two weeks later the accused was arrested for trafficking and when questioned about his partner's lot, he made a number of admissions in respect to facts surrounding the murder and said:

> "He ripped me off, he ripped everybody off, the fucker deserved it".

The above related circumstances were the accused's version and testimony. The Crown implied that the murder was the result of a dispute over money and to rebut the accused's claim of self defence they showed that W. was 5'9" and 170 lbs., while the accused is 6'3" and 240 lbs.

A jury convicted the accused of second degree murder. The Alberta Court of Appeal ordered a new trial and the Crown appealed that decision to the Supreme Court of Canada.

The Alberta Court of Appeal had reasoned that there was a "half way house" on this issue; something of a compromise, somewhat of a legal shelter. Assuming that a person has justification to defend himself but uses excessive force in doing so and does thereby unintentionally cause the death of the aggressor. The Alberta Court had said that in such circumstances the absolute defence of self defence is, of course, not available to the accused as he is not guiltless of any wrongdoing. However, he should not be guilty of murder, but have the "halfway house shelter of manslaughter" available to him.

The theory by the Alberta Court found no favor in the Supreme Court of Canada. The highest Court in the land unanimously decided that there was no justification in codified law for this proposition. Furthermore it "would require proof and complicated jury charges and would encourage juries to reach compromise verdicts to the prejudice of either the accused or the Crown".

The Court concluded that there simply was no partial justification for excessive force. For whatever is excessive, a person is liable and the consequences (death in this case) causes the defender to lose the defence of justification under section 34 of the Criminal Code. In other words, the Supreme Court of Canada said that there is no partial justification, and the accused is wholely responsible for the killing. However, where it is shown that the excessive force was applied without the specific intent to cause death or bodily harm likely to cause death (see section 212(3)) then, of course, the act does not amount to murder but manslaughter.

This is also what the trial judge had explained to the jury. The Supreme Court of Canada held that the Jury was properly instructed and concluded that the members obviously had not believed the accused when he explained that he had stabbed the victim in the back but had not intended to kill or cause bodily harm likely to cause death.

The Supreme Court of Canada said that the uncertainty of this law exists only in the minds of lawyers and not jurors.

> "This jury was told that intentional killing was murder and unintentional killing was manslaughter. They found Faid guilty of murder. I see no reason for suspecting that the jury could have convicted for murder while harbouring any reasonable doubt as to intent".

The Court found that the instructions to the jury were accurate and that Alberta Court of Appeal was in error.

Accused's appeal dismissed.
Conviction of second degree murder restored.

Another matter capable of reducing murder to manslaughter is provocation. However, presence of provocation by itself is inadequate to do so. There must be a wrongful act or insult that would cause any normal person, for the moment, not to be master of his own mind. If in such state one acts on the sudden, before there is time for his passion to cool, then, if his reaction to the insult or wrongful act causes the death of the one who provoked him, that murder may be reduced to manslaughter. Of course, Faid had to choose what defence to use. It is obvious that mixing the defence of self defence with provocation is like attempting to mix oil with water. The control required for the former, to measure the resistance to the

aggression endured so it is not excessive, is totally inconsistent with claiming not to have mastered your own mind due to passion, rage and the like. Although the victim had delivered blows to the accused, the accused had in his evidence claimed the contrary to all the emotions required to create provocation. To successfully raise provocation as a defence (which is only capable of reducing murder to manslaughter) it has to be shown that the accused must have killed because he was provoked, "not merely because provocation existed".

Defence counsel raised the issue of provocation before the appeal courts and said that perhaps the jury should have also considered such possibility. Of course, whether there is evidence capable of concluding that the accused was provoked is a matter of law and for the judge to decide; whether the accused was provoked is a matter of fact and for the jury to consider. In this case there was evidence of provocation, but none that the accused was provoked.

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