ISSUES OF INTEREST

Volume No. 21

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Police Academy

Written by John M. Post

Nov. 1985

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PERSON UNDER DEMAND TO GIVE SAMPLES OF BREATH - RIGHT TO COUNSEL - MEANING OF DETENTION

Regina v. Therens, 18 C.C.C. (3d) 481
Supreme Court of Canada

Therens, the accused, was driving a car and showed symptoms of impairment. A demand was made for samples of breath with which he complied. Everything had gone very cooperatively and the accused was not arrested at any time.

When the Crown adduced a certificate of analysis in evidence, the accused objected. He submitted that he was not told of his right to counsel, and, therefore, the evidence was obtained by an infringement of his right to be so informed. Admission of the evidence would bring the administration of justice into disrepute he claimed. These issues, via an appeal by the Crown, ended up in the Supreme Court of Canada.

Firstly, the Supreme Court had to determine if the accused had been detained when he gave the samples of breath. The answer was a resounding "yes". The reasons for so holding were:

> "The section of the Criminal Code (s. 235) clearly anticipates delay in some circumstances for the administration of this test."
>
> "... the accused was not free to depart as he pleased. To say that he was not detained is simply a fiction which overlooks the plain meaning of words from the viewpoint of an average citizen. An officious bystander would have no difficulty in concluding that (the accused) was detained and . . . had been taken into temporary custody."
>
> ". . . because of the limited duration of the detention, is not, in my respectful opinion, a reason for limiting the meaning of the word 'detention' to detentions of a certain duration."
>
> "In its use of the word 'detention', s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel..."

> "In addition to the case of deprivation of liberty by physical constraint, there is . . . a detention within s. 10 of the Charter when a police officer or other agent of the State assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel".

The other important question was whether the evidence (the certificate of analysis) should be excluded. The facts were simple: the accused was under demand to give samples of his breath and he was, therefore, detained; he should have been informed of his right to counsel and he was not, therefore, his constitutional right was infringed. The Supreme Court of Canada replied in regard to the exclusion of the certificate in evidence:

> "To do otherwise than reject this evidence on the facts and circumstances in this appeal would be to invite police officers to disregard Charter rights of the citizen and to do so with an assurance of impunity".

Crown's appeal was dismissed.

Comment:

It seems possible that Mr. Therens' name will become as immortal in Canadian law as the name Miranda is in the U. S. There seems little doubt that this case will have considerable consequences. My views are usually optimistic and I dislike to join those who consider all cases that bring about change, bad decisions. However, I must make an exception on this occasion. The Supreme Court of Canada seems to have gone beyond any prediction I have been privy to.

The Court abandoned its own definition of detention as established in the Chromiak* case and adopted one that is a culmination of the quotations above. Furthermore, there was a strong opinion that the Chromiak circumstances (which was a road-side breath test) were not distinguishable from those in this case where the suspect had to accompany the officer. The Court held that both situations constitute detention.

Some other comments by the court on detentions in circumstances where there is no legal obligation on the part of a citizen to do anything,

* Chromiak v. The Queen (1979), 49 C.C.C. (2d) 257.
Also see page 3, Volume 1 of this publication.

would leave one to conclude that a subjective test is to be applied to determine if there was detention. In other words, what did the suspect believe or what was reasonable for him to infer from the circumstances.

In respect to the exclusionary rule, I invite the readers to familiarize themselves with the explanation of that rule in Regina v. Collins (see page 1, Volume 12 of this publication). It should be noted that the B. C. Court of Appeal in that case disassociated itself from the U. S. Judicial opinion that illegally obtained evidence may, among other reasons, be excluded to deter authorities from such practices.

Let's consider the facts. When Mr. Therens was apprehended, the Chromiak decision, by the Supreme Court of Canada, was alive and well. Although some judges felt justified in holding differently, nearly all courts held that being under a demand only, without being physically restrained, did not constitute detention. Therefore, it can be said that the officers acted in accordance to judicially created law. Yet the Supreme Court of Canada seems to have excluded the certificate as not doing so "would invite police officers to disregard Charter rights of the citizen... with an assurance of impunity."

What inferences may our courts draw from this judgement? Firstly, it implies that the exclusion was a punitive measure and leaves one to assume that our Supreme Court feels that the judiciary have a disciplinarian role in regard to authorities who infringe the Charter rights of a citizen. Secondly, it seems that "good faith", or similar causation for an infringement, is not an acceptable excuse to prevent exclusion. Thirdly, as indicated above, all infringements, regardless of circumstances, trigger the exclusionary rule. In other words, all infringements bring the administration of justice into disrepute. This, in essence, means our exclusionary rule is strict.

Only one Justice (who did agree that a demand creates detention) was strong in expressing the view that it had not been established that the administration of justice would be brought into disrepute if the certificate was admitted in evidence in these circumstances.

It may be of interest to note that the trial judge had excluded the certificate as a remedy under subsection (1) of s. 24 of the Charter. The Supreme Court of Canada declined to rule if this was appropriate in view of the specific provisions in subsection (2). The Supreme Court excluded the evidence under s. 24(2) of the Charter.

There are considerable debates in legal circles about the far-reaching affects of this decision by our highest court. The views of the Supreme Court Justices were not consistent with one another and some points I make can be argued not to be the opinion of the majority of the Court. However, I am by no means the only one who is more than surprised that the Supreme Court of Canada ruled as it did.

* * * * *

REASONABLE EXCUSE TO REFUSE - ATTITUDE AND BEHAVIOUR OF PEACE OFFICER

Regina v. Barnsley, Vancouver County Court, Registry No. CC831767

The accused, a 19 year old man, was involved in a single car accident. A demand for a breath sample was made of him. His young passenger was arrested for outstanding traffic matters. The constable and the accused got along famously and the evidence at trial showed that the accused "exhibited co-operation and politeness". Upon arrival at the police building the accused and his passenger were given in charge of another constable while the arresting officer made ready for the breathalyzer tests. When he returned a remarkable change in the accused was noticed. The attitude of co-operation had changed into one of belligerence. By abusive comments the accused made it clear he was not going to take any test. He did not give a reason at the time for his refusal. The accused and his passenger testified at the former's trial for "refusing to blow" how the officer who temporarily watched the prisoners decided to search the accused. When he put his hand on the inside of the accused's leg he had flinched. The constable had grabbed the accused by his hair, pulled his head back and slapped him across the face. He had then grabbed a necklace the accused wore and had pulled it off him upon which he goaded the accused by saying: "try it". The accused had not spoken a word and had not reacted in any way.

The trial judge had considered the episode an unfortunate incident for which the accused could seek a remedy by other legal means. The officer who demanded the breath sample was not involved and was not given a reason for the refusal. The trial resulted in a conviction which the accused appealed claiming that:

1. the trial judge had not addressed the issue of reasonable excuse; and

2. the behaviour of the assaulting peace officer was so outrageous that it in fact constituted a reasonable excuse for him to refuse supplying a breath sample.

The County Court Judge reviewed some cases in which the question of reasonable excuse had been an issue and concluded that police misconduct can cause a suspected impaired driver to have a reasonable excuse for refusing to give breath samples.

In one case* a suspect was ordered to drop his pants and bend over which caused hilarity among police officers who were present.

* R. v. Cristoff (1978) 3 W.W.R. 577, B. C. County Court decision.

Immediately upon that humiliating drama the suspect had been told to blow and he had bluntly refused. He was held to have had a reasonable excuse to do so.

In another case* the Court held that malice, unfairness, illigality or threats could give a suspect a reasonable excuse to refuse. One refuses, however, at one's peril. Whether an excuse is reasonable is up to the Court regardless how sincere the suspect was in his belief. This view was also adopted by the B. C. Court of Appeal**. The suspect in that case had consumed alcohol after his driving and he concluded that the analyses would consequently be inaccurate. That, however, was not found to be a reasonable excuse despite the fact that the Court recognized that the accused had a legitimate fear of prejudice in respect to his blood-alcohol content at the time of driving. In other words, fear of wrongful conviction is no excuse. Then there was a decision by the New Brunswick Court of Appeal† in which that Court held that a reasonable excuse includes a circumstance which renders compliance with a demand extremely difficult or one that involves a substantial risk to the suspect's health.

The County Court Judge reasoned:

> "If there is police misconduct which understandably infuriates a citizen such that his judgement is affected and there is not sufficient time for him to collect his thoughts and respond rationally to the demand, is that not some circumstance which renders compliance extremely difficult... and in those circumstances is the excuse for such refusal understandably justifiable?"

The Judge answered both questions in the affirmative. He found that the trial Judge had not considered the matter of reasonable excuse. Furthermore, had he done so, then by law, he would have had to conclude that the accused had a reasonable excuse.

Conviction set aside.
Acquittal substituted.

* * * * *

* R. v. Miller (1972) 21 C.R.N.S. 21. Ontario High Court decision
** R. v. Dunn (1980) 8 M.V.R. 198. B.C.
† R. v. Nadeau (1974) C.R.N.S. 155.

IDENTIFICATION

Regina v. Todish 18 C.C.C. (3) 159
Ontario Court of Appeal

Mrs. C. was counting the cash receipts of the store she managed. A man came in, pushed her to the ground, and took all the cash ($2,000 approximately). Mrs. C. gave a detailed description of the robber and claimed that she recognized the robber as the person who came in the store a few days before to use the telephone. In the evening of the day of the robbery the accused came into the store and his features and clothing were so significantly similar to those of the robber that the employee on duty called police. The accused, a man with a record of convictions for thefts, was arrested. His home was searched and a jacket, identical in description to that worn by the robber was found. No money was recovered.

Police phoned Mrs. C. and asked her to come to the police station as they had a "suspect in custody". When she arrived she was told that the suspect was upstairs in an office and was asked to walk past the office to see if that suspect was the man who robbed her. The accused was in the office with two police officers and was identified by Mrs. C. as the robber.

The identification evidence was the kernel of the Crown's case when the accused was tried by judge and jury. The latter obviously accepted the identification evidence as they convicted the accused. The accused appealed.

The trial judge had not been elated about the way the identification was handled. Besides human observations being notoriously unreliable, this identification was to be viewed with some concern, he had told the jury. Mrs. C might have been influenced by having been told that police had "a suspect" in custody and then was shown that suspect in between two police officers. The lack of a photo or actual line-up was strongly criticized. However, the jury was told that the robbery had happened only a few hours before the identification and that Mrs. C. had been very positive. Furthermore, she had dealings with the suspect before and had prior to the identification said that the person who robbed her had made a phone call in the store a few days before the robbery. That, the Justice told the jury made the evidence, despite the unusual manner in which police handled the identification, capable of finding as a fact that the robber and the suspect were one and the same person.

The Ontario Court of Appeal said that the police procedure had rendered the identification by Mrs. C. "virtually worthless". However, the court of Appeal agreed with the direction the trial judge gave to the jury and the apparent acceptance of the identification evidence was left undisturbed.

Comment: Should anyone find comfort in the fact that the evidence of the identification withstood the test by means of appeal, certain aspects of the system should be remembered. The appeal was based on the instructions to the jury being inadequate. A judge sitting with a jury must instruct what is capable of being, while the jury, applying the law as instructed, does determine what is. A judge sitting alone, does fulfill both functions, of course. All the judge in this case could do was to determine if by law a jury was entitled to find a fact. He, as well as the Court of Appeal concluded that, upon the evidence, one could conclude that the person who used the phone, the robber and the person subsequently coming into the store were one and the same individual. Whether or not these justices would have so found if they were sitting alone is difficult to predict. They most certainly were critical of the procedure police followed.

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WARRANT WHERE DAMAGES OR INJURIES ARE FEARED - WARRANT EXECUTED BUT NOT SERVED ON PRISONER - VALIDITY OF ARREST

Regina v. Allen, 18 C.C.C. (3d) 155
Ontario Court of Appeal

Under the summary conviction provisions in the Criminal Code, a warrant may be issued for the arrest of the person who the informant fears may cause injuries to him or her. The person is not charged with an offence, but if the justice, upon hearing the evidence is satisfied that the informant's fear is based on reasonable grounds, then the prisoner can be ordered to enter into a bond to secure good conduct or be placed in gaol should there be a refusal to enter into a bond. Such a warrant was outstanding for Mr. Allen. A police constable received radio instructions to execute the warrant at Mr. Allen's home. The officer was 2 miles from where the warrant was and one-half mile from the address where Mr. Allen lived. The constable decided to go without the warrant and saw Mr. Allen leaving his home when he arrived. The constable told Allen about the warrant for "threatening" and effected the arrest which resulted in a struggle and an escape. Later Mr. Allen was found hiding in the back of a truck and he was arrested for escaping lawful custody.

Needless to say that when the accused was tried for escaping, the lawfulness of the arrest became an issue. In the summary conviction procedures under the Criminal Code (section 728) it specifically states that where a warrant is issued, "a copy thereof shall be served on the person who is arrested thereunder". Although section 745 C.C. (threatening) does not create an offence but is a protective and preventative measure, the warrant was nonetheless one issued in the first instance for the arrest of Mr. Allen. Not being able to serve the warrant upon arrest had not affected the lawfulness of the custody. However, the serving of the warrant should be done as soon as practicable after the arrest is made. Mr. Allen was not served with the warrant at any time. This had affected the lawfulness of the custody and an acquittal resulted.

The Crown appealed and the Ontario Court of Appeal convicted the accused. It simply held that what was important was the status of the custody at the time of the escape. Perhaps the custody later on, at the police station, was unlawful due to the omission of serving the warrant, but when the accused escaped the arrest and custody had been lawful. Furthermore the Court rejected the argument that the warrant was issued without jurisdiction as section 745 C.C. does not create an offence. Section 728 does speak of a warrant for the arrest of a defendant. Of course, if there is no offence their is no defendant argued the defence. The Court responded that section 745 C.C. provides for a justice to cause the parties to appear before him and Part XXIV of the Criminal Code is applicable to the means. Therefore the warrant was issued in accordance to law.

Acquittal set aside.
Conviction substituted.

* * * * *

SIDE TRACKING

Jack Falk and The Queen, Supreme Court of British Columbia, Vancouver CC850576 - April 1985.

"Side tracking" is a much criticized practice in the United States. The Court system in the States may appear similar to ours but it is on closer examination quite different. Basically, only Federal Courts have jurisdiction over constitutional issues, and trials in State Courts have, due to this, been stretched beyond belief. Every time an innovative defendant or his counsel raises a unique constitutional issue then, depending on the issue, the trial may have to be adjourned until the appropriate Courts have made a decision upon the petition of the defendant. Those, who are financially well endowed have been able to exploit this system to their advantage. The book, "The Price of Perfect Justice"* by Mr. Justice Macklin Fleming of the Court of Appeals in California, explains this system very well and the author condemns the practice.

For reasons completely different to those in the U.S., it was feared by many that our Charter would create a similar practice. Indeed, several attempts by defence counsel have been to have trials in lower courts adjourned to enable them to take a Charter issue to a court of superior jurisdiction.

Section 24 of the Charter deals with the enforcement of the rights and freedoms and provides that anyone can seek an appropriate remedy from a "court of competent jurisdiction" when their rights or freedoms have been infringed. The trend of the decisions where remedy is sought for alleged infringements, where it involves a person accused of having committed an offence, is that the court of competent jurisdiction to determine if infringement occurred and to impose a remedy, is the court that has jurisdiction to try the accused.

This is consistent with the dictum that any Canadian court may decide on constitutional issues, if and when they arise during proceedings appropriately before that court.

In this case the accused was charged with aggrevated assault. The correctional institute in which he served also alleged a disciplinary default. Prior to his criminal trial he petitioned the B. C. Supreme Court to prohibit the trial. He claimed that proceeding with both would amount to double jeopardy (s. 11(h) Charter). Defence counsel

* Published by Basic Books Inc. New York 1974.

had raised a forceful submission that this issue should be decided by the Supreme Court instead of making the argument of double jeopardy part of the defence to the criminal allegation.

She submitted that no person should have to stand trial if the Crown has no constitutional right to proceed against him or her. Furthermore it would be an unnecessary inconvenience to witnesses to conduct a trial if the constitutional objection is correct.

The Chief Justice of the B. C. Supreme Court responded:

> "I have the view that, when a matter is before a court that has jurisdiction to hear the substantive offence, it is better in most cases that Charter defences be advanced at the trial."

The Chief Justice was also of the view that the constitutional issues to be raised must not be divided up with trials in one Court and Charter applications in another. That practice would relegate the trial to a subserviant role.

Accused's petition dismissed.

The book "The Price of Perfect Justice" ought to be of particular interest to us in view of our Charter and our search for its meaning and application. In 1977 (pre Charter days), Barbara McLintock, the well known B. C. Journalist (currently with the Vancouver paper, The Province) wrote a review of this book for the predecessor of this publication "The Criminal Justice Bulletin" (published by Camosun College in Victoria, B. C.). With her consent, here is Barbara's review of "The Price of Perfect Justice".

"The Price of Perfect Justice": The Adverse Consequences of Current Legal Doctrine on the American Courtroom. By Macklin Fleming. Published by Basic Books, Inc., New York, 1974. The author was a Justice of the California Court of Appeals.

Controversy surrounding the administration of justice in B. C. appears to have come to a head in recent weeks, with complaints of chaos in the criminal courts in Vancouver and, finally, involvement of the entire provincial cabinet in the issue. Various solutions have been suggested, most of them having to do with Crown counsel - hire more prosecutors, pay them better, give them merit pay, and so on. There have also been recommendations to increase the number of judges, to build more courtrooms, to improve management of the system.

However, if we follow the theory proposed by Macklin Fleming, we must conclude that these will be no more than band-aid solutions and will do nothing to solve the real problems of the system. Fleming's argument in The Price of Perfect Justice is that the root problem is a philosophical one, not a political or administrative one. His thesis is based on the U.S. experience, particularly that of the state of California, but it can easily be applied to B.C., though in a less extreme form.

Put briefly, his thesis is: "The Goddess of Justice is traditionally depicted holding in one hand the scales of justice, with which she weighs the Right, and in the other, the sword, with which she executes it... The sword and the scales belong together, and the law is in phase only when the power with which the Goddess wields the sword is equalized by the skill with which she balances the scales... This book argues that, in our perpetual adjustment and tinkering with the Goddess' scales in order to strike a perfect balance, we have allowed her sword to rust and her right arm to atrophy; that, as a consequence of this neglect of the compulsive element, the legal system as a whole has been thrown out of kilter and into disarray".

The reason for the tinkering, Fleming argues, is that those in the legal system have come to believe that "with the expenditure of sufficient time, patience, energy and money, it is possible to achieve perfect justice in all legal process", and that this perfection is an ideal to be assiduously sought. The search, he notes, has led to an ever-increasing emphasis on form and procedure at the expense of substance, to the point that the central question in some criminal trials is not the factual guilt or innocence of the accused but the correctness of the procedure used in investigating, arresting and trying him.

But, he says, "in our pursuit of the will-o'-the wisp of perfectability, we necessarily neglect other elements of an effective procedure, notably the resolution of controversies within a reasonable time, at a reasonable cost, with reasonable uniformity, and under settled rules of law". The result of the search for perfectability is that less actually gets accomplished, and accomplished well, than would otherwise be the case, and as a result, the administration of justice falls into disrepute with the public.

"But, the perfectionists argue, no sacrifice is too great to assure that in a given case, perfect justice will be done. Ignored is the sacrifice of the legal order itself and of the life, liberty, and property of those that the legal order is designated to protect. Ignored also is the necessity that the procedure we follow lend substance to the moral and ethical idea that those who take up the sword shall perish by the sword.

"Each time the criminal process is thwarted by a technicality that does not bear on the innocence or guilt of the accused, we trumpet abroad the notion of injustice; and each time a patently guilty person is released, some damage is done to the general sense of justice."

After outlining the thesis, Fleming - who is a judge of the California Court of Appeals - goes on to document dozens of ways that the process is being thwarted by the search for perfectability. The examples are all taken from the U. S., and while some of them apply in B.C., most do not.

It is clear from the examples that the situation in many U. S. jurisdictions is far worse than that in B. C. and we have not yet developed many of the problems plaguing their courts. For example, in the U. S. a case can be shuffled back and forth enlessly between state and federal courts, determining what jurisdiction each has in various aspects of the case (side tracking).

Also, in the U. S., a judgement by its Supreme Court on the subject of the rights of an accused can be considered retroactive, so someone convicted of an offense 20 years ago has the right to appeal under a Supreme Court judgement made yesterday.

However, we do already suffer from some of the same problems - delay caused by an accused who changes his lawyer several times over and must be given an adjournment each time to ensure his right to a full defence is not compromised, for example. It is also possible to cite some Canadian examples that do not apply to the U. S. - prosecutions that result from police wiretaps, for instance.

Witness the case in March in Vancouver where the Court of Appeal quashed a conviction in a drug-conspiracy case because the Crown had not produced a witness to testify that he saw the judge sign the order authorizing the wire tap. Surely this is a perfect example of a case where guilt or innocence became irrelevant, and the only question as the perfection of the investigative procedure.

The Price of Perfect Justice is undoubtedly a controversial book and would be met with considerable opposition from some persons in the justice system. But it also presents an important argument, and should surely be read by all those - politicians and administrators - who are about to tinker with the system further and apply more band-aids to its serious wounds.

It might be noted also that the book is exceptionally well-written and is easily read and digested by anyone with only the most basic understanding of our legal system.

Barbara McLintock

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MAY IT BE PRESUMED THAT ONE WHO POSSESSES MAGIC MUSHROOMS HAS KNOWLEDGE OF THE RESTRICTED DRUG THEY CONTAIN?

Regina v. Edgars, B. C. Supreme Court, Prince Rupert No. 7142T.

The accused, a middle aged woman, was found picking "magic mushrooms". She already had a quantity of them in a plastic bag when police officers seized the mushrooms and told her that it was illegal to pick the plants. She had explained that the mushrooms were for her ailing brother-in-law who used them as a pain killer. There was no mention made by anyone that the mushrooms contained a restricted drug (psilocybin) and hence there was no evidence the accused knew she was in possession of that drug. She was convicted of possession of psilocybin and appealed by means of stated case.

In 1979 and 1980 the B. C.* and Alberta** Courts of Appeal had held respectively that possession of the mushroom was not intended by Parliament to support a charge of possession of its integral parts. However, in 1982 the Supreme Court of Canada† expressed a different view. The major question in that case had also been whether a person could be convicted of possessing psilocybin by being in possession of the natural plant that happens to contain that drug. Since hallucinogenic effects can be attained by chewing the plant, the Court concluded that possession of the mushroom is the equivalent of possession of the restricted drug it contains. The question was put: "But what about the owners of land that happen to have these mushrooms grow wild; or the person who is innocently in possession of what they believe to be an ordinary mushroom. The Court replied that common sense on the part of the authorities would protect them.

Apparently following the Supreme Court of Canada decision the trial judge had concluded that the accused possessed mushrooms which in turn contained the restricted drug. However, the appeal turned on the issue whether the Crown had proved requisite knowledge on the part of the accused. The trial judge had held that the accused's statement that the mushrooms were for curing a sore back was of no assistance in determining if the accused had the knowledge necessary to convict her.

The trial judge had held that the knowledge must be presumed if possessing the plant is possessing the drug it contains.

* R. v. Parnell (1979) 51 C.C.C. (2d) 413
** R. v. Cartier (1980) 54 C.C.C. (2d) 32
† The Queen v. Dunn - See Volume 10, page 12 of this publication

The Supreme Court Justice who heard this appeal referred to a decision by the Ontario Court of Appeal* which states that when the Crown has proved possession, the presumption arises that the accused had guilty knowledge. In this case the accused had not called any witnesses nor did she testify herself. This meant that the Crown having proved possession the trial judge properly inferred mens rea.

Conviction was upheld.

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* R. v. Couture 33 C.C.C. (2d) 74

"CASUAL ARREST" AND ITS CONSEQUENCES IN RELATION TO SUBSEQUENTLY FOUND EVIDENCE

Regina v. Duguav, Murphy and Sevigny - 18 C.C.C. (3d) 289
Ontario Court of Appeal

Mr. and Mrs. L. preparing for an evening out, put their dog in the garage. One of three young men who were visiting in the neighbour's back yard asked Mr. L. if he always did that when he went out. He said he did. When the L's returned home in the early morning hours they found their home had been broken into and stereo equipment, jewelry and liquor was missing. Needless to say police were told about the three young men.

The neighbour knew that one of the young men was the "Murphy lad" and it was arranged that this lad and his buddies would come over to the neighbour's. When they arrived the L's identified two of them as the young men they saw the night before. The threesome was invited into the rear of a police car as two detectives wanted to speak to them. When one of the detectives during the trial of the young men for "break, enter, and theft", was asked if the accused were under arrest, he had replied that they were under "casual arrest". The officers conceded that at the time of the arrests they only suspected the accused had committed the break-in and had questioned them to enhance their investigation and obtain confessions. Subsequent to the "casual arrest" the "Murphy lad" made a statement that confirmed the officers' suspicion and an official arrest was made for the break-in with the usual warnings. This resulted in confessions from all three accused and the recovery of the stolen property.

The trial judge had held that the arrest was unlawful as it was not made on the well known prerequisite grounds. In these circumstances the accused were also arbitrarily detained contrary to their rights (s. 9 Charter). He had disallowed the confessions and the spin-off evidence of the recovery of the stolen property as admission of that evidence would bring the administration of justice into disrepute. The Crown appealed the consequential acquittals.

Every unlawful arrest does not necessarily result in arbitrary detention, confirmed the Ontario Court of Appeal. In this case the "casual arrest" (which the Court held has no support in law) had been made to assist the investigation and hopefully confirm the "hunch" of these experienced officers. In other words there were no grounds for an honest belief based on reasonable and probable grounds. This flagrant departure from the dictates of s. 450 C.C. caused the resulting detention of the accused to be arbitrary.

As an aside, it seems that the Ontario Court of Appeal was of the opinion that the arrests had been totally unnecessary. The accused had been co-operative throughout and the confessions and recovery of property would likely have resulted without the arrests.

The sole question the Ontario Court of Appeal was now to address was whether the admission of the voluntary statements, the recovered stolen goods and the fingerprints taken of the accused (which matched those found inside the L. home) would bring the administration of justice into disrepute. The trial judge had used words as "shocking", "nefarious" and "unlawful" to describe the action of the officers. He had said that only the use of torture would exceed these practices in impropriety. These words were "excessive" and his reasons too general in describing the actions of the officers, said the Court of Appeal. There are cases where trained evidence is acceptable as rejection would be more harmful to the state and society than the acceptance of it. Not all admission of evidence obtained consequently or subsequently to an infringement of an accused's right will bring disrepute on the administration of justice. Furthermore, the Court of Appeal reiterated that if an accused applies for rejection of evidence under s. 24 of the Charter the onus to show that his rights or freedoms were infringed is on him.

Crown counsel also argued that before evidence can be excluded under s. 24(2) of the Charter there must be a causal connection between the infringement of a right or freedom and the obtaining of the evidence. The Ontario Court of Appeal did not confirm that the Crown's submission was an accurate statement of the law but responded that "be that as it may" there was such direct link between the arbitrary detention and all of the evidence.

Subsection (2) of section 24 of the Charter states that when an infringement is found the circumstances must be considered to determine if disrepute will befall the administration of justice. For instance, were the officers really up against it and did they have to take certain liberties with the law to avoid greater harm to society? The answer also in this regard was "No". The youths were 17 years old; they were identified; they were not about to abscond; they had no criminal record; and (this is somewhat hard to grasp) the Court held that the offence (B & E of a home with life imprisonment as a maximum penalty) was not a serious offence.

The Ontario Court of Appeal found in a 2 to 1 decision, that the trial judge did not err in law in finding that admission of the evidence would bring the administration of justice into disrepute.

Crown's appeal dismissed.
Acquittal of all three accused upheld.

Comment: This case could cause a lot of confusion as on the surface, it seems to contradict binding precedents.

The Court rejected the confessions made by the accused not because there was a doubt about them being made voluntarily, but because they were obtained by an infringement of the accused's right not to be arbitrarily detained.

If the Court had not admitted the statement because of a problem in regards to voluntariness the evidence of finding the stereo equipment and the finger print evidence should have been admissible. This was demonstrated in the wellknown case of The Queen v. Wray. By means of an involuntary statement police recovered the murder weapon. A ballistic test had corroborated the accused's claim, that it was the murder weapon. All Courts (from the trial court to the Supreme Court of Canada) held that Wray's confession was inadmissible but the Supreme Court of Canada held that where facts are discovered as a direct result of an inadmissible statement then that portion of the statement relating to those facts and the facts themselves are admissible. This doctrine of "subsequent facts" is, to the best of my knowledge, alive and well. That where a statement is excluded because of an infringement of a right or freedom, that doctrine has no application.

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ADMISSIBILITY OF COMPUTER PRINTOUTS.

ARE THESE MECHANICALLY KEPT RECORDS, "RECORDS MADE IN THE USUAL AND ORDINARY COURSE OF BUSINESS"?

Regina v. Symanski, County Court of Vancouver Island Nanaimo CR3087, November 1984.

To prove a criminal allegation against Symanski it was essential for the Crown to have monthly bank statements admitted in evidence. Defence counsel objected to the admissibility and a voir dire was conducted. The kernel question was whether a computer print-out is "a copy of any entry in any book or record kept in any financial institution". S. 29 of the Canada Evidence Act provides that such records or booke must be received in evidence as prima facie proof of such entry, transaction or account. Furthermore s. 30 of the Act provides that records made in the usual course of business are admissible in evidence.

When records were adduced in the past the Courts would not admit their content unless there was evidence (usually by means of an affidavit) that:

1. the statement was an ordinary book or record of the bank when the entry was made;

2. the entry was part of a usual and ordinary course of business;

3. the record was in custody and control of the bank; and

4. the copy adduced in evidence is a true copy.

Now that all the records and books are kept electronically, those prerequisite conditions to admissibility are difficult to meet. The accused therefore objected to the admissibility of a copy of his monthly bank statements. He claimed that the Crown had failed to show that the entries on the computer printout could be relied upon to demonstrate his transactions. To do that the Crown would have to show "the procedures and processes relating to the input of entries, storage of information and its retrieval". In other words, the computer software package.

The Court did not buy the accused's arguments. Quoting the B. C. Court of Appeal* on s. 29 of the Canada Evidence Act and computer printouts of records, the Court held that the section "had aptly survived the transition from the past era of unwieldy ledgers through

* R. v. Best

the era of ledger card cabinets and wheels, to the present era of the immovable and often far distant electronic data storage and retrieval centers of computer accounting".

The printouts were admissible under the provisions of s. 29 as well as 30 of the Canada Evidence Act.

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KIDNAPPING AND UNLAWFUL CONFINEMENT

BURDEN TO PROVE THAT ACCOMPANIMENT WAS NOT VOLUNTARY

Regina v. Gough - 18 C.C.C. (3d) 453
Ontario Court of Appeal

The 200 lb. accused, a man with a violent temper, was engaged to a 90 lb. woman. Their courtship, during which they lived together, is not described as a romantic event. The woman was subjected to severe violence.

Apparently one day the woman had enough and went into hiding. She knew that the accused would not give up until he had found her and if he did, would persist and use violence to get her back. On an occasion that she had to go out to do some business, the woman left a message with her hostess that if she was seen with the accused the police should be notified. The accused did spot the woman and drove her around to her appointments, accompanying her everywhere and not letting her out of his sight. The woman testified that if she had resisted his company she would have been beaten. She gave in and out of fear only, she stayed with him. The accused drove to another city and allowed the woman to phone her hostess to say she would not be home. They ended up at the woman's parents place where they stayed overnight. In the morning hours police arrested the accused. He was charged that he had without lawful authority confined, imprisoned, or forcibly seized the woman (section 247 C.C.).

Subsection (3) of section 247 C.C. states that when a person is charged under that section, the lack of resistance on the part of the victim is no defence unless the accused proves that the failure to resist was not caused by duress, threats or force. This, the accused claimed, is inconsistent with the Charter provisions which stipulate that one can only be convicted in accordance with the principles of fundamental justice. It also contradicts the right to be presumed innocent until proven guilty he said. In view of these provisions the reverse onus created by s. 247 (3) C.C. is of no force or effect claimed the defence (see section 52(1) Charter).

The Ontario Court of Appeal commented that the lack of consent to the confinement on the part of a complainant is only a matter of common sense. When we give someone a ride in a car or host a person on an island, we actually confine that person. The consent to that confinement exonerates us. Lack of resistance is not by itself a defence but is simply relevant to the matter of consent. In this case it was up to the accused to turn the evidence of lack of resistance

into evidence that the complainant consented to the confinement. Needless to say lack of resistance leads to a reasonable inference that there was consent. This inference is because of s. 247(3) C.C. not open to the judge of the facts, unless the accused shows on the balance of probabilities that he by threats or force did not cause the failure to resist.

If one comes to think of it, this reversed onus provision is awkward. Gestures we make, words we speak, or items within reach may be misinterpreted and cause a person to feel confined on account of them. That person may, out of fear, not resist or object. Actually the section demands that an accused proves something that was in the mind of another person.

The Court suggested that subsection (3) should not be a reverse onus clause but should simply say that lack of resistance caused by threat or force is no evidence of consent to confinement. The complainant then simply could testify what caused him or her not to resist and the accused would simply through cross examination or defence evidence have to rebut that evidence.

This Court did something quite similar to the position it took on presumptions of fact. There are several in the Criminal Code and at common law. For instance, if a person was found in the driver's seat of a car we may presume the fact that he had care or control of the car. The test devised whether such "presumption" is an inappropriate one is whether the prerequisite evidence makes the presumed fact a probability. In other words, there must be a logical link between what is and what may be presumed. The Court in essence held that the same applied here. Not containing such a link the reverse onus was considered unreasonable and arbitrary.

The Court of Appeal declared s. 247(3) C.C. to be contrary to the Charter provision and therefore without force or effect.

Accused's appeal allowed.
New trial ordered.

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FIGHT - CONSENT TO ASSAULT - INTENT

Regina v. James Thomas - Vancouver County Court - Vancouver Registry C.C. 840480

The accused and the complainant had engaged in a bar room fight. There was no doubt that their activity was like ballroom dancing as both were willing parties to the engagement. The accused, who is powerful and large, quickly gained the upperhand and the complainant's actions became less aggressive and eventually were completely defensive. He was laying on the floor, face down, with his hands covering the back of his head and neck. The accused did not let up and continued to beat his victim who by now was no longer a combatant. When the victim (apparently to get away) raised himself on one arm, the accused took his boot to the complainant's face. This caused serious injuries and the loss of one eye. Consequently the accused faced a charge of wounding thereby committing an aggravated assault.

The defence claimed that:

1. the accused did not commit an assault as the complainant had consented to the fight;

2. there was no specific intent on the part of the accused to wound; and

3. that the precedent set by the New Brunswick Court of Appeal* is distinct from this case as that related to a schoolyard fight.

With regard to consent by the victim, the Court in essence applied the well established test in which the stages of a fight are distinct from one another. Basically, when one consents to a fight he gives consent to be aggressively touched and to match the required skills for such a contest. However, it must be inferred that anyone only consents to a fair fight.

Criminal intent is divided into general and specific intent. For the former the Crown only needs to prove that the person intended to commit the act that constituted the offence. For the latter it must be proved that the accused specifically intended the consequences of his acts. In other words, under the relatively new section 245.2(1) C.C. (aggravated assault), does the Crown only have to prove that the

* R. v. McTavish 8 C.C.C. (2d) 206

accused intended to assault his victim, or does it have to prove that the accused specifically intended to wound his victim. The Nova Scotia case is on all fours with this one. A schoolboy, in a fight that had turned into a criminal assault, kicked his victim in the head causing him serious injuries. The same defence was raised, but the New Brunswick Court of Appeal said that that kind of kicking involves bodily injury as a probable consequence. No one who consents to a fair fight can reasonably contemplate such act. However, that wounding was intended needs not be inferred anymore from the kicking or other excessive act. Specific intent was required under the old section 228 C.C. but not under its successor. Said the Court:

> "... on the evidence a kick in these circumstances where one person is in a clear submissive posture, the other person is wearing boots, to the face is sufficient intent to satisfy the provisions of this section and this indictment."

The Court concluded that section 245.2(1) C.C. has substantially changed the law. Where assault (the severity of the beating prior to the kick was sufficient to infer an intent to do bodily harm) results in wounding, then the general intent to do bodily harm is sufficient.

Accused convicted.

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SEXUAL ASSAULT - EMOTIONAL STATE OF COMPLAINANT

Regina v. Mohr, Valliere, Shorobahoe and Walraven
Supreme Court of B. C., Vancouver Registry C.C. 831779

Prior to Bill C-127 in 1983, there was a common law exception to the hearsay rule known as "Recent Complaint" also known as the "hue and cry principle". It is age old and was an invention of the defence side of criminal trials. It was reasoned that if a woman was sexually violated she would raise a hue and cry at the first opportunity. If she had failed to do so then perhaps she was not violated either. The principle was eventually seen as a prosecution tool to negative consent and to establish the credibility of the complainant. The statement that "first complaint" could be presented via the confidant. The statement was not to prove the truth of its content but simply to corroborate the complainant's evidence. Later the role was extended to all crimes where the victim (male or female) had an experience that lead to hysteria or panic.

Bill C-127 abrogated the rules relating to evidence of "recent complaint" in sexual assault cases (does not abrogate it in regards to other offences). However, no matter how closely the doctrine is related to the mental state of the complainant and the words he or she uttered, what is abrogated is the complaint. There seems nothing to prevent the Crown from adducing evidence describing the complainant's mental state or his/her behaviour. That was done in this case of sexual assault. The defence objected strenuously and claimed that the Crown was trying to lead evidence of "recent complaint".

The B. C. Supreme Court Justice held that the evidence of the complainant's emotional state was admissible. The weight of the evidence is to be determined by the judge of the facts. Concluded the Court:

> "The abrogation by s. 246.5 of the recent complaint exception to the hearsay rule prevents the introduction by the Crown of statements made by the complainant to others. It does not prevent the introduction of relevant evidence, albeit circumstantial, which the jury may view as corroborating her testimony."

Evidence allowed.

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YOUNG OFFENDER'S STATEMENT - ADMISSIBILITY

VALIDITY OF WAIVER FORMS

Regina v. G. - B. C. Court of Appeal - June 1985, Vancouver Registry CA 003553

To question a 16 year old juvenile regarding his involvement in some break-ins a police officer went to the youth's home. The juvenile was home and was told all - identity of officer - right to remain silent - right to have anyone present should he decide to speak to the officer - the reason for the interview - etc. The juvenile asked what would happen should he have been involved. The officer said he would be charged accordingly. The youth responded that a lawyer would tell him not to say anything. He indicated to have gone this route before and he made it clear that he would not discuss the matter with the officer.

Upon this the officer told the youth that fingerprints were found at the scene. Should the youth's prints be on file and should he be involved in the break-ins a warrant in the first instance would probably result. A moment's pause resulted after which the youth said he had been involved in two break-ins and was prepared to give a statement. The officer again gave the youth his right to remain silent, the right to have anyone present and the advice that he could talk to a lawyer first. Despite this the young man signed a waiver form thereby acknowledging to be aware and to have understood all of his rights (see s. 56(4) Young Offenders Act).

Despite this apparently flawless compliance with all legal requirements on the part of the officer the trial judge had ruled that the statement was inadmissible in evidence. The waiver form did not quite match the provisions contained in section 56 of the Young Offenders Act. Furthermore all the warnings given had conveyed to the youth that whatever he said would or may be given in evidence. This, said the trial judge, was not in compliance with s. 56(2)(b)(ii) Y.O.A. which stipulates that what must be conveyed to a young suspect is that "any statement given by him may be used as evidence in proceedings against him". This, held the trial judge, means a person in authority must not say that the evidence may be given, but that "the statement could be used in evidence against him". Furthermore, the warnings given and printed on the waiver form, refer to oral statements (you need not say...) only. This may confuse a young person to believe that the warning does not refer to written statements.

The Crown took this ruling to the B. C. Court of Appeal which gave a short reason for judgement which in my opinion and interpretation of it, made it clear that the trial judge had taken matters too far. The three justices unanimously stated that the Court had overlooked the provision in s. 56 which states that the language used to convey to a juvenile his or her rights, must be appropriate so it clearly explains what their options are.

The trial judge had exclusively examined the waiver form while he should have considered its content in conjunction with what the accused youth was told by the officer.

The B. C. Court of Appeal, in my view, simply directed that common sense must prevail. What is appropriate language for one is not for the other. The key issue is that the Crown must show that the accused youth understood all his rights. "Appropriate language" is synonimous here with whatever language is necessary to make him or her understand all of the rights they have and the options open to them under section 56 Y.O.A. Apparently in response to the trial judge's interpretation of subsection (2)(b)(ii) the Court of Appeal said that what must be clear to the suspect is that if all prerequisites are met, his statement "would be admissible in evidence against him".

Crown Apeal allowed.
Statement admitted.

Comment: Despite the word "against" in the last sentence above, I do not believe the Court of Appeal intended to take a view of the provision in s. 56 Y.O.A. similar to that of the trial judge. Firstly the Court would have emphasized that point; secondly it would have defeated its own reasoning on the interpretation of the section. Actually, the Court of Appeal held that the essence and tenor of the section must be met by ensuring that certain specifics are conveyed to a young suspect in such language that he or she can understand the meaning rather than hear the words.

It should also be seriously considered if the section, in relation to the warning preceding the taking of a statement, says that the young person must know that any statement he makes may be admitted "against" him. The word "against" in s. 56(2)(b)(ii) Y.O.A. seems to refer to "the proceedings" and not "the evidence". Needless to say if one is tried for an offence the proceedings are against that person.

At one time the Courts were critical of a warning that informed a suspect that his utterances may be used "against" him and in some cases it was not accepted by the Court as a proper warning (despite the fact the warning was not mandatory). How could, for instance, an exculpatory statement (except one that denies the obvious) be against an accused. Also, it is entirely the function of the Court to determine if a statement is for or against an accused. In any event police were discouraged to include the words "against you" in their warnings.

Since the late seventies, the words "against you", due to the views expressed by some courts of superior jurisdiction, have become innocuous. One judge said that if an officer had told an accused that his utterances would be held against him, that most certainly was not binding on the court. The evidentiary value of the statement would not change one iota because of what the officer said. In terms of proving voluntariness, the judge was of the opinion that the words "against you" were more likely to make a suspect remain silent. It therefore enhanced the proof of voluntariness, despite its legal inaccuracy.

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BEING A PARTY TO TRAFFICKING

Regina v. Filion, County Court of Vancouver C.C. 841648 April 1985

An undercover officer encountered the accused on the city streets and was taken to a third party who sold the officer some marihuana.

The accused's version of what happened differed slightly from the officer's. The officer swore that the accused opened the conversation by saying, "Pot or hash?" When the officer had replied "Pot", he was taken to the man with the goods a short distance away. The officer then made a purchase in the absence of the accused. The accused also testified. He said the officer had approached him and had asked: "Have you got something to smoke?" He agreed with the rest of the officer's version of what happened.

The accused was charged with trafficking and argued that he had simply made the officer aware where he could obtain the contraband he asked for. That, the Courts have held, does not constitute being a party to trafficking.

The Court held that passive presence at the commission of a crime is not a crime; also that mere introduction as in this case, with no further involvement in the sale and no acts to further it, is not an offence.

The County Court Judge reasoned that if one would go to "McDonald's" and ask someone there where marihuana is sold, he is likely going to get directions and prices quoted. The person who gives that information does not aid or abet the trafficker.

Therefore, a reasonable doubt existed if the accused was a party to trafficking and he was consequently acquitted.

Comment: It seems that if the officer's version of his initial contact with the accused was accepted, the Court would have had to infer that the accused was actively soliciting business for the trafficker. It would in those circumstances be difficult to say that the accused was "passive" on the scene of the alleged crime. Even if the accused's version of the contact was accepted there is a difference between a "passive" and an "active" presence regardless of who initiated the contact or broached the purchase of the contraband. If this was not so then a person operating like the accused could traffic with impunity even if there was proof that he had referred, in the same manner, numerous prospective customers to the same vendor. I believe the judgment was too generous in respect to "reasonable doubt" and may not be supported or followed by other members of the judiciary under similar circumstances. It may be that the "passive" McDonald parable is quite distinct from the "active" and eager response of the accused.

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SPEEDING AND THE CHARTER

Harper v. The Queen, County Court of Vancouver Island #00610, May 1985

Criminal liability is subdivided into catagories. The most simplistic summation of them is to say that they are: (a) offences requiring a guilty mind (mens rea); (b) strict liability (due diligence or mistake of fact may be a defence) or absolute liability. The latter is best described as to say that when it happened, it happened and the doer is liable. Liability which has mens rea as a prerequisite is predominantly created by the Federal Parliament. Also by provincial offences where the enactment creating them says that a person must do something knowingly, wilfully, deliberately or with some like frame of mind. Law that is regulatory in nature, particularly at the provincial level, carries strict or absolute liability. As the enactments are not indicating the category of liability, absolute and strict liability are sometimes difficult to distinguish from one another. One of the most explanatory cases on these liabilities is R. v. City of Sault St. Marie 40 C.C.C. (2d) 253.

An example may assist to explain the above. In Ontario a truck driver's regular truck went in the shop for work to the differential. Somehow, due to error, the gear ratio of the truck was altered and it, of course, affected the accuracy of the speedometer. On his first day out with his repaired truck the driver received a speeding ticket. He put up a defence of "mistake of fact", in that he believed his speedometer to be accurate and it had indicated he was driving below the speed limit. If speeding is an offence of strict liability the defence he raised should have been available to him; if the offence was one of absolute liability his sincere but mistaken belief in a fact would not assist him. The Ontario courts held that speeding is an offence of strict liability and the truck driver was acquitted.

Our B. C. Motor Vehicle Act creates a vicarious liability in section 76 by making the registered owner liable for offences committed with his vehicle. In one case* the question was raised if such liability provision can withstand a Charter test. The Courts held that it could, as all offences that may be alleged by means of s. 76 M.V.A. are strict liability offences. The trial judge arrived at this conclusion on account of the severity of the penalty. According to the Offence Act the maximum vicarious liability is a fine of $2,000 or 6 months imprisonment.

In this case the accused had been riding a motorcycle and claimed that the speedometer was 30 K.P.H. out after some repairs were made. The provincial court judge had held that the accused had made out the

* R. v. Watch 24 M.V.R. 224

defence of "due diligence" if the offence of speeding is one of strict liability. However, he held that it was one of absolute liability and convicted the accused.

The accused appealed claiming that on the basis of the "watch" decision and that of the Ontario courts, the offence of speeding is one of strict liability.

Firstly the County Court Judge decided that speeding is an offence of absolute liability. It is not tied to the Offence Act for penalty (see s. 122.1(1) M.V.A.). Furthermore, as was held by the B. C. Court of Appeal, absolute liability offences are not contrary to any Charter provisions*

The County Court Judge agreed with the provincial court judge and dismissed the accused's appeal but encouraged him to take the matter to a higher court as he considered the matter to be ambiguous.

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* Re s. 94(2) of M.V.A. (1983) 4 C.C.C. (3d) 243

POSSESSION OF WEAPON DANGEROUS TO THE PUBLIC PEACE

Regina v. Backman, B. C. Court of Appeal, CA 001655 - Vancouver

The accused had an "obtuse" argument with an acquaintance who was standing on a balcony about 12 feet above the sidewalk from where the accused broadcasted his version of the topic under discussion. At one stage of the verbal dispute the accused told his acquaintance that he had a pistol in his pocket. He did not show it, nor did he say he would use it. The man on the balcony interrupted the heated debate went inside and alerted police about the accused and his pistol. Consequently the accused was convicted of having in his possession a weapon, or imitation thereof, for a purpose dangerous to the public peace. He appealed this conviction.

The B. C. Court of Appeal observed that the accused's statement about the pistol could, due to a lack of evidence supporting such finding, not be considered to be premeditated. The pistol the police found on the accused was a "cheap" starter pistol that was capable of firing the caps which only cause a report. It then emphasized some points made by other courts which make it clear that section 85 C.C. does not prohibit carrying a weapon other than for a purpose dangerous to the public peace*. Also that something that is quite legal to have possession of may, because of sudden anger or annoyance, be used quite unpremeditatedly as a weapon. The lawful possession then does not convert into an unlawful possession under this section. Concluded one Court:

> The formation of the unlawful purpose, which may be inferred from the circumstances in which the weapon is used, must precede its use. The interval of time between the formation of the purpose and the use of the weapon need not be long. It may in some cases be very short, but the gap must be significant.**

The B. C. Court of Appeal held that the accused telling his disputant that he had a pistol was undoubtedly to scare the complainant, who phoned police but then continued his argument. Creating an alarm in the complainant (which he probably failed to do) was insufficient to transform the innocuous possession of the starting pistol into a possession contrary to s. 85 C.C.

Accused's appeal allowed, acquittal entered.

Note: One of the cases the Court of Appeal referred to was adjudged

* R. v. Sulland (1983) 41 B.C.L.R. 167.
** R. v. Flack (1968) 4 C.R.N.S. 121.

by the Ontario Court of Appeal in 1974 (R. v. Chomenko 18 C.C.C. (2d) 353).

The accused was on his way to a costume party. He was dressed up as a member of the mafia and carried as part of his attire a cap pistol. He was stopped for a traffic violation and while the officer wrote out the ticket the accused had genuinely alarmed the officer by his behaviour but particularly because he had pointed the replica of a pistol (cap pistol) at the officer. The Ontario Court of Appeal had not been satisfied that the purpose of the possession of the imitation of a weapon had been for a purpose dangerous to the public peace. One has to admit that the circumstances in the B. C. Bachman case are considerably milder.

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TRICKERY - SHAM CHARGES TO GIVE APPEARANCE OF LEGITAMACY TO CUSTODY OF AGENT PROVOCATEUR

Regina v. Clarke, 19 C.C.C. (3d) 106
Alberta Court of Appeal.

In the early seventies a fellow by the name of Pettipiece was arrested for his involvement in an armed robbery that yielded considerable proceeds to his cohorts who got away with those proceeds. To apprehend the rest of the group and recover the money, police officers played the parts of judge and prosecutor. At the conclusion of Pettipiece's bogus first court appearance he was under the impression he was released on bail and owed a bondsman (who was not going to let Pettipiece out of his sight) fees for his services. Things worked out as planned. When Pettipiece was tried he fought the admissibility of what he had told the agent provocateur who shared the cell with him prior to his sham court appearance and also what he told the so-called bondsman during their search for his partners in crime for them to pay the bond fees.

The B. C. Court of Appeal decided in 1972* that they had no alternative but to hold that the statements were admissible. However, this was not with much enthusiasm. To personate the judiciary was called a bankruptcy of ideas and "a reprehensible police activity".

The Pettipiece case was decided in pre-Charter times. The accused Clarke in this Alberta case was tricked somewhat similarly. Although this also happened in pre-Charter days, his trial was post-Charter. The accused was arrested for murder and an agent provocateur was placed in his cell. Clarke talked and the Crown adduced his statement in evidence. There would not likely have been any argument (the practice is acceptable in Canada) had it not been for a sham court procedure to give the appearance of legitimacy to the agent provocateur's custody. Police had drafted an information and made the agent appear before a Provincial Court Judge on a trumped-up charge. The Judge who was totally unaware that the charge was bogus, remanded the agent in custody. As a consequence of this abuse of judicial process the agent shared the accused's cell and obtained the statement which, argued the defence, ought to be excluded under s. 24(2) of the Charter. This as the contemptuous judicial process violated the principles of fundamental justice and infringed the accused's right not to be deprived of his liberty other than by those principles.

"What happened to Pettipiece happened to me", said Clarke. It was in the pre-Charter times considered a reprehensible practice, it is now,

* R. v. Pettipiece 7 C.C.C. (2d) 133

since the Charter an outright infringement of one's right.

The Alberta Court of Appeal held that the police practice was improper, but felt it did not need to decide if Clarke's rights to justice had been infringed by the phoney charge and Court appearance. There simply was no causal link between that improper maneuver and the statement the accused made to the agent. What happened to Clarke was a far cry from what happened to Pettipiece. Pettipiece had personally made a bogus court appearance, and was thereby made to believe that he was out on bail. The very misrepresentations that surrounded Pettipiece's "talking" were the promises for bail arrangements by the agent and the so-called court appearance itself. In Clarke's case there was no causal connection between the agent's court appearance and his statement to him. As a matter of fact Clarke was unaware of the agent's Court appearance when he spoke to him. If the agent had not appeared in court at all but had told the accused to have been charged with "whatever", Clarke would, in the circumstances as they were, not have known the difference. Section 24(2) of the Charter, our constitutional exclusionary rule, specifically states that the infringement of a right or freedom must be the very means by which the evidence considered for exclusion, was obtained.

Said the Court of Appeal:

> "... the appearance was designed not to influence the accused but rather to ensure that the trick not be discovered by anyone".

Accused's appeal dismissed.

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CONTEMPT IN THE FACE OF THE COURT
CHARTER OF RIGHTS AND FREEDOMS
RIGHT TO A FAIR AND IMPARTIAL PROCEDURE

Regina v. Martin 19 C.C.C. (3d) 248
Ontario Court of Appeal

The accused switched the price tag on a tooth brush and was tried for fraud under $200. She testified denying the allegation, but was not believed.

Apparently a child of the accused could have testified for the defence, but did not due to having a heart condition. The trial judge had expressed gratitude that the child was not called. When the accused's counsel spoke to sentence the sick child was mentioned again and the judge commented "tragic, tragic indeed". The accused must have assumed the remarks about her child to have been facetious or expressing disbelief as she responded, "screaming" at the judge: "I've (without any profanity) had it with your system". The judge ordered: "Remove the accused". She responded: "I'd be delighted. My kid's got a sick heart problem. You sit there and feel good about it. It's scandalous".

The next day the accused appeared again before the same judge and was cited for contempt of Court. The accused apologized; the Crown entered a transcript of the outburst and without any further evidence a conviction for contempt was registered. The conviction was appealed.

The Ontario Court of Appeal held that the proceedings in respect to the contempt citation violated the accused's right to a fair trial by an impartial judge (11(d) Charter). The judge could reasonably be seen as biased as the comments were directed at him. Furthermore another judge should have heard evidence of what the trial judge had said and in what tone of voice to determine if the accused's outburst in fact amounted to contempt.

When comments offend a judge, and reflects adversely on his/her character or integrity, it amounts to contempt particularly if they are calculated to lower his or her authority. If such is the case, another judge must determine if there was contempt and impose the penalty. In cases where the actions amounting to apparent contempt are not aimed personally at the presiding judge or where, in exceptional cases, the circumstances are such that to preserve the order of the court demand immediate action then "limitations on such rights, particularly with respect to time, may be justified."

In this case the judge should not have dealt with the alleged contempt as he did. He was personally offended, there was no urgency and the accused had a right to a fair trial by an impartial judge.

Accused's appeal allowed.
Acquittal entered.

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LEGAL TID-BITS

After a heated argument with his mother, the accused took the family car and collided with another car. He failed to stop and was later apprehended sitting behind the wheel of the car, parked, and with the radiator steaming. He was charged under the Young Offenders Act with Hit & Run under the Criminal Code. The Crown proved everything except that the accused left the scene with the intent to escape civil or criminal liability. It depended on the statutory presumption in section 233 C.C. which states that leaving the scene is presumed to be done to escape liability unless there is evidence to the contrary. The trial judge held that this presumption was of no force or effect as it violated the presumption of innocence as enshrined by the Charter and he acquitted the accused.

The Nova Scotia Court of Appeal disagreed and held that the presumption is rational and that it does not violate our constitution.

R. v. T. 18 C.C.C. (3d) 125.

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The 42 year old accused picked up a 15 year old female hitch-hiker. Under the pretence that he had to drop something off he left the highway and eventually drove into a park where he parked and began hugging his passenger. She managed to get the door open and fall out of the car. The accused came after her and started again to hug her while he told her not "to freak out" as he would not harm her. She once again got away but he grabbed her and hugged her. The girl was very upset and started to walk away. The accused apologized and drove the girl to her destination. She occupied the back seat for that portion of the trip. The whole hugging and grabbing episode had lasted approximately 2 1/2 minutes. The accused was acquitted of unlawful confinement (s. 247(2) C.C.) and the Crown appealed. The B. C. Court of Appeal held unanimously that the confinement was the wrong charge in the circumstances and it was not prepared to rule that "for a male to hug a female amounts to the criminal offence of confinement, without more". There simply was no confinement within the terms of the Criminal Code.

Crown's appeal dismissed.

R. v. Calvin 14 C.C.C. (3) 510.

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The accused and his friend separated while inside a drugstore. The friend took a bottle of lotion and put it in his pocket. He was followed out of the store as he had failed to pay for the lotion. The two met on the parking lot where the friend showed the bottle of lotion to the accused and told him that he stole it. He handed it over to the accused who, along with the friend, was arrested approximately 5 seconds after he got to be in possession of the lotion. A store detective had observed the whole process. The accused appealed his conviction of possession of stolen property. To be in possession one must have knowledge and control. The 5 seconds were found insufficient time to show that the accused accepted the control and he was acquitted.

Regina v. Thompson, County Court of Vancouver, Vancouver C.C. 841970

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Section 15 of the Charter became effective April 17, 1985. It deals with equality "before and under the law". A man came before the B. C. Supreme Court to be tried by means of direct indictment ordered by the Attorney General under s. 507(3) C.C. In view that he was singled out to be deprived of the benefit of a preliminary hearing, he claimed that he had not received equal treatment under the law. At the outset of his trial he moved that the indictment be quashed as s. 507(3) C.C. is inconsistent with s. 15 of the Charter. The Supreme Court declined to accede and held that there are several different modes of trial described and provided for in our laws. Uniformity is not necessarily synonymous with equality. S. 507(3) simply provides an optional mode of trial at the selection of one of the parties to the proceedings.

Regina v. Flight, Westminster registry X015092.

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