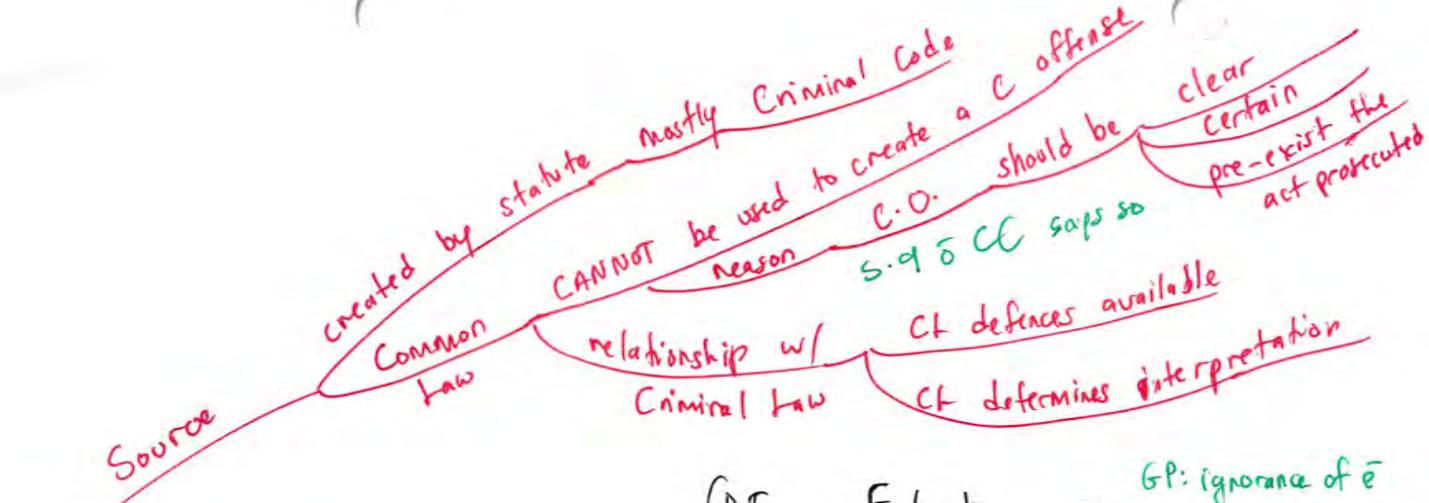
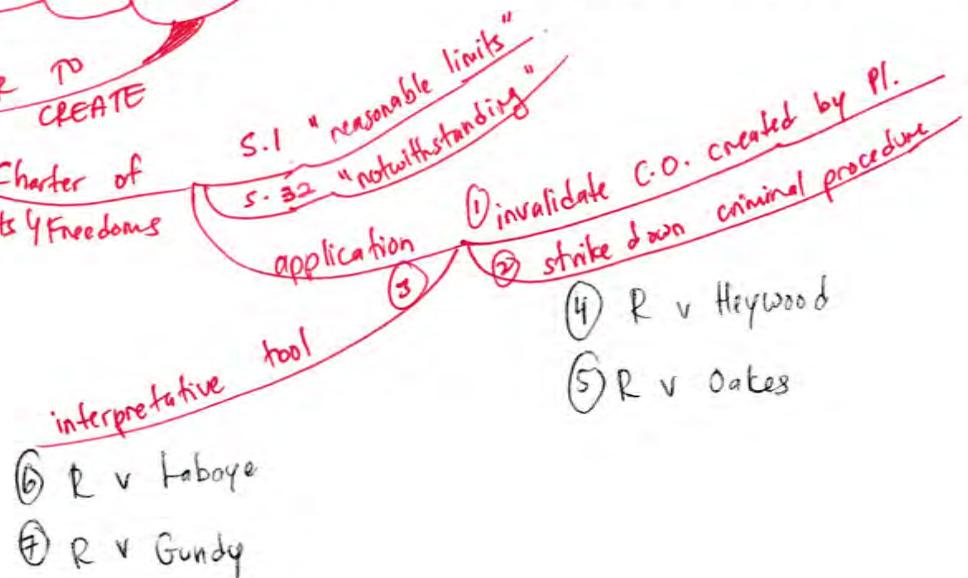


S.91(27) CA	S.92(15) CA S.92(14) CA
Federal	Provincial
• can create C.O.	• can not
• can create Regulatory Offences	• can create RD as well
* most criminal cases are prosecuted in Provincial CTs	• can administer criminal justice



- ① Frey v Fedoruk
- ② Lewis (City) v Tetreault
- ③ R v Jobidon

GP: ignorance of the law is not an excuse.
Held that "Officially Induced Error" may excuse the behavior



① Frey v Fedork

- Frey detained by Fed after caught peeping into a house of a woman
- Fed was acquitted as there was no "peeping tom" offence. Fed sued Frey for wrongful imprisonment

Issue: Can a J declare an act to be a crime?

SCC: No. It is for the Parliament to enact and not the courts.

* Subsequently, trespassing and voyeurism was added to the CC as offences (S. 177 and S. 162)

② Tevis (City) v Tetrovult (2006) SCC

Held: 6 elements to prove "Officially Induced Error":

1. Error was an error of law or mixed of error of law and error of fact
2. Accused considered legal consequences of his act
3. Accused obtained advice from an appropriate government official
4. Advice received was on its face reasonable
5. Advice received was erroneous.
6. Accused relied on the erroneous advice in committing the prohibited act.

③ R v Jobidon (1991) SCC

- Df agreed to fight victim outside a bar
- Victim fell unconscious but Df continued to hit him. Victim died.
- Charged of manslaughter. Df pleaded that victim consented to the fight

TJ: Acquited. CA: Manslaughter

SCC: - consent not valid for causing serious harm or non-trivial bodily harm

- once victim is unconscious, it becomes assault
- since victim died to the assault, Df have committed manslaughter

④ R v Haywood (1994) SCC

- S. 179(1)(b) - person w/ history of sexual violence found loitering in or near a school, playground or public park
- HELD: clear and specific = Unambiguous and not vague, could still be overly broad - violates S. 7 & Charter (Liberty)

* Broad: geographical scope, duration

5 provinces it covers etc

⑤ R v Oakes (1986) SCC

- S. 8 of Narcotics Act Control: anyone found in possession of narcotics will be presumed to be for the purpose of trafficking, unless he can prove otherwise
- HELD: reversal of onus of proof violate S. 11(Cd) & Charter (presumption of innocence)

RATIO: not within ambit of S. 1 - fails the proportionality test - not rationally connected to the objective

OACES test:

* to justify charter infringement under S. 1

- ① Objective sufficiently important/ compelling to limit a Charter right
- ② Proportionality between the objective and the means to achieve it.
- ③ Rational connection between the violation and the objective.
- ④ Minimal impairment - least restrictive means of achieving the objective

* arbitrary or disproportionate to achieve state's objective

⑥ R v. Labaye (2005) SCC

See, e.g., R v Labaye [2005]

- The issue in this case was whether what went on in an orgy membership club constituted "acts of indecency"
- To ground criminal responsibility for indecency, the harm must be one which society formally recognizes as incompatible with its proper functioning (autonomy, liberty, equality and human dignity are among these values)
- The Supreme court held that the appeal should be allowed and that the conviction s/b set aside.

TLDR:

Held: = harm the only measure to of indecency in Canadian law
= harm in indecency must be serious, certain political beliefs or individual beliefs is not enough

= indecency in Canada:

- threaten someone's liberty
- express something undesirable to people
- force someone to commit misdeed
- ~~harms~~ harms someone engaging in certain acts

= the prosecuted acts are consensual and behind closed doors
= acts were relatively private and did not degrade participants
HELD: activities not within the meaning of s. 210(1) & c.c.
"common bawdy house"; consistent w/ personal autonomy and liberty rights

∴ ACQUITTED of public indecency crime s. 210(1) & c.c

~~as been creating constitutional procedure~~
~~administrative mechanics of procedure involved~~

⑦ R v Gundy (2008) ONCA

If the accused does not challenge the admissibility of the results of the Intoxilizer/Breathalyzer analysis on the basis that the accused's rights under the Charter were violated, the Crown is not req'd to establish that the officer had reasonable and probable grounds to make the s. 254(3) demand. Any objection to the admissibility of the results of the analysis should ordinarily be made, at the latest, when the Crown tenders the evidence either through a certificate under s. 258(1)(g) or by way of oral testimony.

Where the accused intends to object to the admissibility of the results of the analysis on the basis of a violation of the Charter, the accused should comply with Rule 30 of the *Rules of the Ontario Court of Justice in Criminal Proceedings*, although a TJ has a discretion to dispense with notice in a proper case.

TLDR:

- challenge on basis violate S. 8 & Charter (right to be secure against unreasonable search and seizure)
- arresting officer used an approved screening device, which registered a fail, after which she made a demand for an Intoxilizer test
- HELD: no violation of S. 8 of the Charter

CLASSIFICATION OF OFFENCES

Indictable

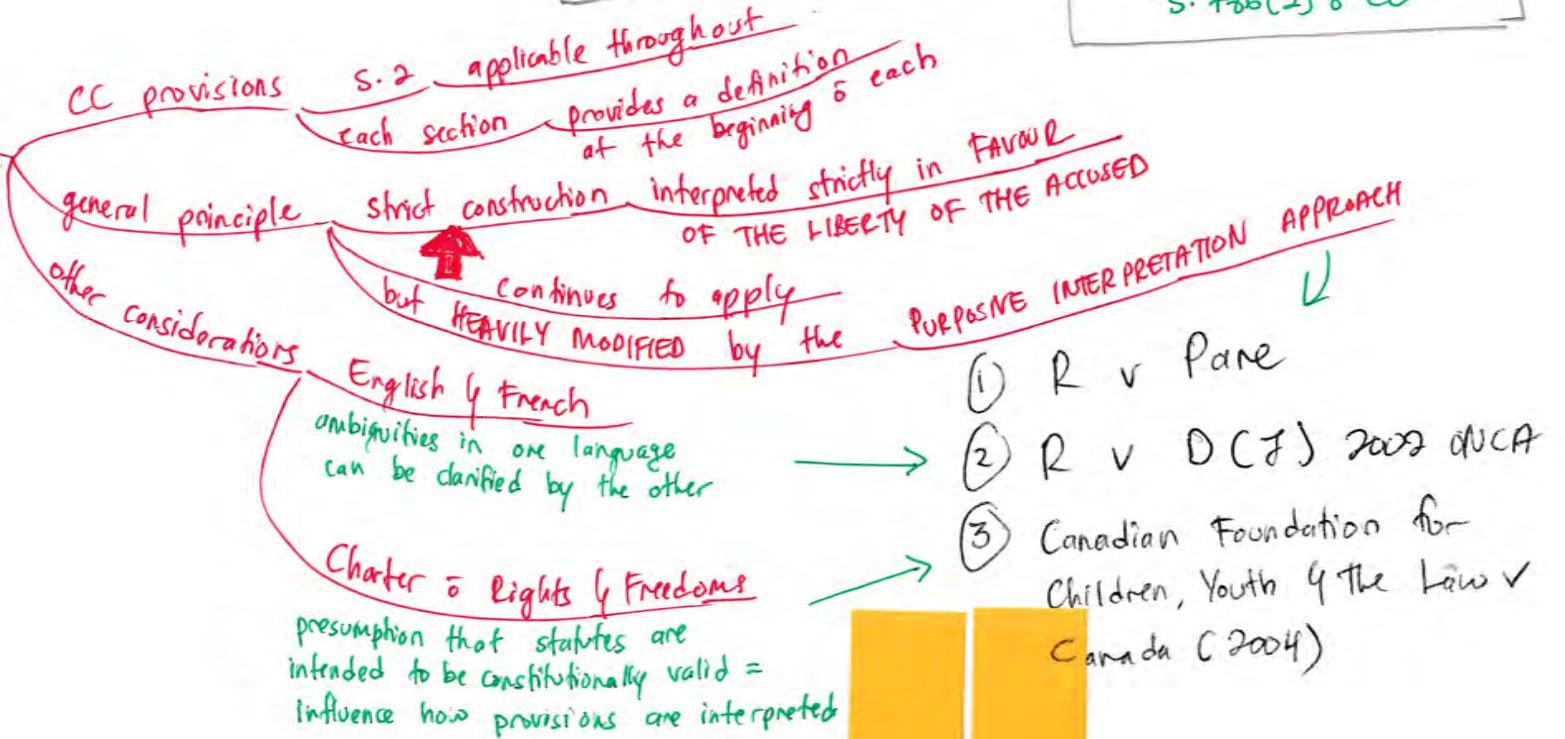
- higher max sentences
 - generally more serious
 - no time limit to when charges can be laid
- * there can also be a "hybrid" class of offences where the prosecutor can choose whether to treat as Indictable or Summary, NOT a third class

Summary

- heard in lower courts
 - however can elect to be heard by a higher court or by a Trial Jury
 - exception to this election as CC takes away the right to elect on a number of offences
- there is a time limit to when charges can be laid under statute (1 year) S. 786(2) o CC

OVERVIEW
continued

INTERPRETING
Criminal Provisions



(1) R v Pare (SCC - 1987)

See R v Pare [1987]

- A boy was murdered two minutes after being assaulted.
- There was a question whether this constituted first degree murder which req's that the killing take place "while committing" in s. 214(5)
- The appeal was allowed by using the purposive approach
- It was held that the words do not req' the murder and the underlying offence to take place simultaneously
- Where the act causing death and the acts constituting the indecent assault all form part of one continuous sequence of events forming a single transaction, the death is caused "while committing" an offence for the purposes of s214(5)
- Accordingly, it is the continuing illegal domination of the victim which gives continuity to the sequence of events culminating in the murder and makes it a single transaction
- The conviction of first degree murder should be restored"

TDR: S. 214(5) "while committing"

☞ 1st Degree Murder required death caused during indecent assault

Analysis

Literal: Murder occurred AFTER the indecent assault

Strict Construction: require court to adopt interpretation most favourable to Accused

SCC: Murder causally connected to the underlying offence, formed part of a continuous sequence of events

Act: Accused strangled a 7 year old victim to death with a shoelace after sexually assaulting him.

→ 1st Degree Murder RESTORED

RATIO: ① Doctrine of Strict Interpretation must not contradict a Purposive Interpretation that considers the scheme and purpose of the legislation.

② Interpretation cannot lead to arbitrary or irrational outcomes

(2) R v DCF) 2002

- Court analyzed both E & F version to define forcible entry s. 72(1) o CC

(3)

Canadian Foundation for Children, Youth & the Law v Canada [2004]:
FACTS: s43 of the CC justifies the reasonable use of force by way of correction by parents and teachers against children in their care

The appellant (CFC) sought a declaration that s43 violates ss7, 12 and 15(1) of the Charter

- The TJ and the CA rejected the appellant's contentions and refused to issue the declaration requested

ISSUE: Constitutionality of provision allowing parents and teachers to use minor corrective force

REASONING:

- s7 protects individuals from violation of their personal security
- McLachlin found that there was no violation of the s
- The Crown had conceded that the law adversely affected the child's security of person, so the issue was whether the violation offended a principle of fundamental justice
- The Foundation proposes three claims as mentioned above
- McLachlin rejected the first claim that it failed to give procedural protection as children receive all the same protection as anyone else

On the second claim, she rejects that the "best interests of the child" is a principle of fundamental justice as there is no "consensus that it is vital or fundamental to our societal notion of justice."

s12 analysis: s12 prevents "cruel and unusual punishment"
Citing the standard of showing cruelty and unusual punishment from R. v. Smith as "so excessive as to outrage standards of decency", McLachlin rejects the claim as the s only permits "corrective force that is reasonable" thus cannot be excessive by definition

s43 does not lead to a violation of s15 of the Charter, and the Foundation erroneously equates equal treatment with identical treatment

So while s43 makes a distinction on the basis of age (triggering s15), the distinction isn't discriminatory
The question may be put as follows: viewed from the perspective of the reasonable person identified above, does Parliament's choice not to criminalize reasonable use of corrective force against children offend their human dignity and freedom, by marginalizing them or treating them as less worthy without regard to their actual circumstances?

HELD: The law stands

- (11) R v Menezes } causation
- (12) R v Nette }
- (13) R v Moore }
- (14) R v Peterson } "omission" as AR
- (15) R v Browne }

Some offenses require that a "consequence" must occur

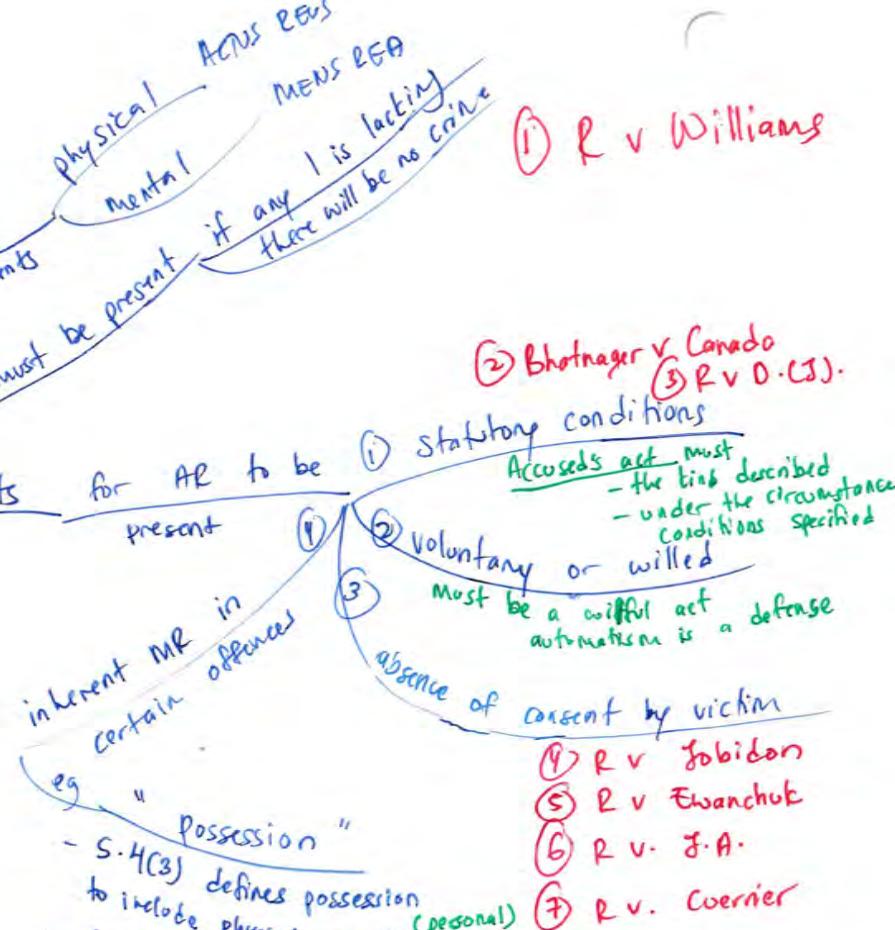
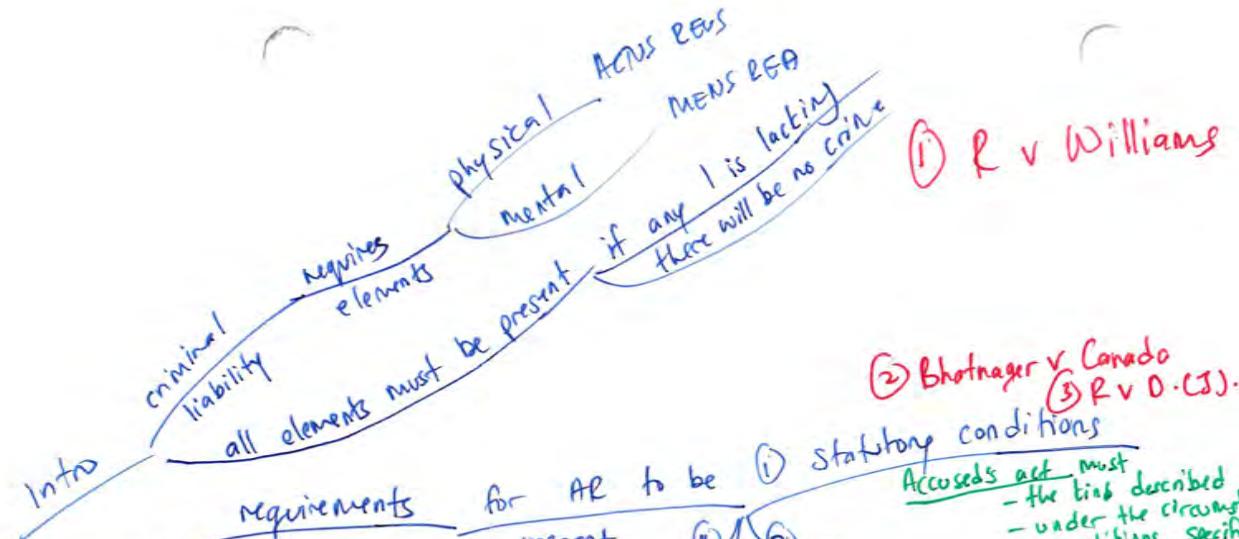
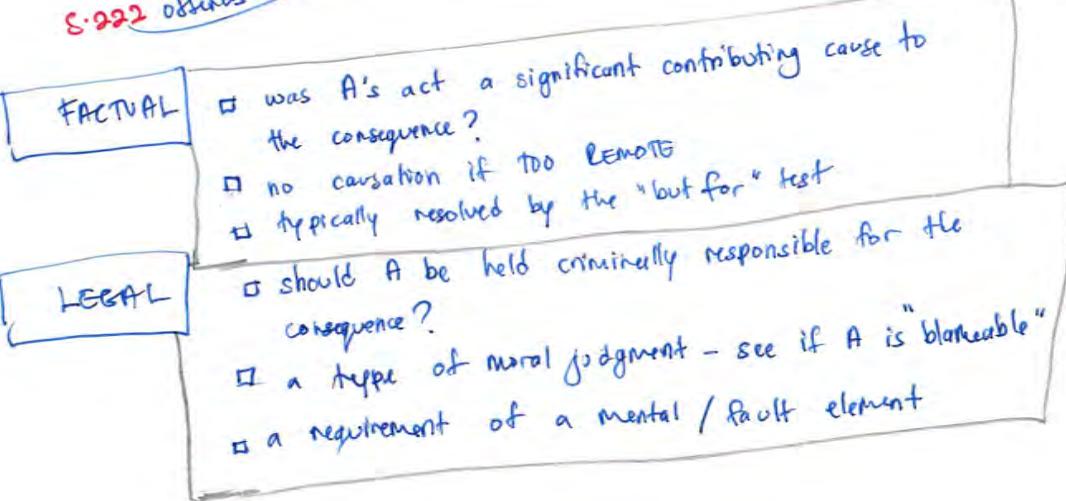
S.201 Offenses "causing bodily harm" e.g.

S.430 Offenses "causing danger to life" death

S.222 Offenses "causing"

general principle Causation

Analysis into FACTUAL and LEGAL causation



- (1) R v Williams
- (2) Bhotnager v Canada
- (3) R v D.C.J.
- (4) R v Jobidon
- (5) R v Ewanchuk
- (6) R v. J.A.
- (7) R v. Coenier
- (8) R v York
- (9) R v Terrence
- (10) R v Pham

① R v Williams (2003) SCC

- Accused learned he was HIV +, did not disclose to gf and they continued to have unprotected sex
- TJ: guilty of aggravated assault and common nuisance
- CA: substituted with attempted assault
- SCC: AR is present but not AP = because there is reasonable doubt that victim's life was endangered by a virus

she likely had acquired prior to the date the accused came to know of his HIV status. SCC upheld conviction of attempted aggravated assault

② Binatnager v Canada (Minister of Employment & Immigration) 1990 SCC

- FCCA found Minister of Crown guilty of contempt of court for failure to comply w/ a court order to produce records
- SCC: contempt is a criminal (quasi). ~~as such~~ there can be no vicarious liability

3. R v D.(J). 2002

- charged with s. 72(1) & co of forcible entry
- Facts: while fleeing police and police dogs, he knocked on door, let in by a minor. The house dweller knew him. The adult also knew him and did not have issue with his presence. (did not ask to leave)
- Held: Crown unable to prove FE. His entry was not forced or violent or w/ threat of such. **No interference w/ their peaceful possession**

4. R v Jobidon, SCC intro

5. R v. Ewanchuk (1999) SCC

Facts: A touched complainant in a trailer progressively more intimate despite her saying no each time

TJ: Acquitted on basis of implied consent
CA: Upheld acquittal
SCC: AR is sexual offence (1) touching (2) sexual nature is contact (3) absence of consent. Consent to be effective must be freely given, s. 265(3) - no consent if forced, fear fraud or exercise of authority

obiter: there is no defense of implied consent

for sexual assault in Canadian law. TJ accepted complainant's evidence that she did not consent but treated her conduct as raising R. Doubt about consent and calling it "implied" = ERROR

6. R v J.A. (2011) SCC

Facts: long term partners - choking until unconscious, woke up to A inserting dildo in her anus, A took it out after she woke up and they continued w/ vaginal intercourse

TJ: convicted of sexual assault - complainant say did not consent to sexual activity during her unconsciousness, although consented to choking
CA: acquitted

SCC: restored conviction for sexual assault
Issue: Can a person consent to sexual acts in advance of being unconscious to sexual acts during unconsciousness?

* SCC: parliament defined consent in a way that required persons to be conscious throughout the sexual activity - does not extend to acts committed during unconsciousness. Legislation requires constant ongoing consent to sexual activities and the capability to stop the act at any point.

* Dissenting: consenting adults can willingly and consciously agree to engage in sexual practices that involve TRANSITORY UNCONSCIOUSNESS so long as the acts committed do not exceed the scope of the prior consent or cause bodily harm (which would vitiate her consent at common law)

7

R v Cuernier (1998) SCC

Issue: Aggravated Assault for having unprotected sex knowing of his HIV positive status (S. 268 & CC)

Facts: 2 complainants testify they consented to unprotected sex but would not have done so if they knew. At trial, neither complainant tested positive for HIV.

TJ: Acquitted, CA: Uphold acquittal

SCC: S.265 - failure to disclose HIV positive is fraud - vitiating consent to sex. Without disclosure & e HIV status there can be no true consent. New trial



R v Terrence (1983) SCC

Facts: A charged w/ possession of stolen automobile. A testified that the driver (a friend) asked him to ride with him in a relative's car and only realized car was stolen when a police chase began.

SCC: there must be an element of some measure of control on part of P & A as an essential element of "possession".

HRD: upheld ONCA's squashing of conviction agree that evidence of control necessary to establish possession under S.3(4)(b)

8

R v York (2005) BCCA

Facts: A found stolen goods in his warehouse and moved it outside so as to return to owner.

Convicted of Possession of Stolen Property S.254(1)(a) and Theft S.334(a)

BCCA: intent is essential ingredient for theft and possession of stolen property. A had no dishonest intention / deprive rightful owners. Personal possession includes intent to deal in some prohibited manner.

Convictions set aside - registered acquittals.



R v Phom (2005) ONCA

Facts: A convicted of joint possession of cocaine for the purpose of trafficking.

Drugs were found/seized in A's apartment. A was not present during search, but N was.

ONCA: constructive possession requires the presence of knowledge and some measure of control.

ONCA: agreed w/ TJ's findings that evidence in apt showed A had knowledge and control over the drugs even she wasn't present during the seizure (looking at the

items present surrounding the drugs and A's personal possession, TJ entitled to find evidence of constructive possession.

Dissent: there is possibility drugs brought after A left apt, once off & not discharged

11

R v Menezes (2002) ONSC

- street racing resulting in death
- the other driver/racer charged w/ criminal negligence causing death solely based on his co-participation in "the race"

ON CAUSATION

= requires a finding that A caused death in both fact and in law

= TJ accepted evidence that A had slowed down, thus "withdrawn" from the race but the deceased continued at the excessive speed which had caused the fatal accident

= no causation as deceased decided to

maintain excessive speed (no longer) related to the race w/ A

HELD: Acquitted of criminal negligence causing death. Only guilty of dangerous driving.

12

R v Nettle (2001) SCC

F: A robbed a 95 yo woman & left her bound w/ wire with a garment around her head & neck - She died from asphyxiation w/in the next 48 hours.

Trial: Jury found guilty of second degree murder, guided by TJ's standard of causation as "slight or trivial cause necessary to find a second degree"

SCC: on the question of causation test applicable to second degree - Smithers standard of "more than a trivial cause"

HELD: despite TJ's usage of different terminology jury was correctly instructed - 2nd degree upheld

13

R v Moore (1979) SCC

F: A runs a redlight w/ his bicycle. Upon being stopped by a police officer, he refused to give his name and address. Charged w/ obstruction o Justice

TJ: acquitted. CA reversed & ordered new trial. A appealed to SCC

SCC: Officer was carrying out duty o law enforcement and attempted to ID A, failure o A to comply constitute an obstruction o an officer in the performance of that duty

14

R v Peterson (2005) ONCA

F: A lived w/ 84 yo father. Father fell sick frequently as his housing, clothing & food was not properly taken care of

TJ: convicted o S.215 failing to provide for necessities o life and endangering life. A appealed on sentence, conviction

ONCA: S. 215(1)(c) duty to provide the necessities o life arises when one person is UNDER THE CHARGE of another, TJ was correct to hold A as in charge o his father (had onset Alzheimer). Upheld

conviction & sentence

Dissent: only on the sentence - 6 months imprisonment, 2 years probation & 100 hours community service

15

R v Browne (1997) ONCA

F: A and a fellow drug dealer was stopped by police. The friend swallowed a plastic bag o crack cocaine & they avoided arrest. Later they failed to induce vomiting & the bag & she started to feel ill. A told her he will take her to the hospital, but called a cab instead.

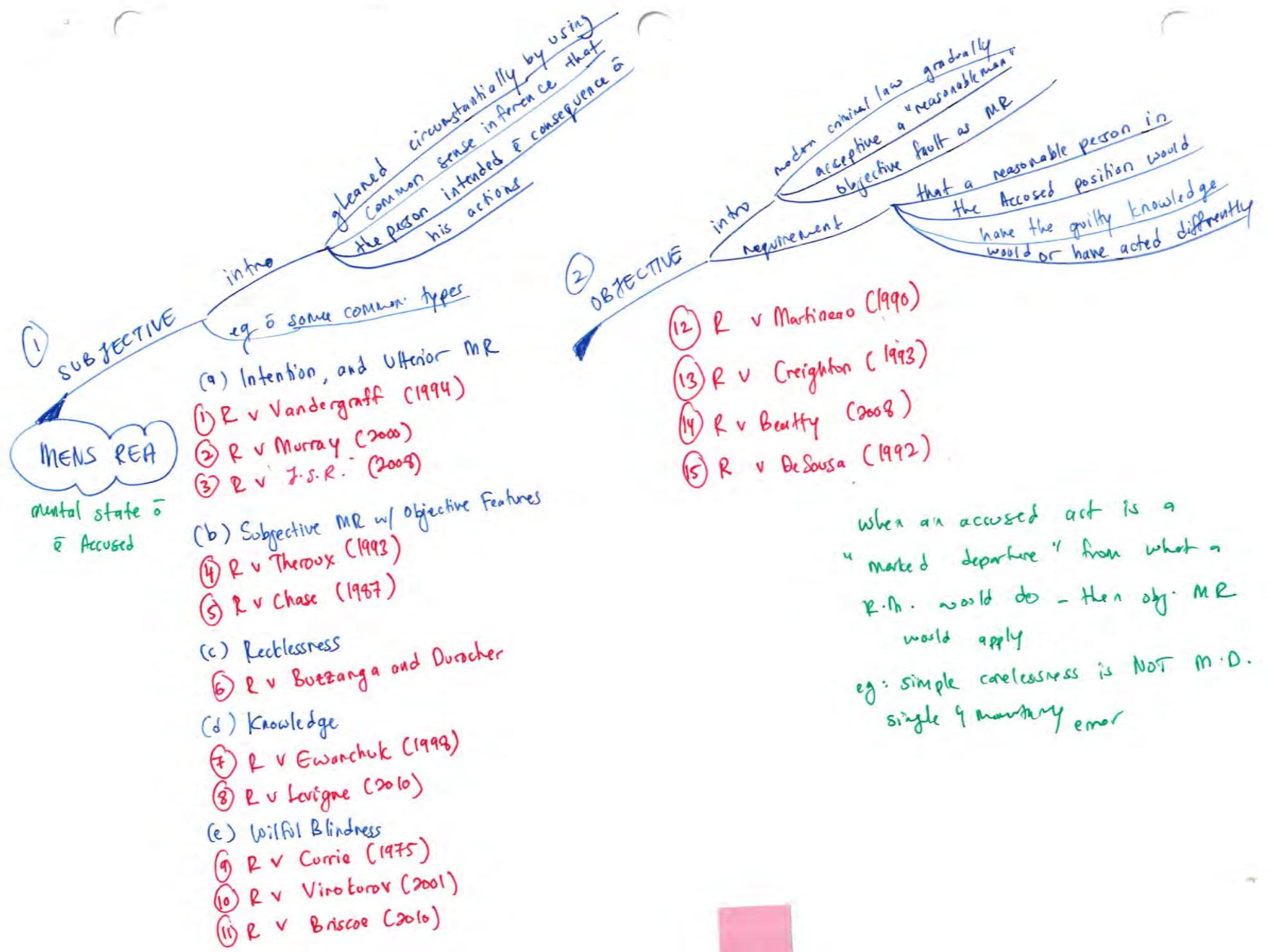
Cab took 15 mins to arrive and she died shortly on arrival at the hospital

TJ: convicted A o S. 219(1) - by calling taxi & 911 showed "wanton

& reckless disregard for her life" TJ found by his statement, it had created "an undertaking" under S. 217

ONCA: given the serious penal consequence o causing death by criminal negligence (S. 219), the "undertaking" must have been made w/ binding intent

the words "I'll take you to a hospital" does not constitute an undertaking creating a legal duty under S. 217



①

R v Vandegrift (1994) MBCA

F: V threw a jar of peanut butter towards ice rink after his hockey team lost - other spectators too, but his jar hit a woman and injured her
S.26F(1)(a)

TJ: convicted w/ assault w/ a weapon, concluding that "there was intention to apply force in a general sense, and it happened to be particularly against this complainant."

CA: without proof of INTENTION TO APPLY FORCE TO THE COMPLAINANT or to another person, there cannot be a conviction for assault or assault w/ a weapon

②

R v Murray (2000) ON SC

F: Df was counsel to B for murder and rape charges. Df was in possession of videotapes critical to B and H(wife) case. Df then got another experienced criminal lawyer to take over (R) and retained for himself another counsel who, after consultation w/ the Law Society, was advised tapes should be delivered to the judge in a sealed packet. R after viewing the tapes, got a research team and decided tapes are NOT privileged and turned to the police. Tapes were used by Crown and B found guilty of murder. Df charged w/

③

R v JSE (2008) ONCA

- this is an appeal against the quashing of a committal for trial on a 2nd degree murder.

F: A shot into the crowd in a gang-related shoot-out but a bystander was hit and killed

CA: A did not intend to hurt a bystander but intended to hit someone else, and engaged in the dangerous act - frenzied shootout into a crowded street - A HAD TO KNOW THAT SOMEONE OTHER THAN HIS TARGET MIGHT DIE

④

R v Theroux (1993) SCC

F: A convicted at trial for fraud s.380(1)(a). A director at a company who took deposits for a residential construction project, representing that the deposits were insured, when they were in fact, not. Company became insolvent, project incomplete & investors lost their money

CA: upheld conviction

SCC: does the fact that A honestly believed the project would be completed, negate MR?

H: MR is established as he told depositors they had insurance protection, knowing this to be false and subjecting the depositor's money to be at risk

⑤

R v Chase (1987) SCC

F: A was convicted for sexual assault, upon appeal to CA, was reduced to "common assault" as A did not touch complainant's vagina

SCC: recognition of sexual assault is not confined to specific anatomy or the genitalia - test is an "objective" to determine if it is sexual viewed in light of all circumstances - in this case the motive is sexual gratification - reinstate sexual assault

* a "specific intent" offence, thus to succeed must show that A had a specific intent to obstruct justice when concealing the tapes, which he did not

S.139 - willfully attempting to obstruct justice

HELD: there is a doubt as to his intention to obstruct justice as Df was mistaken as to the solicitor-client privilege - acquitted

⑥

R v Buzzanga and Durocher (1999) SCC

F: In order to encourage sympathy w/ the French-speaking community, DFs released an anti-French flyer. Charged under s.319 for wilfully promoting hatred.

SCC: the A had intention to promote hatred or foresaw it was certain to result from the flyer. However TJ erred in equating "intent to create controversy, furor, uproar" w/ "intent to promote hatred". New trial ordered.

TLDR: Intent can be inferred from objective circumstances.

⑦

R v Ewanchuk (1999) SCC

* this is the touching in van case

WRT MR: MR in this case is the intention to touch, knowing of, or being reckless of, or wilfully blind to, a lack of consent

As such, A'd defense that he believed he had consent cannot stand in the face of complainant's clear verbal objections.

TLDR: cannot have "honest belief" if you are reckless or wilfully blind

⑧

R v Levigne (2010) SCC

F: A charged under s.172(1)(a)4(c)
"luring a child"

TJ: acquitted, did not apply subs (4) which is "to take reasonable steps to ascertain age" - concluded it was reasonable possible that A, despite all indications, believed he was dealing w/ an adult

CA: substituted a conviction

SCC: dismissed appeal - A took no reasonable steps to ascertain the person's age despite assertion during their communication that he was only 13

⑨

R v Currie (1975) ONCA

F: A cashed a check payable to B. He said a stranger asked him to cash it in return for \$5 and that nothing about the cheque or the stranger aroused suspicion. In fact, cheque was stolen

TJ: convicted w/ offence of uttering a forged document. Applied doctrine of wilful blindness and that A should have made further inquiries.

CA: doctrine of constructive knowledge does not apply to criminal law.

Appeal allowed.

⑩

R v Vinokurov (2001) ABCA

F: A charged w/ s.355(b) - A was manager at a pawn shop - received stolen property from a series of break-ins. A consulted w/ mother (owner) of shop as well as completed all required paperwork sent to police

CA: convictions quashed - new trial ordered. recklessness ≠ "knowingly" under ss although wilful blindness will still knowingly MR

⑪

R v Briscoe (2010) SCC

F: L told B (Accused) that he wanted to find someone to kill. B stood by and watch as a 13 yo girl was raped and murdered L and other persons.

TJ: L and B tried together, but acquitted B - says no MR as he did not have knowledge L intended to kill
CA: overturned acquittal and ordered new trial as TJ failed to consider WILFUL BLINDNESS

SCC: MR here is INTENT and KNOWLEDGE
A intended to assist L to commit offence and KNEW L intended to commit even if he didn't know how specifically

12

R v Martineau (1990) SCC

F: M and a friend T set out armed knowing they are going to commit a crime. M testified he thought they were only going to Break and Enter. T killed 2 ppl.

TJ: convicted M of second degree murder under s. 230 (at that time 213)

CA: the s. 213 inconsistent w/ Charter as it expressly removes Crown's burden of proving beyond R.O. that A had a foresight of death

SCC: section 213 infringes ss 7 and 11(c) of the Charter and not saved by 1

13

R v Creighton (1993)

F: A injected K w/ cocaine w/ her consent, K had cardiac arrest and asphyxiated. A convinced a companion to not call for help, cleaned up apartment and left

TJ: convicted of manslaughter - as death was a consequence of an unlawful act under S.222(s)(a)

CA: upheld conviction

SCC: appeal to determine if the common

law definition of manslaughter contravenes S.7 of Charter as it only requires foreseeability of bodily harm, not death?

14

R v Beatty (2008) SCC

F: A's pick up truck crossed the centre line hitting 3 people in the opposite lane vehicle. Charged with dangerous operation of a motor vehicle S.249(4).

Evidence shows no mechanical failure, no intoxication. Df states he might have fallen asleep.

TJ: no "marked departure"

CA: the act of crossing the line is objectively "marked departure"

SCC: AP fulfilled, but no MR there is no "marked departure", CA incorrect to infer just because accident happened > m-D.

HELD:

- MR for unlawful act manslaughter is foreseeability of risk of bodily harm, which is not trivial or transitory, in the context of a dangerous act.
- Foresayability of death is not required.
- Does not violate S. 7 of Charter as the MR is appropriate to the stigma associated w/ "manslaughter" = indicates a lesser blame than murder

Decision: TJ conviction proper, not disturbed

R v DeSousa (1992) SCC

F: A was in a fight when he threw a bottle against a wall, causing glass fragments to injure a bystander

Charge: unlawfully causing bodily harm

S-269

TJ: S-269 created criminal responsibility for causing bodily harm by way of an unlawful act, which will include an offence of absolute liability, since the offence had a possibility of infringement, it contravenes s.7

TJ granted motion to declare S-269 declared to no effect and quashed indictment →



"penal negligence"

AR = "marked departure" from what a reasonable person would do in the circumstances. Personal / subjective characteristics to A is irrelevant (short & incapacity)

MR F infer from facts if objective foresight to bodily harm

CA: overturned motion and set aside order quashing indictment
SCC: no violation to S-7 & II to Charter
SCC: S-269 requirement

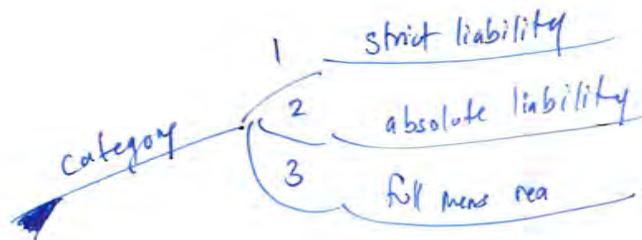
- ① committed an underlying unlawful offence
- ② caused bodily harm as a result of committing that offence

MR:

- ① must fulfil MR & to underlying offence
- ② underlying act objectively dangerous that a R.M. would realize a risk to harm



- can be created by any level of government
- generally R.O. are created to regulate conduct and not inherently wrong



① R v Sault Ste Marie (1978) SCC

defines the THREE types of offences in Canadian Criminal Law

② s.94(2) of MVA, Reference Re

③ R v Wholesale Travel Inc (1991) SCC

④ R v Raham

⑤ Lewis (City) v Tetrault (2006)

Framework Answer

① Is it a True Crime OR Regulatory?

- It is a matter of statutory interpretation
go through each category
~~Explain facts & L unless~~

(a) True Crimes - knowingly etc are required

(b) Regulatory - No MR language and focus
of public welfare - Strict Liability
principle

(c)

- CLEAR language & A.L.
→ "all or nothing"
→ "no heavy penalty"
→ "Due Diligence not a defense"
- can't have imprisonment otherwise invalid

① R v Sault Ste Marie (1978) SCR

F: City charged w/ water pollution - prohibition discharging or depositing or causing or permitting discharge that may impair water quality.

H: important to distinguish between true crime and public welfare offences - "absolute liability" = conviction on mere proof of act w/out any relevant MR

"strict liability" = MR x need to be established but defense of reasonable belief or reasonable care acceptable

"mens rea" = MR must be established

"true crimes"
As such: criminal offences require MR,

Public Welfare Offences are prima facie strict liability, and absolute liability arise where legislature made it clear

guilt is on mere proof & prohibited act

②

Reference Re s.94(2) & MVA

- ~~absolute~~ ^{absolute} strict liability offences cannot carry imprisonment terms
- Section was of no force as it is inconsistent w/ s.7 - right to life, liberty security
 - CA said so, SCC upheld
 - * A.L. perse ok, but if deprive liberty, then see if justified by

s.l. & Charter but rarely not,

* mandatory imprisonment for absolute liability committed unlawfully and unwittingly is inconsistent w/ s.7 - inhumane, offends principles of justice

③

R v Wholesale Travel (1991) SCE

F: travel agency charged w/ false or misleading advertisement under Competition Act. The Act provides a statutory defense to due diligence coupled w/ requirement for a timely retraction

H: the offence is not an infringement of s.7 & charter as MR is negligence with defense to due diligence available, however the additional requirement

of timely retraction means that the statutory defense is more narrow than the CH defense; it may result in conviction of an accused who was not negligent;

→ the offence is punishable by imprisonment, so at least a defense must be available to the accused

TDR - regardless if you categorize the offense as "crime" or "regulatory" but if it involves restriction of liberty then Charter analysis must be done.

- negligence is minimum level of fault for imprisonment

④

R v Raham (2010) ONCA

- "stunt driving" S. 172 of the Highway Traffic Act punishable by fine or imprisonment or both
- DF argued the offence is a strict liability offence punishable w/ prison, thus violate S.7 of Charter

H: S.172 is strict liability,
due diligence as an available

defense, therefore not unconstitutional
ordered re-trial - df may succeed
on due diligence as the speeding
was during a passing of another
truck and only 2km over the
(+50) limit and slowed down
after passing

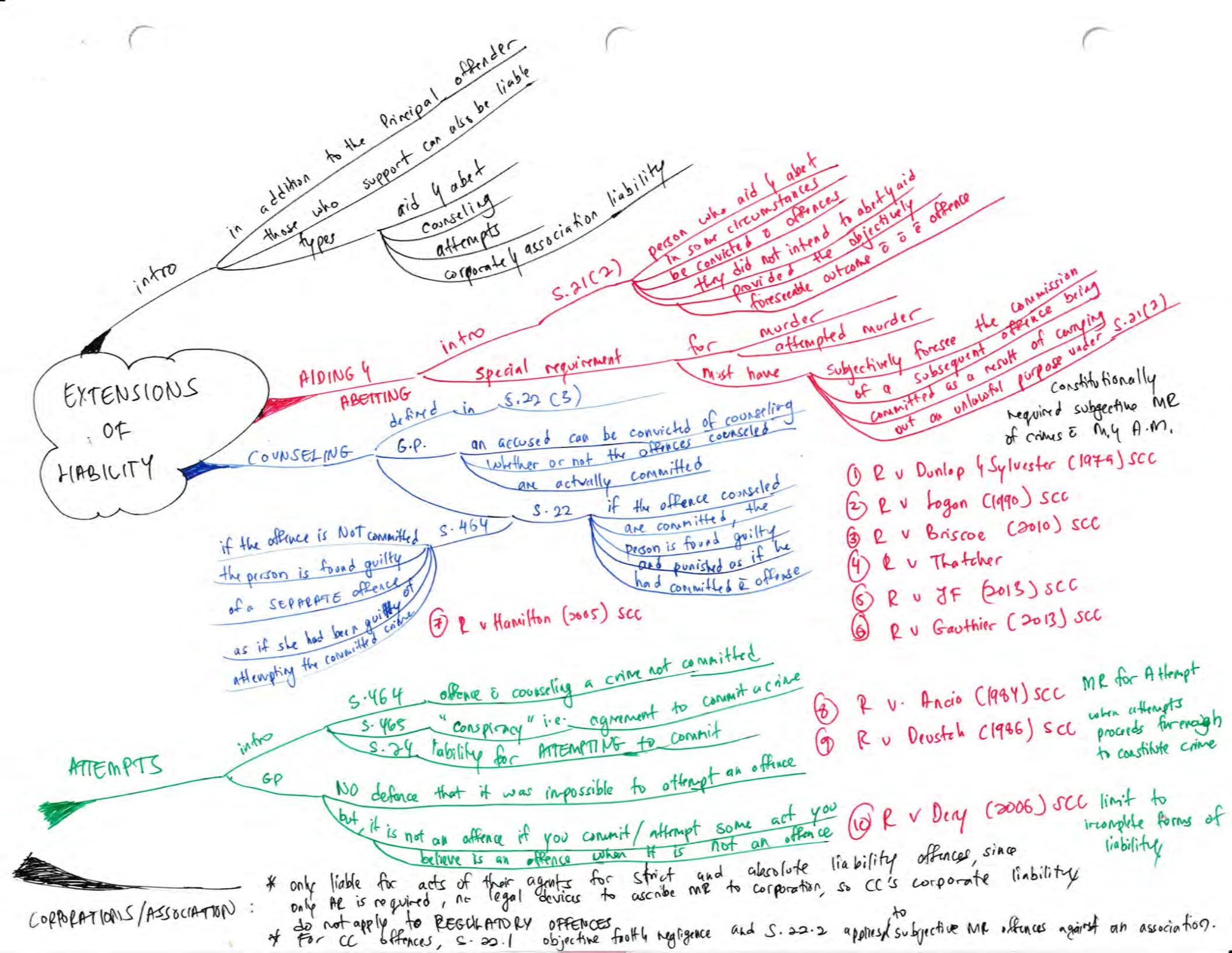
⑤

Levis (City) v Tetreault (2006) SCC

Offence: operating a MR without registration fees paid, DF raised officially induced error - renewal notice did not reach them and they mistook a date printed on their license

Held: This is a strict liability offence, no burden to proving MR - defense of due diligence available to DF but DF failed to prove

DD means citizen have a civic duty to know his obligation, passive ignorance is not an excuse



①

R. v. Dunlop and Sylvester [1979] 2 S.C.R. 881

the 2 accused were convicted on a charge of gang-raping Complainant, along with 16 other men. Complainant identified the accused as two of her attackers but they denied the charge. There was no evidence that the accused formed common intention with those involved to commit rape.

Issue: Whether there was evidence the accused aided and abetted commission of the offence.

Held:

- Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement. In this case, there was no evidence that while the crime was being committed either of the accused rendered aid, assistance, or encouragement to the rape of the complainant.
- A person cannot be properly convicted of aiding and abetting in the commission of acts which he does not know may be or are intended.
- There was no evidence that the appellants had formed any common intention with those involved in the gang rape to commit rape upon the complainant. One must be able to infer that the accused had prior knowledge that an offence of the type committed was planned, i.e., that their presence was with knowledge of the intended rape.

②

R. v. Logan [1990] 2 S.C.R. 731

During a robbery, a person was shot and severely injured. Neither respondent did the shooting. The trial judge instructed the jury that the Crown had to establish beyond a reasonable doubt that the accused knew or ought to have known that someone would probably shoot with the intention of killing. Respondents were convicted of attempted murder. The Court of Appeal allowed appeals with respect to the convictions for attempted murder and substituted convictions for robbery.

SCC Held:

- Given that a minimum degree of mens rea (subjective foresight) is constitutionally required to convict a principal of the offence of attempted murder, the restriction of s. 7 in this case is in convicting, through the operation of s. 21(2), a non-principal who does not have that same degree of mens rea. It is not the legislative objective of s. 21(2) as a whole which this Court must scrutinize, but only the legislative objective of that portion of s. 21(2) that restricts the accused's rights under s. 7 of the Charter in issue in the present case. This differential treatment of parties and principals charged with attempted murder is the restriction which must undergo the s. 1 test.
- In this case, the objective of such a differentiation is to deter joint criminal enterprises and to encourage persons who do participate to ensure that their accomplices do not commit offences beyond the planned unlawful purpose. The objective of the legislation is that this possibility of conviction through s. 21(2) will make parties more responsible for the actions of their accomplices.
- The words "or ought to have known" are inoperative when considering under s. 21(2) whether a person is a party to any offence where it is a constitutional requirement for a conviction that foresight of the consequences be subjective, which is the case for attempted murder. Once these words are deleted, the remaining section requires, in the context of attempted murder, that the party to the common venture know that it is probable that his accomplice would do something with the intent to kill in carrying out the common purpose.

3

R. v. Briscoe (2010) SCC 13 (reviewed above at page 46)

The mens rea requirement reflected in the word "purpose" under s. 21(1)(b) of the Criminal Code has two components: intent and knowledge. For the intent component, the Crown must prove that the accused intended to assist the principal in the commission of the offence. It is not required that the accused desired that the offence be successfully committed. As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the principal intends to commit the crime, although he or she need not know precisely how it will be committed. Even in the case of murder, the principal's intention to commit the crime must be known to the aider or abettor, but it need not be shared. It is sufficient that he or she, armed with knowledge of the principal's intention to commit the crime, acts with the intention of assisting the principal in its commission.

4

R. v. Thatcher

The Appellant was arrested and charged with causing the death of his ex-wife. At the trial, the Crown led direct and circumstantial evidence to prove that the Appellant had personally murdered his ex-wife or, alternatively that he caused someone else to do so and was therefore guilty as a party to the offence (i.e., that he aided or abetted the killer) pursuant to S. 21 CC. the bulk of the evidence tendered by the Crown was consistent with either theory.

Held:

- where an accused is being tried alone and there is evidence that more than one person is involved in the commission of the offence, it is also appropriate for the trial judge to direct the jury with respect to the provisions of S.21 even though the identity of the other participant or participants in unknown and even though the precise part played by each participant may be uncertain.
- Where there is evidence before a jury that points to an accused either committing a crime personally or, alternatively, aiding and abetting another to commit the offence, provided the jury is satisfied beyond reasonable doubt that the accused did one or the other, it is a matter of indifference which alternative actually occurred.

5

R. v. JF, 2013 SCC 12

J, a youth, learned that his friend T and her sister R were planning to murder their mother by plying her with alcohol and drowning her, a plan which the sisters ultimately executed and were convicted for. The police found an MSN chat log between J and T in which J provided information to T about death by drowning; suggested that the sisters should give their mother codeine pills in addition to alcohol; and suggested ways to mislead the police. The Crown also led evidence that J supplied the girls with pills and met T and R after the murder to provide an alibi. The trial judge instructed the jury that J could be convicted of conspiracy to commit murder under s. 465(1) of the Criminal Code either as a principal, or as a party under s. 21(1) (b) or (c) of the Criminal Code. J was convicted of conspiracy to commit murder. The Court of Appeal dismissed an appeal from the conviction but reduced J's sentence.

SCC, dismissing appeal, held:

- There are two schools of thought in Canada as to how, and under what circumstances, a person can be found liable as a party to the offence of conspiracy. The narrower approach (the Trieu model) limits such liability to aiding or abetting the formation of the agreement. The broader approach (the McNamara model) extends such liability to also include aiding or abetting the furtherance of the conspiracy's unlawful object. The approach to be followed is Trieu and not McNamara. Party liability is limited to cases where the accused aids or abets the initial formation of the agreement, or aids or abets a new member to join a pre-existing agreement.
- The Trieu model is a legitimate basis for party liability to a conspiracy. A person becomes party to an offence if he aids or abets a principal in the commission of the offence. It follows that party liability to a conspiracy is made out where the accused aids or abets the actus reus of conspiracy, namely the conspirators' act of agreeing.

Act of conspiracy is Agreeing

TQ & I already agreed to commit crime and I came after, so I can't be a party to the crime but definitely a party to conspire - as youth, he was tried, 12 months prison
46 month conditional supervision

R. v. Gauthier, 2013 SCC 32

Accused charged with being party, together with her spouse, to murder of their three children as part of a murder-suicide pact. Accused raised alternative defence that she had abandoned common intention to kill the children.

Issue was whether defence of abandonment raised by accused met air of reality test.

Held:

- The defence of abandonment must be submitted to the jury only if there is evidence in the record that is reasonably capable of supporting the necessary inferences in respect of each of the elements of this defence. The defence can be raised by an accused who is a party to an offence on the basis that he or she did or omitted to do anything for the purpose of aiding any person to commit the offence, or abetted any person in committing it (s. 21(1) of the Criminal Code), or on the basis that he or she had formed with other persons an intention to carry out an unlawful purpose and to assist each other therein and that an offence was committed in carrying out the common purpose (s. 21(2) of the Criminal Code), if the

evidence shows

- that there was an intention to abandon or withdraw from the unlawful purpose;
- that there was timely communication of this abandonment or withdrawal from the person in question to those who wished to continue;
- that the communication served unequivocal notice upon those who wished to continue; and
- that the accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence.

- There will be circumstances in which timely and unequivocal communication by the accused of his or her intention to abandon the unlawful purpose will be considered sufficient to neutralize the effects of his or her participation in the crime. But there will be other circumstances, primarily where a person has aided in the commission of the offence, in which it is hard to see how timely communication to the principal offender of the person's intention to withdraw from the unlawful purpose will on its own be considered reasonable and sufficient.

R. v. Hamilton, [2005] 2 S.C.R. 432

Accused sent “teaser” e-mail on Internet marketing the sale of “Top Secret” files. Teaser advertised software that would enable purchaser to generate valid credit card numbers. Files sold included instructions on how to make bombs and how to break into a house. Accused was charged with counseling four offences that were not committed.

Issue was whether accused had requisite mens rea for offences charged.

Held:

The concern in this case is with the imposition of criminal liability on those who counsel others to commit crimes. The actus reus for counseling is the deliberate encouragement or active inducement of the commission of a criminal offence. The mens rea consists of nothing less than an accompanying intent or conscious disregard of the substantial and unjustified risk inherent in the counseling: that is, it must be shown that the accused either intended that the offence counseled be committed, or knowingly counseled the commission of the offence while aware of the unjustified risk that the offence counseled was in fact likely to be committed as a result of the accused's conduct.

8

R. v. Ancio, [1984] 1 S.C.R. 225

Respondent, who wanted to speak with his estranged wife, broke into an apartment building with a loaded sawed-off shotgun. Kurely, the man with whom his wife had been living, went to investigate the sound of breaking glass and threw the chair he was carrying at respondent when he saw him climbing the stairs. The gun discharged, missing Kurely, and a struggle followed. Shortly after his arrest, respondent stated to police that he "had him [Kurely] by the throat and I would have killed him." The trial judge found respondent had broken into the apartment building with the intent to use the shotgun to force his wife to leave and convicted him of attempted murder. The Court of Appeal over-turned that conviction and ordered a new trial. At issue here is whether the mens rea in attempted murder is limited to an intention to cause death or to cause bodily harm knowing it to be likely to cause death, or whether the mens rea required extended to the intention to do some action constituting murder as defined by ss. 212 or 213 of the Code.

Held:

The crime of attempt developed as, and remains, an offence separate and distinct from murder. While the Crown must still prove both mens rea and actus reus, the mens rea is the more important element. The intent to commit the desired offence is a basic element of the offence of attempt, and indeed, may be the sole criminal element in the offence given that an attempt may be complete without completion of the offence intended.

9

R. v. Deustch, [1986] 2 S.C.R. 2

Accused placed Advertisement for secretary/sales assistant. At interview, he indicated job might require sexual intercourse with clients if necessary to close sales and holding out of large financial rewards. No offer of employment was made. Issue on appeal is whether appellant's acts or statements could, as a matter of law, constitute an attempt to procure rather than mere preparation.

SCC held:

- No satisfactory general criterion has been, or can be, formulated for drawing the line between preparation and attempt. The application of this distinction to the facts of a particular case must be left to common sense judgment.
- The distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.

R. v. Déry, 2006 SCC 53

D and S were charged with conspiring to commit theft and conspiring to possess stolen liquor. The trial judge found that no agreement had been established between the two men to steal or possess liquor and acquitted them of conspiracy, but found their actions more than merely preparatory to conspiracy and convicted them of attempting to conspire. A majority of the Court of Appeal affirmed their convictions. D alone appealed to this Court.

Held: The appeal should be allowed.

- D's convictions should be set aside and acquittals entered. An attempt to conspire to commit a substantive offence is not an offence under Canadian law. Criminal liability does not attach to fruitless discussions in contemplation of a substantive crime that is never committed, nor even attempted, by any of the parties to the discussions. Here, though D discussed a crime hoping eventually to commit it with S, neither D nor S committed, or agreed to commit, the crimes they had discussed. The criminal law does not punish bad thoughts of this sort that were abandoned before an agreement was reached, or an attempt made, to act upon them.
- Early intervention through the criminalization of conspiracy is therefore both principled and practical. Likewise, the criminalization of attempt is warranted because its purpose is to prevent harm by punishing behaviour that demonstrates a substantial risk of harm. However, when applied to conspiracy, the justification for criminalizing attempt is lost, since an attempt to conspire amounts, at best, to a risk that a risk will materialize.

SELECT DEFENCES

introduction

There are more defenses
than these
select defenses in
the syllabus

- ① Mental Disorder
 - modification to CL defense to "insanity"
 - S.2 "disease to mind" affecting A in one or both ways described in S.16
 - 1.1 R v Cooper defines mental disorder
 - 1.2 R v Parks modified definition
 - 1.3 R v Kjeldson how defence works for sociopathic offenders
 - 1.4 R v Dommen the meaning of "wrong"

- ② AUTOMATISM and INVOLUNTARY ACTS regarding the Actus Reus
 - AR requires willed act
 - Automatism: A'd physical actions are not culpable when they are Not Voluntary or Thought Directed or Conscious

- 2.1 R v Swaby - reserved to cases where A appears to have a disconnect between his action and conscious will
- 2.2 R v Parks
- 2.3 R v Stone * - 2 categories:
 - i. non-mental disorder
 - ii. Mental disorder
- 2.4 R v Fontaine
- 2.5 R v Luedcke * - S.16 will operate for mental disorder-automatism
 - non-mental disorder will bring complete acquittal

- ③ Simple Intoxication and Specific Intent Crimes
 - S.1 is not a defense for general intent crimes
 - it is only a defense if proof is needed for MR of a specific intent crime
- 3.1 R v George
- 3.2 R v Tatton
- 3.3 R v Robinson

- ④ Extreme Intoxication and General Intent Crimes
 - extreme intoxication akin to automatism could provide a defense to general intent offenses as it would undermine the voluntariness to act
 - unconstitutional to substitute AR4MR of becoming intoxicated w/f AR4ME to E offense

- 4.1 R v Daviault
- 4.2 R v Bouchard - Lebrun
 - * self-induced intoxication cannot be a defense to an offence against the bodily integrity to another person

- ⑤ Defence to E Person
 - self defense provisions in CC recently amended in 2013
 - difference generally some factors which were essential requirements under the old provisions are now merely factors to consider and weighted
 - the concept of "reasonable belief" is still applicable to the new provision
- 5.1 R v Lavallee
- 5.2 R v Cormier

- ⑥ Necessity
 - a heavily circumscribed defense
 - three elements:
 - ① requirement to imminent peril or danger
 - ② A had no reasonable legal alternative to the action he or she took
 - ③ proportionality between harm inflicted and harm avoided

- 6.1 R v Latimer

SELECT DEFENCES PT 2

(7) Duress

- available under S. 17 & CC and at common law
- S. 17 identifies a limited defense
- duress under common law difference:
 - * S. 17 applies to those who actually committed the offence (as opposed to being parties under ss. 21)
 - * S. 17 contains a long list of crimes that are categorically excluded from this defense (subject to Charter challenge)
- currently there is disagreement among courts of appeal as to whether duress is a defense to murder

7.1 R v Ryan

7.2 R v Aravena

7.3 R v Willis

(8) Provocation

- S. 232, applies solely to the offense of murder
- it is a partial defense, reducing a conviction of murder to manslaughter

R v Tran

(9) Entrapment

- a common law defense
- if a state agent provided A w/ the opportunity to commit crime without either a reasonable suspicion that the A was involved in crime or a bona fide inquiry into a particular type of crime in a high crime area
- will result in a stay of proceedings
- even if there is bona fide inquiry or reasonable suspicion, entrapment will apply if state agent induces the commission of a crime

9.1 R v Mack

9.2 R v Barnes

(10) Error of fact

- generally Not a Defense, see S.19
- "Colour of right" may be relevant
- SCC also created "officially induced error" as a defense

10.1 Lilly v the Queen

10.2 R v Jones

10.3 Lewis (City) v Teteault

10.4 R v MacDonald

R. v. Cooper, [1980] 1 S.C.R. 1149

Accused, an out-patient at a psychiatric hospital was charged with the death of an in-patient at the same hospital. The accused had strangled the victim after an unsuccessful attempt at sexual intercourse. Appellant had a lengthy psychiatric history. The defence of insanity was not raised at the trial. A psychiatrist was called by the defence to seek to establish that the accused did not have the capacity to form an intention to kill. In answer to a question put by the trial judge the psychiatrist testified that he did not think that the accused was suffering with a disease of the mind. None the less, the trial judge dealt with this issue of insanity in her charge to the jury. The jury found the appellant guilty of non-capital murder and he was sentenced to life imprisonment.

The question raised by the appeal is whether there was evidence from which a properly charged jury could conclude, on a balance of probabilities, that the appellant had disease of the mind to an extent that rendered him incapable of appreciating the nature and quality of the act of which he was charged, or of knowing that it was wrong.

Held:

- One might say that in a legal sense “disease of the mind” embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong.
- Underlying all of this discussion is the concept of responsibility and the notion that an accused is not legally responsible for acts resulting from mental disease or mental defect.
- Once the evidence is sufficient to indicate that an accused suffers from a condition which could in law constitute disease of the mind, the judge must leave it open to the jury to find, as a matter of fact, whether the accused had disease of the mind at the time the criminal act was committed.

“In many, if not most cases involving the defence of insanity, the question whether the accused suffered from a disease of the mind is not the critical issue; the pivotal issue is whether a condition which, admittedly, constitutes a disease of the mind rendered the accused incapable of appreciating the nature and quality of the act or knowing that it was wrong. R. v. Rabey

The real question in this case, in my view, is not whether the accused was suffering from a disease of the mind, but whether he was capable of appreciating the nature and quality of the act.

To “know” the nature and quality of an act may mean merely to be aware of the physical act, while to “appreciate” may involve estimation and understanding of the consequences of that act. In the case of the appellant, as an example, in using his hands to choke the deceased, he may well have known the nature and quality of that physical act of choking. It is entirely different to suggest, however, that in performing the physical act of choking, he was able to appreciate its nature and quality in the sense of being aware that it could lead to or result in her death.

R. v. Kjeldson, [1981] 2 S.C.R. 617

Appellant, whose only defence was insanity, was convicted of first-degree murder at trial. Medical evidence revealed that he was a psychopath and understood the physical nature and consequences of his act, though indifferent to such consequences. The trial judge instructed the jury (1) that psychopathy could be a disease of the mind and (2) on the meaning of the word “appreciate” in s. 16 of the Criminal Code.

The principal issue to be determined was the definition of the word “appreciating” and the adequacy of the trial judge’s charge to the jury in that respect.

Held: The appeal should be dismissed.

A person appreciates the nature and quality of an act within the meaning of s. 16 if he knows what he is doing and is aware of the physical consequences which will result from his acts. The trial judge correctly instructed the jury that psychopathy could be a disease of the mind and on the meaning of “appreciating”; and, in view of the evidence of the medical witnesses, the instruction was adequate.

R. v. Oommen, [1994] 2 S.C.R. 507

Accused killed a friend. For a number of years the accused had been suffering from a mental disorder described as a psychosis of a paranoid delusional type and, at the time of the killing, his paranoia was fixed on a belief that the members of a local union were conspiring to "destroy" him, and believed his friend was one of the conspirators who must be killed before they killed him.

At his trial on a charge of second-degree murder, the accused raised the defence of insanity. Psychiatrists testified that the accused possessed the general capacity to distinguish right from wrong and would know that to kill a person is wrong but that, on the night of the murder, his delusion deprived him of that capacity and led him to believe that killing was necessary and justified under the circumstances as he perceived them.

Held:

- Section 16(1) of the Code embraces not only the intellectual ability to know right from wrong in an abstract sense, but also the ability to apply that knowledge in a rational way to the alleged criminal act. Indeed, the section focuses on the particular capacity of the accused to understand that his act was wrong at the time of committing the act. An accused should thus be exempted from criminal liability where, at the time of the act, a mental disorder deprived him of the capacity for rational perception and hence rational choice about the rightness or wrongness of the act.
- An accused need not establish that his delusion permits him to raise a specific defence, such as self-defence, to be exempted from criminal responsibility. The inability to make a rational choice may result from a variety of mental disorders, including delusions which cause an accused to perceive an act which is wrong as right or justifiable. Here, the evidence was capable of supporting a conclusion that the accused was deprived of the capacity to know his act was wrong by the standards of the ordinary person.

R. v. Swaby, [2001] O.J. No. 2390 (Ont. C.A.)

Restricted weapon found in motor vehicle in which accused was a passenger. Court held that section 91(3) of Code should be interpreted to exclude possibility of conviction for involuntary act. That the Crown is required to prove that coincidence of occupancy of vehicle and accused's knowledge of weapon in vehicle was attributable to voluntary conduct on part of accused.

R. v. Parks, [1992] 2 S.C.R. 871

Respondent attacked his parents-in-law, killing one and seriously injuring the other. He drove to a nearby police station to report what he had done. Respondent claimed to have been sleepwalking throughout the incident. The respondent was charged with first degree murder and attempted murder. At the trial respondent presented a defence of automatism. The testimony of five expert witnesses called by the defence was that respondent was sleepwalking and that sleepwalking is not a neurological, psychiatric or other illness. The judge then acquitted the respondent of the charge of attempted murder. At issue here is whether sleepwalking should be classified as non-insane automatism resulting in an acquittal or as a "disease of the mind" (insane automatism), giving rise to the special verdict of not guilty by reason of insanity.

Held:

- Automatism, although spoken of as a "defence", is conceptually a sub-set of the voluntariness requirement, which in turn is part of the *actus reus* component of criminal liability. An involuntary act, including one committed in an automaticistic condition entitles an accused to an unqualified acquittal, unless the automaticistic condition stems from a disease of the mind that has rendered the accused insane. In the latter case, the accused is not entitled to a full acquittal, but to a verdict of insanity.
- When a defence of non-insane automatism is raised by the accused, the trial judge must determine whether the defence should be left with the trier of fact. This will involve two discrete tasks. First, he or she must determine whether there is some evidence on the record to support leaving the defence with the jury. An evidential burden rests with the accused; the mere assertion of the defence will not suffice.

- Given the proper foundation, the trial judge must then consider whether the condition alleged by the accused is, in law, non-insane automatism. If the trial judge is satisfied that there is some evidence pointing to a condition that is in law non-insane automatism, automaticistic state brought on by nothing more than his wife's insulting words. At trial, the then the defence can be left with the jury. The issue for the jury is one of fact: did the accused claimed: insane automatism, non-insane automatism, lack of intent, and accused suffer from or experience the alleged condition at the relevant time? Because the Crown must always prove that an accused has acted voluntarily, the onus rests on the prosecution at this stage to prove the absence of automatism beyond a reasonable doubt.
- Two distinct approaches to the policy component of insanity have emerged in automatism cases, the "continuing danger" and "internal cause" theories. The first theory holds that any condition likely to present recurring danger should be treated as insanity. The second holds that a condition stemming from the internal make-up of the accused, rather than external factors, should lead to a finding of insanity. Though seemingly divergent, both theories stem from a concern for the protection of the public.
- "Disease of the mind" is a legal term and not a medical term of art but it contains a substantial medical component as well as a legal or policy component. The medical component of the term, generally, is medical opinion as to how the mental condition in question is viewed or characterized medically. The legal or policy component relates to (a) the scope of the exemption from criminal responsibility to be afforded by mental disorder or disturbance, and (b) the protection of the public by the control and treatment of persons who have caused serious harms while in a mentally disordered or disturbed state.
- Our system of justice is predicated on the notion that only those who act voluntarily should be punished under the criminal law. Here, no compelling policy factors preclude a finding that the accused's condition was one of non-insane automatism. As the Crown did not meet its burden of proving that somnambulism stems from a disease of the mind, committal under s. 614(2) of the Criminal Code is precluded, and the accused should be acquitted. However, because the medical evidence in each case impacts at several stages of the policy inquiry and is significant in its own right, sleepwalking in a different case on different evidence might be found to be a disease of the mind.

R. v. Stone, [1999] 2 S.C.R. 290

The accused admitted stabbing his wife 47 times but claimed to have done it while in an alternative, provocation.

Issue is Whether accused entitled to have either or both automatism defences left with the jury.

Held:

- Two forms of automatism are recognized at law. Non-insane automatism arises where involuntary action does not stem from a disease of the mind and entitles the accused to an acquittal. Insane automatism, on the other hand, arises only where involuntary action is found, at law, to result from a disease of the mind and is subsumed by the defence of mental disorder. A successful defence of insane automatism will trigger s. 16 of the Criminal Code and result in a verdict of not criminally responsible on account of mental disorder.
- The law presumes that people act voluntarily. Since a defence of automatism amounts to a claim that one's actions were not voluntary, the accused must establish a proper foundation for this defence before it can be left with the trier of fact. This is the equivalent of satisfying the evidentiary burden for automatism. Once the evidentiary foundation has been established, the trial judge must determine whether the condition alleged by the accused is mental disorder or non-mental disorder automatism.

- A two-step approach should therefore apply to all cases involving claims of automatism. First, the defence must establish a proper foundation for automatism. This burden is only met where the trial judge concludes that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. In all cases, this will require that the defence make an assertion of involuntariness and call confirming psychiatric evidence. Other relevant factors to be considered in determining whether this defence burden has been satisfied include: the severity of the triggering stimulus; corroborating evidence of bystanders; corroborating medical history of automaticistic-like dissociative states; whether there is evidence of a motive for the crime; and whether the alleged trigger of the automatism is also the victim of the automaticistic violence. No one factor is determinative. The trial judge must weigh all of the available evidence on a case-by-case basis. Placing this burden on the defence, while constituting a limitation of an accused's s. 11(d) Charter rights, is justified under s. 1.
- Second, given the establishment of a proper foundation, the trial judge must determine whether the condition alleged by the accused is mental disorder or non-mental disorder automatism. The assessment of which form of automatism should be left with the trier of fact comes down to the question of whether or not the alleged condition is a mental disorder. Mental disorder is a legal term defined in the Code as "a disease of the mind". The question of what conditions are included in that term is a question of mixed law and fact because it involves an assessment of the particular evidence in the case rather than a general principle of law. Trial judges should start from the proposition that the condition is a disease of the mind and then determine whether the evidence in the particular case takes the condition out of the disease of the mind category.
- There are two distinct approaches to the disease of the mind inquiry. Under the first, the internal cause theory, the trial judge must compare the accused's automaticistic reaction to the way one would expect a normal person to react in order to determine whether the condition the accused claims to have suffered from is a disease of the mind. The trial judge must consider the nature of the alleged trigger of the automatism and determine whether a normal person might have reacted to it by entering an automaticistic state. This comparison is a contextual objective one. Evidence of an extremely shocking trigger will be required to establish that a normal person might have reacted to it by entering an automaticistic state as the accused claims to have done.
- If the trial judge concludes that the condition the accused claims to have suffered from is not a disease of the mind, only the defence of non-mental disorder automatism will be left with the trier of fact as the trial judge will have already found that there is evidence upon which a properly instructed jury could find, on a balance of probabilities, that the accused acted involuntarily. The question for the trier of fact will then be whether the defence has proven, on a balance of probabilities, that the accused acted involuntarily. A positive answer to this question by the trier of fact will result in an absolute acquittal. On the other hand, if the trial judge concludes that the alleged condition is a disease of the mind, only mental disorder automatism will be left with the trier of fact. The case will then proceed like any other s. 16 □
- case, leaving for the trier of fact the question of whether the defence has proven, on a balance of probabilities, that the accused suffered from a mental disorder which rendered him or her incapable of appreciating the nature and quality of the act in question. The determination of this issue by the trier of fact will absorb the question of whether the accused in fact acted involuntarily.

R. v. Fontaine, [2004] 1 S.C.R. 702

The accused received a call from the victim, a disgruntled former employee saying, "We're coming to get you, pigs." Feeling that he was being watched and followed, the accused purchased a firearm. He later shot and killed the victim. Before a judge and jury, the accused pleaded mental disorder automatism. Several psychiatrists gave evidence. But the judge refused to put this defence to the jury on the ground that the required evidential foundation had not been laid. The accused was convicted of first-degree murder. The Court of Appeal quashed the conviction and ordered a new trial.

SCC Held:

- The accused's defence of mental disorder automatism should have been put to the jury. If there is some evidence upon which a properly instructed jury could reasonably conclude that an accused probably perpetrated the alleged criminal act in a state of automatism, the evidential burden has been discharged and the defence is in play before the jury.
- An "evidential burden" is not a burden of proof. It determines whether an issue should be left to the trier of fact, while the "persuasive burden" determines how the issue should be decided. These are fundamentally different questions. The first is a matter of law; the second, a question of fact. Accordingly, on a trial before judge and jury, the judge decides whether the evidential burden has been met. In answering that question, the judge does not evaluate the quality, weight or reliability of the evidence. The judge simply decides whether there is evidence upon which a properly instructed jury could reasonably decide the issue.

- In the case of "reverse onus" defences, such as mental disorder automatism, it is the accused who bears both the persuasive and the evidential burdens. In these defences, the persuasive burden is discharged by evidence on the balance of probabilities. As regards all affirmative defences, the evidential burden will be discharged where there is some evidence that puts the defence "in play"; the defence will be in play whenever a properly instructed jury could reasonably, on account of that evidence, conclude in favour of the accused.
- Where mental disorder automatism is raised as a defence, an assertion of involuntariness on the part of the accused, supported by evidence from a qualified expert which, if accepted by the jury, would tend to support that defence, will normally provide a sufficient evidentiary foundation for putting the defence to the jury. Accompanying instructions in law will make it clear to the jury that the burden remains on the accused to establish the defence to the required degree of probability.
- Applying the law to the facts, the Court of Appeal did not err as to the nature of the evidential burden on a defence of mental disorder automatism, nor did it err in concluding that the accused had discharged that burden and was entitled to have his defence considered and decided by the jury. The accused gave evidence tending to establish that he was acting involuntarily at the time of the offence. He also adduced expert evidence to support his own testimony. The evidence clearly went beyond a mere allegation of the existence of a defence. It included a relatively detailed description of the accused's perception of the facts at the moment of the criminal act. The main defence expert, a psychiatrist, concluded that the accused was suffering, at the time of the offence, from a psychotic episode induced by substance abuse. According to the expert, at the relevant times the accused was "seeing things" and making pathological connections between people, situations and events. Taken as a whole, this evidence was sufficient to discharge the accused's evidential burden on his defence of mental disorder automatism.

R.v. Luedcke, 2008 ONCA 716

Accused admitted that he was in parasomniac state when he had non-consensual sexual relations with victim. Accused having family history of parasomnia and personal history of engaging in sexual intercourse with girlfriends while asleep. Trial judge acquitting accused rather than finding him not criminally responsible ("NCR") on account of mental disorder -- Crown's appeal allowed -- Trial judge failing to appreciate evidence regarding potential danger posed by accused's condition and high likelihood that it would.

Held:

If an accused establishes that he or she acted involuntarily while in a disassociative state, he or she will almost always be found NCR. At the pre-verdict stage, social defence concerns dominate, focusing on the risk posed by the potential recurrence of the conduct in issue. Where that risk exists, the risk combined with the occurrence of the conduct that led to the criminal proceedings will almost always justify further inquiry into the accused's dangerousness so as to properly protect the public.

The Queen v. George, [1960] S.C.R. 871

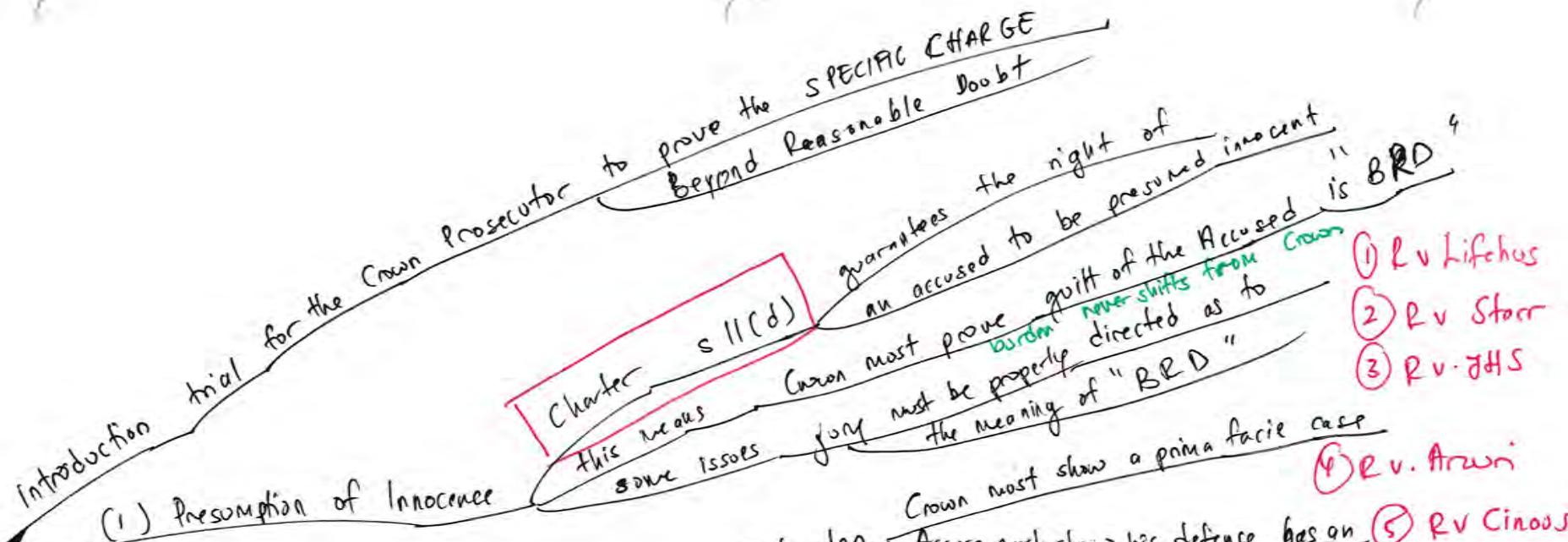
Respondent was charged under s. 288 of the Criminal Code with robbery with violence, and was acquitted by the trial judge on the ground that he was so intoxicated as to be incapable of forming the specific intent to commit robbery. In appealing this decision the Crown contended that the trial judge did not consider the included offence of common assault and, in the result, failed to direct himself with respect to the divisibility of the charge laid and to the incidence of drunkenness as a defence to a charge of common assault, as distinguished from a charge of robbery with violence. The appeal was dismissed by the Court of Appeal, and the Crown then appealed to the SCC.

Held:

- Contrary to what is the case in the crime of robbery, where, with respect to theft, a specific intent must be proved, there is no specific intent necessary to constitute the offence of common assault. Here the manner in which force was applied by the respondent to his victim was not accidental or unintentional. *Re Beard*, [1920] A.C. 479, referred to.
- The finding of the trial judge that the accused had not the capacity to form the specific intent to commit robbery did not justify the conclusion reached in appeal that he could not then have committed the offence of common assault.

R. v. Talton (2015) SCC 33

"The actus reus of the offence of unlawful confinement is very broadly defined. It captures any deprivation of an individual's liberty to move from point to point. Being a general intent offence, the mens rea is limited to the mere intent to effect a deprivation of freedom of movement. An attempt to commit unlawful confinement requires no deprivation of movement, but merely an intent to effect a deprivation of freedom of movement encompassing some minimal act in furtherance of that intent."



ADVERSARIAL PROCEEDING

(4) Role of the Prosecutor

as an advocate

as a quasi-judicial officer

cannot act solely as an advocate but must make decisions in the interest of justice and larger public interest

(1) Boucher v The Queen

(10) Krieger v Law Society of Alberta

(11) R v Nixon

(12) R v Babos

(13) R v Anderson

(5) Role of the Defence

- an officer of the court, must be respectful, honest and not try to mislead the court

- subject to this and rules of ethics, defence counsel is obliged to act solely in the interest of the accused including

(i) evidential burden
(ii) presumptions under rules of evidence

TRIER OF LAW

TRIER OF FACT

* 99% trial judge is the trier of both

* where there is a jury, they will be the trier of fact

* sentencing is a question of law and should not be put to a jury

* adversarial system means the parties initiate the proof that is brought forward, not the judge

(7) R v Gunning

(8) R v Hamilton

- advancing all defences that arise
- securing advantage of all procedural & constitutional protections
- challenging the sufficiency of prosecutorial evidence

Crown must show a prima facie case

(4) R v Arwin

(5) R v Cinous

(6) R v Fontaine

Prima facie contrary to Charter and must be saved under S-1

"mandatory presumptions"
statutory provisions which put the burden to rebut on an A

"reverse onus provisions"
a presumed fact is deemed to exist where Crown prove the basic fact, the A can rebut on a balance of probabilities

R. v. Lifchus, [1997] 3 S.C.R. 320

The accused stockbroker charged with fraud. The trial judge told the jury in her charge on the burden of proof that she used the words “proof beyond a reasonable doubt” . . . in their ordinary, natural every day sense”, and that the words “doubt” and “reasonable” are “ordinary, everyday words that . . . you understand”. The accused was convicted of fraud. On appeal, he contended that the trial judge had erred in instructing the jury on the meaning of the expression “proof beyond a reasonable doubt”. The Court of Appeal allowed the appeal and ordered a new trial

Held, dismissing Crown's appeal:

- A jury must be provided with an explanation of the expression “reasonable doubt”. This expression, which is composed of words commonly used in everyday speech, has a specific meaning in the legal context. The trial judge must explain to the jury that the standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence, the basic premise which is fundamental to all criminal trials, and that the burden of proof rests on the prosecution throughout the trial and never shifts to the accused.
- The jury should be instructed that a reasonable doubt is not an imaginary or frivolous doubt, nor is it based upon sympathy or prejudice. A reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence. While more is required than proof that the accused is probably guilty, a reasonable doubt does not involve proof to an absolute certainty. Such a standard of proof is impossibly high. Certain references to the required standard of proof should be avoided.
- A reasonable doubt should not be described as an ordinary expression which has no special meaning in the criminal law context, and jurors should not be invited to apply to the determination of guilt in a criminal trial the same standard of proof that they would apply to the decisions they are required to make in their everyday lives, or even to the most important of these decisions.

R. v. Starr [2000] 2 S.C.R. 144

Accused convicted of first-degree murder -- Whether trial judge explained concept of reasonable doubt to jury in adequate manner.

Held:

The reasonable doubt instruction given in this case falls prey to many of the same difficulties outlined in Lifchus, and likely misled the jury as to the content of the criminal standard of proof. The key difficulty with this instruction is that it was not made clear to the jury that the Crown was required to do more than prove the accused's guilt on a balance of probabilities. The trial judge told the jury that they could convict on the basis of something less than absolute certainty of guilt, but did not explain, in essence, how much less.

In addition, rather than telling the jury that the words “reasonable doubt” have a specific meaning in the legal context, the trial judge expressly instructed the jury that the words have no “special connotation” and “no magic meaning that is peculiar to the law”. By asserting that absolute certainty was not required, and then linking the standard of proof to the “ordinary everyday” meaning of the words “reasonable doubt”, the trial judge could easily have been understood by the jury as asserting a probability standard as the applicable standard of proof.

The trial judge did refer to the Crown's onus and to the presumption of innocence, and he stated that the accused should receive the benefit of any reasonable doubt. The error in the charge is that the jury was not told how a reasonable doubt is to be defined. As was emphasized repeatedly in Lifchus and again in Bisson, a jury must be instructed that the standard of proof in a criminal trial is higher than the probability standard used in making everyday decisions and in civil trials. In this case the jury was not told that something more than probability was required in order to convict, and nearly all of the instructions they were given weakened the content of the reasonable doubt standard in such a manner as to suggest that probability was indeed the requisite standard of proof. The reasonable likelihood that the jury applied the wrong standard of proof raises a realistic possibility that the accused's convictions constitute a miscarriage of justice.

(3)

R. v. J.H.S., 2008 SCC 30

Accused convicted of sexual assault by complainant who claimed to have been abused over a number of years. Issues was whether trial judge adequately instructed jury on application of principles of reasonable doubt to issue of credibility.

Held:

It must be made crystal clear to the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt. Lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

The trial judge had explained that any reasonable doubt must be resolved in favour of the accused and, in that context, she reminded the jury that they must consider all of the evidence when determining reasonable doubt. This was sufficient.

R v Arun' (2001) SCC

Accused charged w/ 1st degree murder. At the preliminary inquiry, the Crown's case was entirely circumstantial and the accused called 2 witnesses whose testimony was arguably exculpatory

TJ: weighed evidence as a whole and decided accused committed to trial for 2nd degree

CA: affirmed decision to dismiss Accused's Cetiorari

SCC: TJ task is to weigh evidence and

determine that if Crown's evidence, if believed, would be reasonable for a properly instructed jury to infer guilt - does not require consideration of the inherent reliability of the evidence itself - committing Accused to trial is not a wrong result

(5)

R. v. Cinous [2002] 2 S.C.R. 3

Accused found guilty of second-degree murder in shooting to death of criminal accomplice who he believed wanted to kill him. He raised defence of self-defence. Issue was whether defence of self-defence possessed an "air of reality" and whether it should have been put to jury.

Held:

- A defence should be put to a jury if, and only if, there is an evidential foundation for it. A trial judge must thus put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused, but he has a positive duty to keep from the jury defences lacking an evidential foundation — or air of reality. This is so even if the defence is the only defence open to the accused.

The air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive. In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true.

The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. Nor is the air of reality test intended to assess whether the defence is likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

(6)

R. v. Fontaine, [2004] 1 S.C.R. 702

Held: Where mental disorder automatism is raised as a defence, an assertion of involuntariness on the part of the accused, supported by evidence from a qualified expert which, if accepted by the jury, would tend to support that defence, will normally provide a sufficient evidentiary foundation for putting the defence to the jury. Accompanying instructions in law will make it clear to the jury that the burden remains on the accused to establish the defence to the required degree of probability.

R. v. Gunning, [2005] 1 S.C.R. 627

Accused fatally shot trespasser who refused to leave his home and claimed that shooting accidental and that he intended to use his gun solely to intimidate trespasser in defence of his property — Careless use of firearm and intent central issues at trial — issue whether trial judge exceeded his proper function by directing jury that offence of careless use of firearm had been made out and by failing to instruct jury on defence of property.

Held: In view of the fact that the jury was not properly instructed in respect of matters fundamental to the defence, reliance cannot be placed on the verdict to conclude that there is no reasonable possibility that the verdict would have been different without these errors.

R. v. Hamilton, [2004] O.J. No. 3252 (Ont. C.A.)

Accused sent “teaser” email on Internet marketing sale of “Top Secret” files. Files sold included instructions on how to make bombs and how to break into a house and some visa card numbers. Accused charged with counselling four offences that were not committed. issue was whether accused had requisite mens rea for offences charged

SCC held that the trial judge acquitted the accused on the count of counselling fraud because his motivation was mercenary as opposed to malevolent. The trial judge's conclusion that the accused did not intend to induce the recipients to use those numbers is incompatible with the plain meaning of the “teaser” email and with her other findings of fact, including her finding that the accused understood that the use of the generated numbers was illegal. Her assertion that “[h]is motivation was monetary” immediately after her reference to these facts demonstrates an error of law as to the *mens rea* for

Boucher v. The Queen, [1955] S.C.R. 16

Held: Crown counsel exceeded his duty when he expressed in his address by inflammatory and vindictive language his personal opinion that the accused was guilty and left with the jury the impression that the investigation made before the trial by the Crown officers was such that it had brought them to the conclusion that the accused was guilty.

It is improper for counsel for the Crown or the defence to express his own opinion as to the guilt or innocence of the accused. The right of the accused to have his guilt or innocence decided upon the sworn evidence alone uninfluenced by statements of fact by the Crown prosecutor, is one of the most deeply rooted and jealously guarded principles of our law.

Krieger v. Law Society of Alberta, [2002] 2 S.C.R. 372

K was assigned to prosecute an accused for murder. He received results of DNA which implicated a different person for the offence but he refused to disclose this to the defence counsel on time. An allegation was made to Law Society of Alberta against K's conduct. Issue was whether the rule requiring lawyers engaged as prosecutors should make timely disclosure of evidence interfered with prosecutorial discretion.

Held:

1. Prosecutorial discretion will not be reviewable except in cases of flagrant impropriety.
2. That the disclosure of relevant evidence is not a matter of prosecutorial discretion but rather a legal duty, hence the Law Society possesses the jurisdiction to review an allegation that a Crown prosecutor acting dishonestly or in bad faith failed to disclose relevant information, notwithstanding that the Attorney General had reviewed it from the perspective of an employer.

(11) **R. v. Nixon, 2011 SCC 34**

Accused charged with dangerous driving causing death, dangerous driving causing bodily harm and parallel charges for impaired driving. Crown and accused entered into plea agreement. Crown subsequently repudiated plea agreement. Issue is whether act of repudiation matter of tactics or conduct before court or matter of prosecutorial discretion, and whether act of repudiation reviewable on grounds of abuse of process.

Held:

The Crown's decision in this case to resile from the plea agreement and to continue the prosecution clearly constituted an act of prosecutorial discretion subject to the principles set out in *Krieger*: it is only reviewable for abuse of process. Prosecutorial discretion is not spent with the decision to initiate the proceedings, nor does it terminate with a plea agreement. So long as the proceedings are ongoing, the Crown may be required to make further decisions about whether the prosecution should be continued, and if so, in respect of what charges.

In this case, the Crown's repudiation conduct cannot be considered so unfair or oppressive to the accused, or so tainted by bad faith or improper motive, that to allow the Crown to now proceed on the dangerous driving Criminal Code charges would tarnish the integrity of the judicial system and thus constitute an abuse of process.

(12) **R. v. Anderson, 2014 SCC 41**

The accused, an aboriginal, was convicted for impaired driving for the 5th time. Prosecutor served Notice of Intent to seek mandatory minimum sentence against the accused. Issue on appeal was whether decision to seek mandatory minimum sentence is a matter of core prosecutorial decision, and if yes, by what standard it may be reviewed.

The SCC held:

1. That prosecution is not constitutionally obliged to consider an accused Aboriginal status when deciding whether or not to seek a mandatory minimum sentence.

12

R. v. Babos, 2014 SCC 16

Accused were charged with multiple offences involving possession of firearms and methamphetamine. During trial, accused brought application to stay proceedings alleging three forms of state misconduct: that the Crown attempted to intimidate them into foregoing their right to a trial by threatening them with additional charges if they pleaded not guilty; that there was collusion on the part of two police officers to mislead the court about seizure of a firearm, and that the Crown used improper means to obtain the medical records of one of the accused. The trial judge stayed the proceedings which was set aside by the Court of Appeal which ordered a retrial instead.

On appeal against the retrial order, the issue was whether the Crown's conduct was egregious enough to warrant a stay of proceedings.

SCC held as follows:

- 1) A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.
- 2) In this case, the Crown threatened to charge the accused with additional offences if they did not plead guilty. While that was improper, the threats related to something the Crown could have done legally under s. 574(1) of the CC.
- 3) The question at this stage is whether the integrity of the justice system is better preserved by staying the proceedings, or proceeding to a trial in the face of the Crown's threatening conduct.
- 4) This balancing requires weighing the seriousness of the misconduct against the societal interest in having a trial. At this stage, the very serious nature of the charges facing the appellants — 22 charges concerning firearms, illegal drugs, and organized crime — looms large. Society has a profound interest in seeing justice done by having the guilt or innocence of the appellants determined through a full trial on the merits.
- 5) That when the impugned misconduct — threats uttered more than a year before trial by a Crown no longer on the case — is weighed against society's interest in a trial, I am satisfied that this is not one of the "clearest of cases" where the exceptional remedy of a stay of proceedings is warranted.

INVESTIGATION

24. Police Powers

- ✓ Police officers are independent of the Crown prosecutor in Canada. This independence is important to permit the prosecutor to act as a quasi-judicial officer, and not get too close to the mind-set of an investigator. Still, the police will often seek legal advice from Crown prosecutors, including on the wording of search warrants and the like. In the interests of securing liberty, the powers of the police are constrained by law, although can be derived from statute, common law and by implication from statute and common law.
- ✓ Police powers are also significantly limited by the *Charter*, most significantly s. 8 (unreasonable search or seizure) and s. 9 (arbitrary detention, addressing both powers of arrest and detention). Courts have undertaken a careful balancing of police powers in an attempt to ensure respect for liberty, without undermining the effectiveness of police investigations and law enforcement.
- ✓ The law of evidence supports limits on police powers. Although not covered in this examination, individuals have the right to remain silent in their dealings with the police, and what they say cannot be admitted if it is not "voluntary." Where there has been an unconstitutional search or arbitrary detention, evidence that has been obtained as a result may be excluded from consideration.
- ✓ Police officers also have significant obligations to perform in securing the right to counsel for the subject, as noted under the next heading.

(1)

R v Cole — S. 8 infringement (personal use of work issued laptop)

(2)

R v Spencer — Whether search of subscriber information to match IP address is unconstitutional

(3)

R v MacDonald — police push door to ascertain if accused was concealing a gun — S. 8 issue

(4)

R v Grant (2009)

- violation of s. 9 & s. 10
- ~~as~~ violation does not lead to exclusion of evidence under s. 24(2)

(5)

R v ~~Subero~~ Suberu (2009)

- obligation to inform detainee of their right to counsel from the moment an individual is detained

(6)

R v Aucoin (2012)

- stopped for minor traffic offence, wanted to detain in police vehicle so police did a pat down and found drugs
- held: detention was unlawful, pat down search, warrantless was not legally authorized

- evidence of drugs still admissible under s. 24(2) of Charter

R v Marakah (2017)

- whether incriminated text messages protected under s. 8

(1)

R v. Grant (2009) SCC

Encounter between accused and police going from general neighbourhood policing to situation where police effectively took control over accused and attempted to elicit incriminating information from the questions asked him.

The issues were:

- Whether police conduct would cause a reasonable person in accused's position to conclude that he or she was not free to go and had to comply with police demand;
- Whether accused arbitrarily detained; and
- Whether accused's right to counsel infringed

SCC Held that:

- Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint.
- Psychological detention is established either where the individual has a legal obligation to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
- In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained.
- To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
 - the circumstances giving rise to the encounter as they would reasonably be perceived by the individual;
 - the nature of the police conduct; and
 - the particular characteristics or circumstances of the individual where relevant.
- To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go.

Decision: Violation of s. 9 & 10

Once established, whether s. 24(2)

applies (evidence obtained through violation)

must be excluded if its inclusion would bring

the admin to justice into disrepute - in this case gun not to be excluded

[112]

*SCC: Accused was psychologically detained -
this is arbitrarily detained and denied his
right to counsel.*

- It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not. Deference is owed to the trial judge's findings of fact, although application of the law to the facts is a question of law.

(2) **R. v. Suberu, 2009 SCC 33**

Preliminary questioning by police to determine if the individual was involved in criminal act of attempting to use a stolen credit card at a store. Police informed individual of right to counsel upon arrest. Issue was whether this individual was detained from outset of interaction with police.

SCC held that the police duty to inform an individual of his or her s. 10 (b) Charter right to retain and instruct counsel is triggered at the outset of an investigative detention. The concerns regarding compelled self-incrimination and the interference with liberty that s. 10 (b) seeks to address are present as soon as a detention is effected. Therefore, from the moment an individual is detained, the police have the obligation to inform the detainee of his or her right to counsel. The phrase "without delay" in s. 10 (b) must be interpreted as "immediately". The immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the Charter

(3) **R. v. Aucoin, 2012 SCC 66**

Accused was stopped for minor motor vehicle regulatory offence — Police officer conducted pat-down search of accused as a prelude to detention in police vehicle and discovered drugs in accused's pockets as a consequence of pat-down search. Issue was whether detention of accused was unlawful and whether pat-down search was unreasonable.

SCC held that:

- A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. Because the pat-down search was a prelude to securing A in the cruiser, the question that arises is whether detaining A in this manner was reasonably necessary in the totality of the circumstances. T
- The question is not whether the officer had the authority to detain the appellant in the rear of the cruiser, but whether he was justified in exercising it as he did in the circumstances of this case. The problem here arises from the shift in the nature and extent of A's detention

that flowed from the police officer's decision to secure A in the rear of his cruiser while he wrote up the ticket for the motor vehicle infractions. Those factors altered the nature and extent of A's detention in a fairly dramatic way, especially when one considers that the infractions for which he was being detained consisted of two minor motor vehicle infractions. The question is whether there were other reasonable means by which the officer could have addressed his concern about A disappearing into the crowd.

- The officer's actions, though carried out in good faith, were not reasonably necessary. Because A's detention in the back of the cruiser would have been unlawful, it cannot constitute the requisite basis in law to authorize the warrantless pat-down search.
- Nonetheless, the cocaine found on A was admissible into evidence under s. 24(2) of the *Charter*.

(4) **R. v. Cole, 2012 SCC 53**

Pornographic pictures of child were found on employer-issued work computer. issues were whether accused had reasonable expectation of privacy in employer-issued work computer and whether warrantless search and seizure of laptop computer and disc containing Internet files breached accused's rights under s. 8 of Charter

SCC held that Computers that are reasonably used for personal purposes — whether found in the workplace or the home — contain information that is meaningful, intimate, and touching on the user's biographical core. Canadians may therefore reasonably expect privacy in the information contained on these computers, at least where personal use is permitted or reasonably expected

The police in this case infringed the accused's rights under s. 8 of the Charter. The accused's personal use of his work-issued laptop generated information that is meaningful, intimate, and organically connected to his biographical core.

(5) **R. v. Spencer, 2014 SCC 43**

Police had information that an IP address was being used to access or download child pornography and asked Internet service provider to voluntarily provide name and address of subscriber assigned to IP address. Police used this information to obtain search warrant for accused's residence. issue was whether police conducted unconstitutional search by obtaining subscriber information matching IP address.

Held: infringement of *Charter* section 8 to conduct search
[114]
however, evidence found should not be excluded on basis on
"Grant" test

Held that when defining the subject matter of a search, courts have looked not only at the nature of the precise information sought, but also at the nature of the information that it reveals. In this case, the subject matter of the search was not simply a name and address of someone in a contractual relationship with the ISP. Rather, it was the identity of an Internet subscriber which corresponded to particular Internet usage.

In this case, the primary concern is with informational privacy.

(6)

R. v. MacDonald, 2014 SCC 3

Police responding to noise from apartment, knocked and accused opened door, concealing gun behind his legs. Police pushed door further open and seized gun. Issue was whether Police pushing door open further to ascertain concealment constituted search and if so, whether search reasonable.

SCC held as follows:

- To determine whether a safety search is reasonably necessary, and therefore justifiable, a number of factors must be weighed to balance the police duty against the liberty interest in question. These factors include:
 - the importance of the duty to the public good;
 - the necessity of the infringement for the performance of the duty; and
 - the extent of the infringement.
- The duty to protect life and safety is of the utmost importance to the public good, but an infringement on individual liberty may be necessary when, for example, the officer has reasonable grounds to believe that the individual is armed and dangerous. That infringement will be justified only to the extent that it is necessary for the officer to search for weapons.
- The officer's action of pushing the door open further constituted a "search" for purposes of s. 8 of the Charter. The action went beyond the implied licence to knock on the door and constituted an invasion of M's reasonable expectation of privacy in his home. Although the officer's action constituted a search for s. 8 purposes, that search was reasonable because both stages of the Waterfield test were satisfied. The first stage was satisfied because the warrantless search falls within the scope of the common law police duty to protect life and safety and the second, because the search constitutes a justifiable exercise of powers associated with the duty.

7

R v Marakah, 2017 SCC 59

M sent text messages to an accomplice, W, regarding illegal transactions in firearms. The police obtained warrants to search his home and that of W. They seized M's BlackBerry and W's iPhone, searched both devices, and found incriminating text messages. They charged M and sought to use his text messages recovered from W's iPhone as evidence against him. At trial, M argued that the messages should not be admitted against him because they were obtained in violation of his s. 8 Charter right against unreasonable search or seizure.

Acquitting M, SCC held:

- Text messages that have been sent and received can, in some cases, attract a reasonable expectation of privacy and therefore can be protected against unreasonable search or seizure under s. 8 of the *Charter*.
- Whether a claimant had a reasonable expectation of privacy must be assessed in the totality of the circumstances. To claim s. 8 protection, claimants must establish that
 - they had a direct interest in the subject matter of the search,
 - that they had a subjective expectation of privacy in that subject matter; and
 - that their subjective expectation of privacy was objectively reasonable. Only if a claimant's subjective expectation of privacy was objectively reasonable will the claimant have standing to argue that the search was unreasonable. However, standing is merely the opportunity to argue one's case. It does not follow that the accused's argument will succeed, or that the evidence will be found to violate s. 8.
- With a text message, the subject matter of the search is the electronic conversation between the sender and the recipient(s). This includes the existence of the conversation, the identities of the participants, the information shared, and any inferences about associations and activities that can be drawn from that information. The subject matter is not the copy of the message stored on the sender's device, the copy stored on a service provider's server, or the copy received on the recipient's device that the police are after; it is the electronic conversation itself, not its components.
- In this case, M had a reasonable expectation of privacy in the text messages recovered from W's iPhone. Therefore, M has standing to challenge the search and the admission of the evidence of the text messages recovered from W's iPhone.

25. Securing Jurisdiction Over The Accused And Interim Release

- ✓ The police have specified powers to arrest individuals. So too do non-police officers.
- ✓ The common theme in the relevant legal provisions is that arrest – taking physical control over the subject - is to be used as a last resort when other measures available for ensuring the good conduct and attendance before the criminal justice process are not practical or desirable.
- ✓ These less intrusive modes of securing attendance include the appearance notice, the promise to appear, and the summons.
- ✓ Where an individual is arrested, he or she must be released or given a bail hearing where it will be decided whether the individual should be released absolutely, subjected to conditions of release, or held in custody pending the trial.

(3) R v Hall (2002)

- provided the basis for denying bail is not covered by s. 515(10)(a) and (b), s. 515(10)(c) authorized the denial of bail in order to "maintain confidence in the administration of justice"

(1) R v St-Cloud (2015)

- s. 515(10)(a) four circumstances for TJ to consider when determining the detention of an accused is necessary to maintain confidence in the admin of justice

(2) R v Antic (2017) - s. 515(3)

- 2 rights under the right "not to be denied reasonable bail without just cause" (s. 11(e))

- "ladder principle" - prohibits the imposition of a more onerous form of release unless the Crown shows why a less onerous form is inappropriate

26. Disclosure And Production

- ✓ A key right of the accused, and an important obligation on the Crown, is full disclosure of the fruits of the investigation (all information gathered by or made known to the police during the investigation) to the accused. All of the fruits of the investigation are to be disclosed save what is clearly irrelevant or privileged. The law of privilege is covered by the law of evidence but the most relevant privileges should be flagged here.
- ✓ Disclosure is to be made before the accused is called upon to elect his mode of trial for s.536 indictable offences.
- ✓ The accused may also seek to secure relevant "third party records" – relevant documents that are not the fruits of the investigation and that are under the control of persons other than prosecution and police. This is referred to as "production" rather than "disclosure". Where third party records are sought, complex applications must be brought, which differ depending on whether the charge is a sexual offence prosecution or some other offence.
- ✓ If issues arise as to whether proper disclosure or production has been made, the assigned trial judge should ordinarily resolve them. As a practical matter, this requires early assignment of a trial judge who can address these matters.

(1) R v Shinehcombe (1991)

- fruits of Crown investigation is not the property of the Crown for use in securing a conviction, but property of the public to be used to ensure justice is done
- retrial ordered w/ production of evidence/statements

(2) R v O'Connor (1995)

- delay in Crown disclosure
- Crown's conduct is shoddy and inappropriate but cannot be said to have violated the accused's right to full answer and defence

(3) R v McNeil (2009)

- difference between first party disclosure and third party disclosure

27. Preliminary Inquiries

- ✓ As indicated, at the preliminary inquiry, the judge must determine whether the Crown has presented a *prima facie* case. If so, the accused is committed to stand trial and the prosecutor will be called upon to draft an indictment, which will replace the original information as the new charging document.
- ✓ If the Crown does not establish a *prima facie* case, the accused is discharged and the prosecution on the charge that has been laid ends— in effect, the accused who was “charged” is “discharged.”
- ✓ A discharge at a preliminary inquiry is not, however, an acquittal. The prosecution can re-lay the charge and try again, but will not do so unless important new evidence is uncovered.
- ✓ The Attorney General also has the authority to lay a direct indictment, which gives jurisdiction to a court to try the accused. The direct indictment can be used to re-institute a prosecution after a preliminary inquiry discharge, or to bypass a preliminary inquiry altogether by indicting the accused directly to trial.

TRIAL BY JURY

(1) R v Williams (1998)

- aboriginal accused tried by 84 jury for a robbery charge
- defence was mistaken identity & jury convicted him
- on appeal, W argued that his charter rights were violated as TJ denied him the right to challenge potential jurors for cause to determine if they held a racial bias against Aboriginals
- SCC - reasonable to infer that such a prejudice is present at the community level where it is evident at a national & provincial level - judicial directives to act impartially cannot be assumed to be effective
- SCC ordered a re-trial

(2) R v Find (2001)

- accused charged w/ sexual assault of children, accused applied to challenge potential jurors for cause - TJ rejected - CA rejected

SCC: the procedural safeguard to allow accused to challenge a potential juror "for cause" to guard against impartial jurors - however there is no evidence for judicial notice of widespread bias against accused in sexual assault trials - strong views about a serious offence do not ordinarily indicate bias - accused failed to show an exception arise in case of sexual assaults of children

(3) R v Yemau (2012)

- accused convicted of first degree murder
- Upon appeal, CA found Crown had failed to disclose information obtained during the jury vetting process - might have assisted accused in preemptory challenges, however, CA also found

- (1) Accused did not suffer any prejudice from the Crown's failure to meet its disclosure obligations
- (2) no basis to find the jury vetting practice created an appearance of unfairness

SCC: found no reasonable possibility that the jury would have been differently constituted had the pertinent information obtained from vetting had been disclosed - accused had received a fair trial by an impartial jury

(4) R v Kotopenace (2015)

- accused an aboriginal on-reserve was charged w/ manslaughter - application that Aboriginal on-reserve residents were under-represented on the jury roll from which jury was selected - breach of Charter S.11(d)/(f)

SCC: if state makes reasonable effort, but part of a population is excluded because it declines to participate, then the state would have met its constitutional obligations
- representativeness is not about targeting a particular group for inclusion - there are no right to a jury roll of a particular composition or a proportionate representation

31. General Principles Of Sentencing

- ✓ For the most part, the general principles of sentencing have been codified in the *Criminal Code*.
- ✓ Judges are instructed to use alternatives to imprisonment that are reasonable in the circumstances.
- ✓ If, as is often the case, the prosecutor and the defence make a joint submission on sentence, the judge can only depart from it if the joint submission is not in the public interest and should provide an opportunity for the accused to withdraw his or her plea.
- ✓ Mandatory sentences can be struck down as unconstitutional if they are grossly disproportionate, but judges cannot create constitutional exemptions from them.
- ✓ Sentences can also be reduced as a remedy for abuses of state power related to the offence.

• CC sections 606.1, 718, 718.01, 718.1, 718.2, 718.3, 719

- (3) R v Gladue (1999) - aboriginal consideration
- (4) R v Ferguson (2008) - constitutional exemption not a remedy for a S.12 violation
- (5) R v Nur (2015) - mandatory minimum sentence under S.95(2)(a)
(i) and (ii) violate S.12
- (6) R v Morrisey (2000) - mandatory minimum set as an inflationary floor, applicable and proportionate to those so-called "best offender", otherwise breach S.12
- (7) R v Pham (2013) - collateral consequences can be taken into account in sentencing
- (8) R v Anthony-Cook (2016) - TJ should not reject joint submission lightly, short of a breakdown of proper functioning of justice sys.

(1) R v ~~Higa~~ Nasogalak (2010) SCC

TJ found police used excessive force in arresting Accused (Impaired driving), in breach of S.7 of the Charter, as a remedy TJ reduced the sentence under 24(1) of the Charter
CA: TJ had no discretion to reduce a sentence below the statutory minimum

SCC: sentence reduction outside statutory limits may be possible under S.24(1) in some exceptional sentence cases, but this not such a case

(2) R v M. (C.A.) (1996) SCC

Facts: Accused pleaded guilty to numerous counts of sexual assault, incest, assault with a weapon, in addition to other lesser offences, arising from a largely uncontested pattern of sexual, physical and emotional abuse inflicted upon his children over a number of years. TJ sentenced 25 years.

CA reduced to 18 years & 8 months, applying a principle that fixed-term sentences under CC ought to be capped at 20 years.

SCC: restored 25 years - CA should only intervene to reduce / vary a sentence if it is demonstrably unfit. Quantum of sentence should broadly commensurate w/ the gravity of offence & moral blameworthiness.

29. Pre-Trial Motions

- ✓ In either judge alone or jury trials, there will often be preliminary legal issues to be resolved before the trial gets going. These will ordinarily be dealt with by the assigned trial judge.

- ✓ In a jury trial, it is often convenient to assign the judge and to dispose of these matters before a jury is selected, or if the motions can be resolved expeditiously, select the jury and require it to leave the courtroom until the motions are completed.

30. Trial Within A Reasonable Time Applications

- ✓ Section 11(b) of the Charter guarantees an accused the right to a trial within a reasonable time.
- ✓ The only remedy for a breach of that right is a stay of proceedings, which made many judges reluctant to find a breach of the right. The result, over several decades, was that section 11(b) did very little to make the justice system move expeditiously.
- ✓ In 2016, in response to what it described as a “culture of complacency towards delay”, the Supreme Court created a new approach to section 11(b) which provides judges with less discretion about refusing a remedy, and which is meant to encourage all justice system participants – the courts, the Crown, and the defence – to act to speed up the system.

R. v. Jordan, 2016 SCC 27

J was charged in December 2008 and his trial ended in February 2013. J brought an application under s. 11 (b) of the Charter seeking a stay of proceedings due to the delay.

SCC held that the delay was unreasonable and J's section 11(b) Charter right was infringed.

R v Cody, 2017 SCC 31

Cody was charged with drugs and firearms-related offences. There was delay of more than five years between charges and anticipated end of trial. issue was whether accused's right to be tried within reasonable time under s. 11 (b) of Charter infringed.

SCC held that from the time C was charged until his five-day trial was scheduled to begin, fully five years passed. The delay in this case was unreasonable and therefore, C's right under s. 11 (b) of the Charter was infringed.

APPEALS AND REVIEW

32. Appeals of Final Decisions and Judicial Review of Interim Decisions

- ✓ Final verdicts can be appealed.
- ✓ Interim decisions cannot be.
- ✓ Interim decisions can, however, be the subject of judicial review applications where jurisdictional errors occur.
- ✓ Judicial review may be necessary, for example, to challenge preliminary inquiry results, to seek or quash publication bans, or to suppress or access third party records; in these cases if we wait until the end of the trial, the damage sought to be prevented may have already occurred, hence the judicial review application.
- ✓ In the case of appeals, different grounds of appeal and procedural routes apply, depending on whether an offence has been prosecuted summarily or indictably.