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IN THE COURT OF APPEAL OF ALBERTA

BETWEEN:

HER MAJESTY THE QUEEN,

RESPONDENT

- and -

LISA COLLEEN NEVE,

APPELLANT

APPEAL FROM THE CONVICTION AND SENTENCE
BY THE HONOURABLE MR. JUSTICE MURRAY
CONVICTED THE 17TH DAY OF NOVEMBER, A.D. 1994

FACTUM OF THE CROWN RESPONDENT

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FACTUM OF THE CROWN RESPONDENT

PART I - STATEMENT OF FACTS

1. The Appellant was found guilty of the following offences on February 14, 1994 at Edmonton after trial without a jury before the Honourable Mr. Justice Murray:

    1. That she, on or about the 8th day of May, 1991, at or near Edmonton, Alberta, did unlawfully rob Rhodora Nicolas, contrary to Section 344 of the Criminal Code of Canada.

    2. That she, on or about the 8th day of May, 1991, at or near Edmonton, Alberta, did, in committing an assault upon Rhodora Nicolas, carry, use or threaten to use a weapon, to wit: a knife or an imitation thereof, contrary to Section 267(1)(a) of the Criminal Code of Canada.

2. The second count was judicially stayed on the basis of the rule respecting multiple convictions for the same delict.

Evidence at Trial

Rhodora Nicolas, aged 20 years (17 or 18 years of age at the time of the offences) testified as follows:

3. On the evening of May 8, 1991, she was working as a prostitute in the area of 102 Avenue and 97 Street in Edmonton. (104) She was standing on the street with another prostitute at about midnight when a 1/4 ton truck pulled up driven by a woman that she came to know as Kim. Lisa Neve was in the passenger seat. Although Ms. Nicolas did not know Lisa Neve, she had seen her before at the Calgary Young Offender Center. (105, 126-27) Ms. Neve rolled down the window and said hi. She asked Ms. Nicolas if Ms. Nicolas remembered her. (124) Ms. Neve asked Ms. Nicolas if she wanted to go for a drink and told Ms. Nicolas to show her around Edmonton because she did not know where to go. (105, 120)

4. They started driving down 97th Street and Lisa Neve indicated that she wanted to go to Cheers at the Beverley Crest. (106) Kim (or Lisa Neve (131-32)) then indicated that she wanted to go somewhere with no one around to smoke a joint and they started heading toward the highway. Lisa Neve then started talking about a friend named Leesha and said that Ms. Nicolas and 6 other girls had beaten up Leesha. Ms. Nicolas had not done this. (107-08)

5. When they reached a location outside of the city, Kim parked the truck and Lisa Neve got out. She then said, "I guess, you know that, you know, we're not here to smoke up." (109/1-4) She told Ms. Nicolas to take off her clothes but Ms. Nicolas refused. Kim and Lisa then began ripping off Ms. Nicolas's clothes with the aid of a knife. Ms. Neve had the knife first. (109) All of the clothing was removed while the group was inside the truck. (140)

6. While the clothes were being ripped off, Kim told Ms. Nicolas that she had better do what they said and Ms. Neve said that they were going to cut off Ms.

Nicolas' hair. (118) Kim also threatened to break Ms. Nicolas' arm if Ms. Nicolas did not take her clothes off. (150) Kim struck Ms. Nicolas on the face with a closed hand approximately 5 times. (119) Ms. Neve also struck Ms. Nicolas. (145-46) The knife had a blade about 4 - 5" long. (114) At one point Ms. Neve stabbed Ms. Nicolas in the knee causing a small cut. (111) Ms. Nicolas was put out of the vehicle without any clothes. The clothes, including shoes, had a value of approximately $95. In addition her purse, containing identification, lipstick and something less that $20 in cash was not returned to her. (112)

7. When Kim and Lisa Neve left, Ms. Nicolas felt relieved that, at least, she had not been killed. (113) Although Ms. Nicolas was pregnant at the time, she did not tell her assailants this. (119) She started walking and discovered a piece of insulation with which she covered herself. She went to the highway where she was picked up by a family passing in a van. (114) Ms. Nicolas described the temperature as being a little chilly. (120) She was then met by the police and taken back to the scene of the robbery where her top was found. None of her other property was discovered. (115)

8. Ms. Nicolas acknowledged a record of prior convictions which was entered as Exhibit 3.

Mr. Ron Steinhauer testified as follows:

9. At about 2:00 or 2:10 a.m. on May 8, 1991, he was travelling westbound on Highway 16 in his van with his wife and baby son. At a location about 6 to 10 miles east of Edmonton, he saw Ms. Nicolas walking naked, but for a piece of insulation, on the side of the highway. He proceeded to a hotel where he contacted the police and arranged to meet with them on the highway. He then proceeded back to the location where he found the complainant and picked her up. Ms. Nicolas appeared very, very cold. She seemed somewhat confused and was crying. Mr.

Steinhauer proceeded west again to a point where he met the police and turned Ms. Nicolas over to them. (153-56)

Sgt. Philip Joseph Harnois of the Edmonton Police Service testified as follows:

10. On May 8, 1991, he was dispatched to 18th Street and Highway 16, in Edmonton where he located Mr. Stienhauer's mini-van. (157) He found Ms. Nicolas in the back of the vehicle still covered only with a piece of insulation. She appeared to be hysterical, crying and sobbing, and shivering. Her cheeks were swollen and she had a puncture wound on her knee which was not serious but was more than superficial. Ms. Nicolas was provided with the officer's patrol jacket. The temperature at the time was about 5 degrees Celsius. (158)

11. Ms. Nicolas directed Sgt. Harnois to the place where the incident had occurred, a field on Cloverbar Road just north of Highway 16. There he conducted a fairly brief search for Ms. Nicolas' belongings with the assistance of Constables Bruni and Elanik. Only the complainant's torn top was found. (159,214-16) The road and ditches in the area were also checked but nothing more was discovered. (160)

12. Ms. Nicolas was returned to the Capilano Motor Inn so that she could get some of her clothing, Sgt Harnois then proceeded with Ms. Nicolas, intending to return to the location where the incident began. Ms. Nicolas provided the name of a suspect, being Lisa Neve. (160, 172, 177-78, 218-19) Ms. Nicolas first pointed out the area of 97 Street and 102A Avenue and then they proceeded to the area of the "stroll", 103 Avenue between 106 and 107 Street. There they saw a lone female more than ½ block away. The complainant indicated that she thought that was her but that she had bad eyes from that distance. Sgt. Harnois would have had difficulty himself making an identification at that distance in the partial darkness. They drove around the block and in front of this woman and the complainant indicated, "That's Lisa.

That's the girl with the knife." (161/23-24, 221-22)

13. Sgt. Harnois told Ms. Nicolas to remain in the vehicle while he went out and asked Ms. Neve if he could talk to her. She ignored him and he ran up beside her. He asked for her identification and she asked whether she was under arrest. She was advised that she was under arrest for armed robbery. (161) Ms. Neve resisted the officer's hold on her arm. He anticipated that she would be armed and, consequently, removed her fanny-pack and took her umbrella. She was handcuffed but managed to slip one hand out of the handcuffs. The officer held onto one end of the handcuffs and watched Ms. Neve and the complainant while waiting for assistance. Constables Holden and Kelly arrived within 2 minutes. They did a further search of Ms. Neve and found a buck knife in her jacket pocket. (162)

14. The Appellant was dressed in a black leather jacket, white mini skirt, spiked heels and stockings. Prior to the sighting, the complainant had provided an accurate description of the Appellant's clothing. (168, 178, 220)

Evidence on the *Voir Dire*

15. Sgt. Harnois notified the Appellant of the reason for her arrest and advised her of her right to counsel. The Appellant mimicked the officer as he was giving the last part of these rights by reciting along with him. (168) She then indicated that she understood the advice and, when asked whether she wished to call a lawyer, answered, no. While the officer was waiting for assistance, the Appellant had been given the opportunity to have a cigarette. Ms. Neve was with Sgt. Harnois for about 10 minutes at this time. After she had been properly handcuffed and searched by Constables Holden and Kelly, the Appellant was transported to headquarters by those officers. (165-66) From this point Sgt Harnois did not see or speak to Ms. Neve. (169)

16. During the contact with Ms. Neve, he did not question her about what had taken place. He regarded his role as making initial contact and giving the Appellant her *Charter* rights. (173-74) He did not caution her with respect to a statement because he did not intend to take a statement. (174-74)

17. Sgt. Harnois was of the opinion that the Appellant was under the influence of some sort of drug. She was not very responsive to questions but, eventually she would answer and she provided reasonable answers. Immediately upon taking hold of the Appellant's arm, Sgt. Harnois had asked Ms. Neve whether she had a knife and she denied having one. (167, 173)

Cst. William Kelly of the Edmonton Police Service testified as follows:

18. On May 8, 1991, took custody of the Appellant from Sgt Harnois. He did a cursory search of her and recovered a knife from her coat pocket. He then took her to headquarters where she was turned her over to Sgt. Harnois. He did not have conversation with Ms. Neve. (180) The Appellant was in Cst. Kelly's custody for about 15 minutes. (183)

Cst. Mark Holden of the Edmonton Police Service testified as follows:

19. He was the driver of the police vehicle in which he and Cst. Holden attended to deal with the Appellant. Consequently, Cst. Holden dealt with Ms. Neve. She was taken to headquarters and placed in a holding cell. (184-85)

Cst. Pat Bruni of the Edmonton Police Service testified as follows:

20. On May 8, 1991, shortly after 4:00 a.m., he and Cst. Elanik attended at headquarters to assist with Sgt. Harnois' investigation. On the way to headquarters,

he was aware that the Appellant was being transported to headquarters by another police unit. They were to stay with her because the downtown officers were not going to be dealing with her. They located Ms. Neve in a cell and discovered that the she had cut her wrists with her shoe laces. She had also smeared the wall with blood. The officers took her to the Royal Alexandra Hospital where her superficial injuries were bandaged. Upon their return less than 45 minutes later, Cst. Bruni was left to watch over the Appellant. (187-88, 193-94, 196)

21. Cst. Bruni detected no evidence that the Appellant was under the influence of alcohol or drugs. She was, however, a little restless, pacing and somewhat agitated. (189, 191) On cross-examination, there was some question as to whether the constable would have regarded her as distraught. (194-95) After the return from the hospital, the constable was standing at the open door of the Appellant's cell. Cst. Bruni described the conversation in the following terms:

> "Q What did you say?
> A -- was basically searching. I didn't think that she was going to answer any of my questions just based on her state, and I basically asked her who the other individual was that was involved, and to my surprise she freely gave me a name.
>
> Q Okay. What did she say to you, sir?
> A She told me that the girl's name was Kim, that she did not know her last name, and that they had arrived from Calgary with three other females, prostitutes is what she said, and they were going to be working the stroll, which is an area in the downtown area where prostitutes normally hang out.
>
> Q Okay. What else was said, sir, between you and her?
> A She -- she also told me in reference to the -- the alleged assault that she did it to get even because the complainant had beat up one of her -- her friends who was pregnant at the time and also that the complainant was yelling -- was the type that was yelling and getting out of hand, getting out of control. That was another reason for -- for what they did.

> Q Okay. Now, did Ms. Neve provide you with any indication respecting the presence of Kim?
> A She indicated that she wasn't familiar with the city at all, and that she was in a hotel or a motel in the west part of town but would not provide any further information." (189/35-190/20)

22. During the conversation, Ms. Neve was cooperative and appeared to have no difficulty understanding or communicating with Cst. Bruni. (191) After the conversation, at about 5:40 a.m., the Appellant indicated that she wanted to speak to a lawyer and was given that opportunity. However, after she had been given that opportunity and when asked whether she had contacted a lawyer, she advised Cst. Bruni that she had telephoned Kim and told her to leave town. (190-91)

23. Cst. Bruni testified that he had not offered any promises of favour or reward or any inducements to the Appellant. He also said that he had not made any verbal or physical threats. (192)

Cst. David Elanik of the Edmonton Police Service testified as follows:

24. He was present to assist Cst. Bruni when the Appellant was taken to the hospital and returned. He had no conversation with the Appellant. (200)

25. The Defence lead no evidence on the *voir dire* but argued that, in the particular circumstances of this case, given the Appellant's distress and the failure to give a caution, voluntariness had not been established. (206)

Ruling on the *Voir Dire*

26. The learned Trial Judge held that there was nothing in the evidence to indicate that the Appellant did not understand what was going on and that the statement was freely given. (211)

Non-suit application

27. Defence Counsel at trial argued that the Crown had not established any intent to steal, in that the intent proved was simply to render the complainant naked. (232-33) The learned Trial Judge found that there was sufficient evidence, as it stood then, to convict on the basis of the intent described in s. 322(1)(a) of the *Criminal Code*. (237-38)

Defence Case

28. The Defence did not call evidence and did not argue that the offence of assault with a weapon had not been made out. Rather, it was argued that robbery had not been established because the evidence indicated that the complainant's clothing was taken to humiliate and assault her and not with fraudulent intent. (243-44)

Reasons for Judgement

29. On the question of a fraudulent taking, the learned Trial Judge held:

> "The fifth ingredient is whether or not the accused took that property fraudulently and without colour of right. Fraudulently means dishonestly, deceitfully, or immorally. It seems clear that the accused and Kim were attempting to teach Nicolas a lesson and were retaliating for what they believed had been a previous act of violence by Nicolas upon a friend. There is no doubt in my mind that they took the property wrongfully and without colour of right."
>
> (256/43-257/3)
>
> ...
>
> "It may be that one of the reasons for taking Nicolas to the field was to humiliate her; however, what happened involved the taking of her property by force. I can't come to any other conclusion or any other reasonable or rational conclusion than that the accused intended to deprive Nicolas of these items, and that the taking of them was wrong and dishonest."
>
> (257/36-42)

PART II - GROUNDS OF APPEAL

I. IT IS RESPECTFULLY SUBMITTED THAT THE LEARNED TRIAL JUDGE ERRED IN FINDING THAT THE STATEMENTS MADE BY MS. NEVE IN THESE CIRCUMSTANCES WERE FREELY AND VOLUNTARILY GIVEN, AND THUS, ADMISSIBLE AS PART OF THE CROWN'S CASE AGAINST HER.

The Crown's Response

A. It is respectfully submitted that the learned Trial Judge did not err in law or make any unreasonable finding in:

1. Concluding that the Appellant's statement was voluntarily made.

2. Concluding that the Appellant's statement was the product of an operating mind.

3. Concluding that the Appellant's statement was admissible in the absence of a caution.

B. It is respectfully submitted that the Appellant should not be permitted to advance the allegation of a violation of her right to silence for the first time on appeal.

C. If the Appellant is permitted to advance an allegation of a *Charter* violation, it is submitted that the Appellant has not established a violation of the right to silence and that the admission of her statement would bring the administration of justice into disrepute.

D. If this Honourable Court concludes that the statement should not have been admitted, it is submitted that the proviso in s. 686(1)(b)(iii) of the *Criminal Code.* should be applied.

II. IT IS RESPECTFULLY SUBMITTED THAT THE LEARNED TRIAL JUDGE ERRED IN FINDING THAT THE NECESSARY ELEMENTS OF THE OFFENCE OF "ROBBERY" HAD BEEN PROVEN BEYOND A REASONABLE DOUBT AND IN PARTICULAR, THAT THE "TAKING" OF THE PROPERTY OF THE COMPLAINANT WAS "FRAUDULENT" WITHIN THE MEANING OF THAT TERM IN LAW.

The Crown's Response

A. On the facts as found by the learned Trial Judge, it is submitted that the taking of the complainant's property was "fraudulent".

PART III - ARGUMENT

I IT IS RESPECTFULLY SUBMITTED THAT THE LEARNED TRIAL JUDGE ERRED IN FINDING THAT THE STATEMENTS MADE BY MS. NEVE IN THESE CIRCUMSTANCES WERE FREELY AND VOLUNTARILY GIVEN, AND THUS, ADMISSIBLE AS PART OF THE CROWN'S CASE AGAINST HER.

Standard of Appellate Review of Findings on *Voir Dire*

30. The Trial Judge found that the statement in this case was made freely and that there was nothing in the evidence to indicate that the Appellant did not know what was going on. Case authorities indicate that, in the absence of an unreasonable finding or an error of law, the appellate court should not interfere with a trial judge's ruling on the *voir dire*.[1]

Reasonableness of the finding that the Appellant's statement was voluntarily made

31. In this case, the only police officer who spoke to the Appellant about the circumstances of the offence was Cst. Bruni. When he did so, he was alone with the Appellant. Sgt. Harnois was concerned with the arrest of the Appellant and, in the awkward situation with the complainant in the police vehicle, he was concerned with holding the Appellant until she could be transported to headquarters. Csts. Kelly and Holden were responsible only for transporting the Appellant to headquarters. Cst. Elanik assisted Cst. Bruni in transporting the Appellant to hospital and returning her to headquarters but had no conversation with her.

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[1] *R. v. Barrett* (1995) 96 C.C.C.(3d) 319 (S.C.C.), 82 C.C.C.(3d) (Ont.C.A.) (TAB 9), *R. v. Ewert* (1992) 76 C.C.C.(3d) 287 (S.C.C.), 68 C.C.C.(3d) 207 (B.C.C.A.) (TAB 10), McWilliams, *Canadian Criminal Evidence*, at page 15-83 (TAB 11)

32. Cst. Bruni's questioning of the Appellant in respect of the offences, was comprised of a few brief questions. While it could not be said that the information was "volunteered", it was not obtained through "interrogation". The constable testified that he offered no threats or inducements. While he was unable to locate his handwritten notes, the conversation respecting the offence was summarized in his report. There was no evidence of threat or inducement. (191-93) Furthermore, the actual content of the Appellant's comments does not in any way suggest that they followed from any promise or threat. Nor was the evidence of Cst. Bruni respecting the content of the Appellant's statements challenged.

33. While it would have been preferable, if Cst. Bruni had recorded precisely everything that he said to the Appellant, it is submitted that his record and recall of the conversation pertaining to the offence was sufficient to enable a proper inquiry on the question of voluntariness.[2] Cases dealing with the Crown's failure to call all witnesses present at the time a statement is made serve to illustrate that the trial judge's decision as to whether the Crown has met its obligation will vary with the particular circumstances of the case.[3] It is submitted, particularly in the absence of any defence evidence, that the finding that the statement was freely and voluntarily given was not unreasonable.

Reasonableness of the finding that the statement was the product of an operating mind

34. In ***R. v. Whittle*** (1994) 92 C.C.C.(3d) 11 (TAB 16), Sopinka, J., speaking for the Court, made the following comments respecting the "operating mind" test at page 30:

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[2] See: Kaufman, *The Admissibility of Confessions* at page 139 and 3rd Supp. at page 59. (TAB 12)

[3] *R. v. Thiffault* (1933) C.C.C. 97 (S.C.C.) (TAB 13) at page 103, *R. v. Kacherowski* (1977) 37 C.C.C.(2d) 257 (Alta.C.A.) at page 262-63 (TAB 14), *R. v. Wert* (1979) 12 C.R.(3d) 255 (B.C.C.A.) (TAB 15)

> "The operating mind test, therefore, requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused. Indeed it would be hard to imagine what an operating mind is if it does not possess this limited amount of cognitive ability. In determining the requisite capacity to make an active choice, the relevant test is: Did the accused possess an operating mind? It goes no further and no inquiry is necessary as to whether the accused is capable of making a good or wise choice or one that is in his or her best interest."

And at page 31:

> "The operating mind test, which is an aspect of the confessions rule, includes a limited mental component which requires that the accused have sufficient cognitive capacity to understand what he or she is saying and what is said. This includes the ability to understand a caution that the evidence can be used against the accused."

35. This Honourable Court in ***R. v. Paternak*** (1995) 42 C.R.(4th) 293 (TAB 17) (currently under appeal to the Supreme Court of Canada), held that, if the accused has adequate capacity, concern about the operating mind test is misplaced. Kerans, J.A., speaking for the Court, held at page 300:

> "I do not deny the difficulty posed by ***Whittle***. The dual test implies that there can be cognitive ability yet no effective choice. What precisely is the difference? Of course, one difference is that the first can occur even in the absence of any state action, and the second is a consequence of state action. And there may be a difference in the onus of proof. But, in the end, there may be little distinction in result between the state of mind of the person naturally disabled and the person disabled by police behaviour."

36. The question in the present case then is whether the Appellant had the limited cognitive ability to understand what she said and to comprehend that her statements might be used against her. On this question, the evidence did indicate that the accused seemed to at least certain of the officers to be under the influence of a drug to some degree. When dealing with Cst. Bruni, she was restless, pacing and

somewhat agitated. At one point the Appellant inflicted minor injuries to her wrists and smeared blood on the walls of the holding room. However, when she dealt with Cst. Bruni, her statements were coherent and responsive. She was alert enough at the time of her arrest to demand to know whether she was under arrest and to recite along with the officer notifying her of her right to counsel. In addition, after making the statements to Cst. Bruni and when offered the opportunity to call counsel, she telephoned the woman who had committed the offences with her to warn that woman.

37. It is submitted that this evidence is not sufficient to give an air of reality to the argument that the Appellant did not have an operating mind, let alone to satisfy the requirement on appeal that the Trial Judge's finding of an operating mind was unreasonable.

Absence of a Caution

38. In the present case, the arresting officer, Sgt. Harnois, did not give the Appellant a caution because he did not intend to question her. (174-75) The officer to whom the statements were made, Cst. Bruni, did not caution the Appellant and did not inquire as to whether she had been cautioned by the primary investigator. He did not expect to get answers from the Appellant. (197-98) The learned Trial Judge held that it would have been preferable if a caution had been given and, in considering this failure as one factor bearing on voluntariness, should be concluded that the statement was freely given, in spite of the absence of a caution. (211)

39. Although it certainly would have been preferable if a caution had been given, whether or not a caution has been given, is only one factor to be considered in

determining whether the statement should be excluded.[4] Given the nature of the statement in this case, i.e. one given without any significant pressure, the apparent cognitive capacity of the Appellant at the time and the apparent sophistication of Appellant as evidenced by the Appellant reciting the right to counsel and her telephone call to her accomplice, it is submitted that the finding that the statement should be admitted in spite of the absence of a caution was not unreasonable.

***Charter* violation alleged for the first time on appeal**

40. The Appellant alleges for the first time on appeal that her right to silence as guaranteed by s. 7 of the *Charter of Rights* has been violated. There is a substantial body of authority discussing the question of raising new issues on appeal, and in particular, raising *Charter* issues for the first time on appeal. An appropriate starting point is the decision of this Honourable Court in ***R. v. Boross*** (1984) 53 A.R. 257 (Tab 20). In that case, dealing with an allegation of abuse of process at common law, McClung, J.A. held, at p.261:

> *"... the absence of a timely complaint as the case develops may well be a real and reliable gauge of the degree of unfairness that is being worked. So, trial silence is a relevant consideration in deciding whether a substantial wrong or miscarriage of justice has occurred."*

41. The theme was developed in the *Charter* context in ***R. v. Roach*** (1985), 66 A.R. 73 (Tab 21). The Respondent ***Roach*** sought to raise a *Charter* complaint in response to a Crown appeal from an order for a new trial. McClung, J.A., after discussing the burden on the defence to put the matter in issue at trial with some evidence, held, at p.75:

> *For the purpose of this case it is sufficient to say that a silent record will not commission an inquiry into* ***Charter*** *legal rights compliance.*

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[4] *R. v. Boudreau* (1949) C.C.C. 1 (S.C.C.) at page 3 (TAB 18), McWilliams, *Canadian Criminal Evidence* at page 15-65 (TAB 19)

42. The issue finds eloquent expression in the judgment of Lambert, J.A. of the B.C.C.A. in ***R. v. Vidulich*** (1989), 37 B.C.L.R. (2d) 391, (TAB 22) pp.398-99:

> *"An accused must put forward his defences at trial. If he decides at that time, as a matter of tactics or for some other reason, not to put forward a defence that is available, he must abide by that decision. He cannot expect that if he loses on the defence that he has put forward, he can then raise another defence on appeal and seek a new trial to lead the evidence on that defence."*

43. The foregoing was cited with approval by the same court in ***R. v. Ullrich*** (1991), 69 C.C.C. (3d) 473 (Tab 23). The Court confirmed that it would be only in an exceptional case that a new defence would be permitted for the first time on appeal, and added the element that a new defence was more likely to be permitted for the first time on appeal if it was an issue of law alone, and did not require that additional evidence be adduced on appeal or at a new trial (per Hinds, J.A., at p. 477).

44. Foisy, J.A. made the following finding on behalf of this Honourable Court in ***R. v. Barr*** (1991), 113 A.R. 211 (Tab 24) , at p. 213:

> *"The first time that the argument based on s. 10(b) of the* ***Charter*** *was raised was before this court.* ***The failure to put the complaint into issue at the trial is fatal to this ground of appeal."***
>
> (emphasis added)

45. More recently, the dissenting reasons of Harradence, J.A. in ***R. v. Brown*** (1992), 127 A.R. 89 (Tab 25), which were adopted by the Supreme Court of Canada 141 A.R. 163 (Tab 26) deliver a thorough analysis of the rare situations in which a *Charter* complaint will be permitted for the first time on appeal. Key factors in making the assessment include the existence of an adequate evidentiary record, and that the appeal not provide the accused with a "second shot" (see para. 71). In that case, there had been a fundamental change in the law between the time of trial and the

hearing of the appeal. For that reason, it would not be simply a case of providing a "second shot".

46. Most recently, this Honourable Court discussed the test in ***Brown*** in considering a similar situation in ***R. v. Fertal*** (1993), 85 C.C.C. (3d) 411 (Tab 27). Referring to the judgment of Harradence, J.A., Foisy, J.A. held at p.416:

> *"It appears to lay down two hurdles to raising such **Charter** issues for the first time on appeal. In the first place, the **Charter** issue must not be an issue which the defence could have raised at trial and chose not to. In **Brown**, it was shown that the law had radically reversed itself after the trial.... The second hurdle in **Brown** is that the necessary evidence to rule on the **Charter** issue must be before the court."*[5]

47. The Supreme Court of Canada has similarly discouraged late *Charter* complaints; see: ***R. v. Buttar*** (1989), 73 C.R. (3d) 317 (Tab 28).

48. As noted above, one of the concerns expressed by Harradence, J.A. in ***Brown*** is that by raising the issue for the first time on appeal the Appellant is given a "second shot". It is submitted that this is a significant factor on this appeal given that the Appellant will, if a new trial is directed and a conviction entered again, have the opportunity to re-litigate a complex and lengthy sentencing procedure.

49. Although counsel at trial had only recently taken conduct of the matter, the Appellant had previously been represented by counsel in this case. In addition, there was no request for an adjournment to prepare more thoroughly or any suggestion that counsel was not ready to proceed. While it is understandable that the Appellant and her counsel would want to proceed promptly because the Appellant was in custody, having made the choice to proceed and given the fact that she and not the

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[5] See also: *R. v. Fortier*, unreported, April 5, 1995, Alta.C.A. (TAB 29)

Crown had the right to instruct counsel, this anxiety to proceed provides no reason to deviate from the rule that the allegation of a *Charter* breach should ordinarily be made at trial.

Section 7 of the *Charter* and the caution

50. If this Honourable Court chooses to permit the Appellant to proceed with the allegation of the breach of her right to silence, it is submitted that, in any event, the Appellant has not established that her right to silence has been violated. The Appellant, of course, bears the burden of establishing on a preponderance of evidence that her right to silence has been breached.[6]

51. In ***R. v. Whittle***, supra the Supreme Court of Canada recently described conduct of the police which amounts to a breach of the right to silence. At page 35 of that case, Sopinka, J. held:

> "As for the Charter rights asserted, once the operating mind test is established, and accused is not exempted from the consequence of his or her actions absent conduct by the police 'which effectively and unfairly deprived the suspect of the right ...' (***Hebert, supra*** at p. 39)."[7]

52. In this respect the only conduct complained of is the failure to give the Appellant the caution. A number of authorities prior to ***Whittle*** (but in most cases subsequent to ***Hebert***) recognized that the *Charter* does not specifically recognize the right to be notified of the right to silence and that the case authority has not gone so

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[6] *R. v. Collins* (1987) 33 C.C.C.(3d) 1 (S.C.C.) at pages 13-14 (TAB 30)

[7] See also: *R. v. Hebert* (1990) 57 C.C.C.(3d) 1 at page 39 (APPELLANT'S TAB 2)

far as to incorporate a specific requirement that a caution should be given.[8] In ***R. v. W.(W.R.)***, supra at page 543, the B.C. Court of Appeal was not prepared to interfere with the trial judge's finding that there was no evidence, in the particular circumstances, that the suspect knew of his right to remain silent and that, therefore, his right to silence had been violated. It is respectfully submitted that this finding misplaces the onus of proof but even in ***R. v. W.(W.R.)*** the Court recognized that a suspect need not inevitably be notified of the right to silence.

53. Regardless of the onus of proof, the following circumstances militate strongly against a finding that the Appellant's right to silence was violated:

(a) The Appellant was notified of the right to counsel upon arrest and expressly declined. No complaint is made that there was any violation of the Appellant's right to counsel.

(b) The operating mind test was met. Although there was evidence that the Appellant was distressed and some indication that she had been using drugs, she clearly appeared to understand what was going on around her.

(c) The police did nothing which would in any way suggest to the Appellant that she was obliged to give a statement. The statement was found to be voluntary.

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[8] *R. v. Van den Meerssche* (1989) 53 C.C.C.(3d) 449 (B.C.C.A.) at pages 459-60 (TAB 31), *R. v. Van Haarlem* (1991) 64 C.C.C.(3d) 543 (B.C.C.A.) at page 553-54, (1992) 71 C.C.C.(3d) 448 (S.C.C.) (TAB 32), *R. v. Farrell* (1992) 76 C.C.C.(3d) 201 (P.E.I.S.C.A.D.) (TAB 33), *R. v. W.(W.R.)* (1992) 75 C.C.C.(3d) 525 (B.C.C.A.) at pages 542-43 (TAB 34); Respecting questions put to the operator of a motor vehicle, see: *R. v. John Montague Smith*, unreported, Ont.C.A., October 5, 1995. (TAB 35)

(d) There was no evidence of any tricks or oppressive conduct. There is no question that the Appellant knew that she was speaking to a police officer and there would have been no reason for her to believe that evidence obtained by the police would not be used against her. While the statements were made in response to the question or questions of a police officer, there was no pressure and no expectation that they would be answered.

(e) The Appellant appears to have been aware, at least to some extent, of her *Charter* rights. She was able to recite the notice of right to counsel along with Sgt. Harnois.

(f) The Appellant seemed to have no interest in exercising her rights, given the telephone call she made to a friend when offered the opportunity to contact a lawyer.

54. Given these various circumstances, it is submitted that the Appellant has not established that she was deprived of the effective choice whether or not to speak to the police.

Section 24

55. In the event this Honourable Court finds that there has been a breach of the Appellant's right to silence, it is submitted that the Appellant has not established that the admission of her statements in evidence would bring the administration of justice into disrepute. In ***R. v. Collins***, supra at pages 16-22, Lamer, J., as he then was, identified 3 broad categories of factors bearing on the determination of s. 24(2) determinations:

(a) the effect of the admission on the fairness of the trial;

(b) the seriousness of the *Charter* violation, and

(c) the effect of the exclusion on the repute of the administration of justice.

56. Justice Lamer also noted that where the accused is conscripted to give evidence against him or herself after a *Charter* breach, this conscription will generally go to the fairness of the trial and such evidence should generally be excluded. As was noted, however, in ***R. v. Hebert***, supra at page 44, exclusion of such evidence is not inevitable.

57. Respecting the admission of this evidence and the fairness of the Appellant's trial, in addition to the factors listed above on the question of whether there was a violation of the right to silence, it is significant that the admission was only part of the evidence bearing on the question of identity. Unlike the situation in ***Hebert***, the conviction did not rest almost entirely on the statement.

58. As to the seriousness of the violation, the conduct of the police can not be characterized as wilful or deliberate. It is also significant that, to this point, there has been no requirement that a suspect must inevitably be cautioned before the police engage her in conversation.

59. Finally on the question of the effect of exclusion of the evidence on the administration of justice, the accused stands convicted of a serious offence. She raises for the first time on this appeal, the allegation of a breach of the right to silence. It is submitted that, given the factors listed above, the administration of justice would be brought into greater disrepute by a direction of a new trial based on the finding that the evidence should have been excluded.

Section 686(1)(b)(iii), *Criminal Code*

60. If it is held that the statements of the Appellant should have been excluded, it is submitted that the proviso in s. 686(1)(b)(iii) of the *Code* should be applied. In order for the proviso to be applied the Crown must demonstrate that a jury could not have come to a different verdict acting reasonably.[9] The Trial Judge accepted the version of the circumstances given by the complainant. While her credibility and her reliability in making an eyewitness identification are two different matters, this is not a case where reliability of the identification is dangerous or doubtful. The Appellant was a person known to the complainant and a person that she knew by name. It is certainly not a "fleeting glance" case. In this context, the Court may also take into account the accused's failure to lead any contrary evidence.[10]

II. IT IS RESPECTFULLY SUBMITTED THAT THE LEARNED TRIAL JUDGE ERRED IN FINDING THAT THE NECESSARY ELEMENTS OF THE OFFENCE OF "ROBBERY" HAD BEEN PROVEN BEYOND A REASONABLE DOUBT AND IN PARTICULAR, THAT THE "TAKING" OF THE PROPERTY OF THE COMPLAINANT WAS "FRAUDULENT" WITHIN THE MEANING OF THAT TERM IN LAW.

61. The Appellant does not take issue with findings that she took property from the complainant without colour of right and with the intent to deprive the owner of the property. Rather, it is argued that the property was not "fraudulently" taken.

62. The pertinent provisions of section 322 of the *Code* provide:

> "322(1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently, and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent,

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[9] e.g., *R. v. Haughton* (1994) 93 C.C.C.(3d) 99 (S.C.C.) at page 107 (TAB 36)

[10] e.g. *R. v. Leaney* (1989) 50 C.C.C.(3d) 289 (S.C.C.) at page 307 (TAB 37)

(a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;

(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

63. In determining the meaning of the term "fraudulent", it is helpful to look to the definition which the Supreme Court of Canada has provided in respect of the offence of fraud and, in particular, the term "other fraudulent means". That Court has defined fraud as conduct which can properly be stigmatized as dishonest, i.e. conduct that the reasonable person would stigmatize as dishonest. Where the fraud is based on "other fraudulent means" rather than "deceit or falsehood", it is necessary to establish that the conduct was dishonest and not that the accused practised deceit or lied.[11]

64. The question then is whether the violent taking of the complainant's clothing, purse and contents without colour of right would be stigmatized by a reasonable person as dishonest.

65. The Appellant has referred to a number of authorities which suggest that theft requires deception, trickery, cheating or swindling.[12] Insofar as these authorities suggest that, to prove that conduct is "fraudulent", the Crown is obliged to demonstrate that the conduct is more than dishonest, it is submitted that they are

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[11] *R. v. Zlatic* [1993] 2 S.C.R. 5 at pages 15-16,25-26 (S.C.C.) (TAB 38), *R. v. Zlatic* (1993) 79 C.C.C.(3d) 466 at page 477 (S.C.C.) (TAB 39), *R. v. Olan* (1978) 41 C.C.C.(2d) 145 (S.C.C.) at pages 149-50 (TAB 40)

[12] *R. v. Dalzell* (1983) 6 C.C.C.(3d) 113 (N.S.S.C.A.D.) (TAB 41), *R. v. Kerr* [1965] 4 C.C.C. 37 (Man.C.A.) (TAB 42), *R. v. Wolfe* (1961) 132 C.C.C 130 (Man.C.A.) (TAB 43)

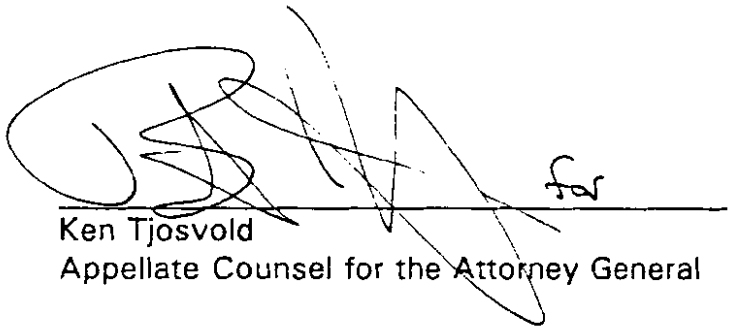
inconsistent with the very clear direction of the Supreme Court of Canada to the contrary in ***Olan, Theroux*** and ***Zlatic***. It is submitted that there is no reason to interfere with the finding of the Trial Judge that the taking of the complainant's property was dishonest and fraudulent.

PART IV - RELIEF REQUESTED

66. The Respondent respectfully requests that the appeal from conviction be dismissed.

Estimated Time: 45 Minutes

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



Ken Tjosvold
Appellate Counsel for the Attorney General

JOINT LIST OF AUTHORITIES

APPELLANT'S AUTHORITIES

TAB 1 **R. v. Stefiuk et alia (No. 1)** (1981) 61 C.C.C. (2d) 268 (Man. Co. Ct.)

TAB 2 **R. v. Hebert** (1990) 57 C.C.C. (3d) 1 (S.C.C.)

TAB 3 **Clarkson v. the Queen** (1986) 26 D.L.R. (4th) 493 (S.C.C.)

TAB 4 **R. v. Rehberq** (1994) 111 D.L.R. (4th) 336 (N.S.S.C.)

TAB 5 **R. v. Zlatic** (1993) 79 C.C.C. (3d) 466 (S.C.C.)

TAB 6 G. Arthur Martin, **"Annotation: Fraud as an ingredient of the crime of theft"** (1965) 47 C.R. 276 (including report of R. v. Kerr giving rise to comment)

TAB 7 **R. v. Dalzell** (1983) 6 C.C.C. (3d) 112 (N.S.S.C.A.D.)

TAB 8 **R. v. Wolfe** (1961) 132 C.C.C. 130 (Man.C.A.)

RESPONDENT'S AUTHORITIES

TAB 9 **R. v. Barrett** (1995) 96 C.C.C.(3d) 319 (S.C.C.), 82 C.C.C.(3d) (Ont.C.A.)

TAB 10 **R. v. Ewert** (1992) 76 C.C.C.(3d) 287 (S.C.C.), 68 C.C.C.(3d) 207 (B.C.C.A.)

TAB 11 McWilliams, ***Canadian Criminal Evidence***,

TAB 12 Kaufman, ***The Admissibility of Confessions*** and 3rd Supp.

TAB 13 **R. v. Thiffault** (1933) C.C.C. 97 (S.C.C.)

TAB 14 **R. v. Kacherowski** (1977) 37 C.C.C.(2d) 257 (Alta.C.A.)

TAB 15 **R. v. Wert** (1979) 12 C.R.(3d) 254 (B.C.C.A.)

TAB 16 **R. v. Whittle** (1994) 92 C.C.C.(3d) 11,

TAB 17 **R. v. Paternak** (1995) 42 C.R.(4th) 293

TAB 18 **R. v. Boudreau** (1949) C.C.C. 1 (S.C.C.)

TAB 19 McWilliams, ***Canadian Criminal Evidence***

TAB 20 **R. v. Boross** (1984) 53 A.R. 257

TAB 21 **R. v. Roach** (1985), 66 A.R. 73

TAB 22 **R. v. Vidulich** (1989), 37 B.C.L.R. (2d) 391,

TAB 23 **R. v. Ullrich** (1991), 69 C.C.C. (3d) 473

TAB 24 **R. v. Barr** (1991), 113 A.R. 211

TAB 25 **R. v. Brown** (1992), 127 A.R. 89

TAB 26 **R. v. Brown** (1992) 141 A.R. 163

TAB 27 **R. v. Fertal** (1993), 85 C.C.C. (3d) 411

TAB 28 **R. v. Buttar** (1989), 73 C.R. (3d) 317

TAB 29 **R. v. Fortier**, unreported, April 5, 1995, Alta.C.A.

TAB 30 **R. v. Collins** (1987) 33 C.C.C.(3d) 1 (S.C.C.)

TAB 31 **R. v. Van den Meerssche** (1989) 53 C.C.C.(3d) 449 (B.C.C.A.)

TAB 32 **R. v. Van Haarlem** (1991) 64 C.C.C.(3d) 543 (B.C.C.A.), (1992) 71 C.C.C.(3d) 448 (S.C.C.),

TAB 33 **R. v. Farrell** (1992) 76 C.C.C.(3d) 201 (P.E.I.S.C.A.D.)

TAB 34 **R. v. W.(W.R.)** (1992) 75 C.C.C.(3d) 525 (B.C.C.A.)

TAB 35 **R. v. John Montague Smith,** unreported, Ont.C.A., October 5, 1995.

TAB 36 **R. v. Haughton** (1994) 93 C.C.C.(3d) 99 (S.C.C.)

TAB 37 **R. v. Leaney** (1989) 50 C.C.C.(3d) 289 (S.C.C.)

TAB 38 **R. v. Zlatic** [1993] 2 S.C.R. 29 (S.C.C.)

TAB 39 **R. v. Zlatic** (1993) 79 C.C.C.(3d) 466 (S.C.C.),

TAB 40 **R. v. Olan** (1978) 41 C.C.C.(2d) 145 (S.C.C.)

TAB 41 **R. v. Dalzell** (1983) 6 C.C.C.(3d) 112 (N.S.S.C.A.D.)

TAB 42 **R. v. Kerr** [1965] 4 C.C.C. 37 (Man.C.A.),

TAB 43 **R. v. Wolfe** (1961) 132 C.C.C 130 (Man.C.A.)