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### **DNA Evidence – Unlawfully preserved sample – police using DNA profile of sample in subsequent investigation and matching with DNA from preserved sample – whether evidence obtained in new investigation admissible – Police and Criminal Evidence Act (PACE) 1984 and Human Rights Act 1998 – (UK)**

In January 1997, a woman was raped in her own home by a burglar. She was medically examined and swabs were taken from areas around her vagina and anus. The swabs were found to contain semen, presumably of her assailant. A year later the defendant was arrested and charged with an unrelated burglary. He gave a false name and details to the police. Saliva samples were taken from him in relation to that burglary. Had the defendant given his real name to the police they would have known that he had previous convictions, one of which was for affray, in which case the police would have been permitted by law to take DNA samples and retain them no matter what the outcome of the burglary charge. In the event he was acquitted of the offence. Under section 64(1) of PACE, the sample taken from the defendant in respect of the burglary charge, should have been destroyed following his acquittal. It was not destroyed and the police subsequently matched the DNA in the saliva sample to the DNA from the swabs taken from the rape victim. The police then arrested the defendant again, this time in respect of the offences committed against the rape victim in January 1997. When interviewed, the defendant denied any involvement with the offences, and refused to consent to the police taking an intimate sample from him. The police then took a non-intimate sample of plucked hair from him. The DNA from the hair matched that from the swabs. The forensic scientist placed the frequency of the occurrence of obtaining such a match from any other person unrelated to the defendant to be one in 17 million. The defendant was then charged with the offences of rape, assault and burglary

The prosecution did not lead evidence relating to the sample taken in respect of the earlier burglary charge, but relied instead on the match in the DNA profiles of the swab sample and the hair. The judge ruled the evidence inadmissible because section 64(3)(B) of PACE provides that samples that are required to be destroyed under section 64(1) shall not be used for the purpose of any investigation. He acquitted the defendant.

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The Attorney General referred the following question on a general point of law to the Court of Appeal.

“Where a sample of DNA is lawfully taken from an accused in respect of offence A (of which offence the accused is subsequently acquitted), and information derived from the sample suggests that the accused is guilty of offence B, does a judge have discretion to permit a prosecution to proceed against the accused for offence B, notwithstanding the terms of section 64 (3B) of the Police and Criminal Evidence Act 1984?”

The Court of Appeal upheld the judges ruling on admissibility, holding that the section was mandatory and not directory. The court reasoned that if the sample which included the profile, is used for purposes of an investigation, then all evidence resulting from that investigation must be excluded.

The Court of Appeal referred the same question to the House of Lords. The House had to consider the proper interpretation of section 64(3B) in its generality.

▷ **Held:**

In determining the matter, their Lordships focused their analysis not on whether the section was mandatory or discretionary but on the consequences of non-compliance with the provision. Following the acquittal of the defendant, the saliva sample should have been destroyed as required by the mandatory “must” in section 64(3B) of PACE. However, the existence of the duty to destroy and its breach was only a starting point and did not answer the precise question before the House. That question related to the consequences of non-compliance with the duty to destroy the sample. Under subsection 64 (3B)(a), a sample that is not destroyed may not be used in evidence against the person entitled to its destruction.

However, the second part of section 64(3B) provides that samples required to be destroyed, shall not be used for purposes of any investigation. The difference between the two provisions is that whereas Section 64(3B)(a) legislated for the admissibility in evidence against the person concerned, section 64(3B)(b) does not contain any language to the effect that evidence obtained as a result of the prohibited investigation shall not be admissible. It does not provide for the consequences of a breach of the prohibition on investigation. The prohibition

must be read in conjunction with section 78(1) of PACE. Section 78(1) provides:

“In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”

This section vests in the trial judge a discretionary power to exclude evidence if it would be unfair to admit it

Respect for the privacy of the individual is not the only value at stake in matters of this nature. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to their person or property, and it is in the interest of everyone that crime should be effectively investigated and prosecuted. In a criminal case this required a triangulation of interests, taking into account the position of the accused, the victim and the public. The interpretation of the Court of Appeal not only conflicted with the plain language of the statute but also produced results that were contrary to good sense.

Counsel for the defendant also argued that because a sample is required to be destroyed after an acquittal, it could never be in accordance with the law to admit it in evidence and to do so would result in a breach of article 8 of the European Convention on Human Rights (right to privacy). In the opinion of the House, if its construction of the provision is correct, then “the interference” was in accordance with law, the critical point being that admissibility is governed by judicial discretion under section 78. The interference required is necessary in a democratic society to ensure the investigation and prosecution of crime, and cannot be said to be a breach of article 8. The law was in full compliance with the Convention.

On this basis, the Lords overturned the decision of the Court of Appeal and upheld, in substance, the position advanced by the Attorney General.

*Attorney General's Reference (No. 3 of 1999)*, [2001] All ER 577

**Evidence – drug offences – abuse of process – entrapment – distinguishing commercial and executive lawlessness – (UK).**

Two journalists posed as wealthy Arab Sheikhs seeking to buy scooters from H and T, in the hope that this would lead to evidence of drug activities involving these two individuals. The newspaper for which the journalists worked wanted to expose the appellants' involvement with drugs. Ultimately, H and T did supply the journalists with heroin and this resulted in criminal charges. At the trial, H and T applied for a stay of proceedings on the basis of abuse of process. In the alternative they asked for the evidence of what took place to be excluded under section 78 of the Police and Criminal Evidence Act 1984. The judge refused the application on the ground that any alleged criminal behaviour on the part of the journalists was minimal when compared to the criminal behaviour of H and T.

They both appealed contending that the trial judge erred in not holding that the journalists' actions had amounted to commercial lawlessness, which outweighed any criminal behaviour on their part.

➤ **Held:** dismissing the appeal:

The court was obliged to balance the interest of avoiding an affront to the criminal justice system against the public interest that those who are charged with serious crime should be prosecuted. In exercising that discretion, it was necessary to differentiate between malpractice by law enforcement agencies and commercial lawlessness. The latter carried less force because the investigator allegedly guilty of misconduct was outside the criminal justice system. The trial judge's discretion was properly exercised.

*R. v. Hardwick; R. v. Thwaites*, The Times, November 16, 2000.

**Criminal Evidence – positive identification of accused – accused disputing identification – whether failure of police to hold identification parade breached Code of Practice**

F was charged with attempted robbery. His victim identified him to police within a short time of the incident forming the subject matter

of the charge, and he was arrested. F denied having anything to do with the incident and asked for an identification parade, but the police refused. At his trial, he objected unsuccessfully to the admission of evidence of the street identification on the ground that no identification parade had been held. He was convicted and he appealed to the Court of Appeal arguing that the failure to hold an identification parade constituted a breach of paragraph 2.3 of the Code of Practice for the Identification of Persons by Police Officers made pursuant to the Police and Criminal Evidence Act 1984. The Court of Appeal agreed with him for the most part but dismissed his appeal on the ground that there was sufficient evidence to sustain the charge despite the non-observance of the Code.

The Court of Appeal nonetheless certified that a point of law of general public importance had been raised by the case. It therefore sent the following question to the House of Lords for determination:

“Do the provisions of paragraph 2.3 of the Code of Practice apply where a suspect has already been positively identified, whether or not in the manner permitted under paragraph D 2.17 of the Code?”

➤ **Held:**

1. At issue here was the proper construction and application of the provisions relating to identification parades in Code D of the Codes of Practice issued under the Police and Criminal Evidence Act 1984. To do so involved an understanding of the background to the creation of the Codes of Practice. It had been recognised that eye - witness identification evidence, even when wholly honest, may lead to the conviction of innocent persons. A Royal Commission on Criminal Procedure reported in 1981 that there was a case for regulating identification parades. Consequently, the Police and Criminal Evidence Act sought among other things to recommend procedures which would provide for the effective investigation and prosecution of crime while at the same time safeguarding the legitimate rights and interest of suspects and accused. Section 66 therefore provided for the issuance by the Secretary of State of Codes of Practice for Police Officers to govern search, detention, questioning, treatment and identification of person, etc. Code D the subject of this case was one of the Codes issued in consequence of this provision.

2. Paragraph 2.3 provides:  
"Whenever a suspect disputes an identification, an identification parade shall be held if the suspect consents ...  
A parade may also be held if the officer in charge of the investigation considers that it would be useful, and the suspect consents"

On a proper construction of this paragraph, an identification parade must be held even where there had been a fully satisfactory or actual and complete or unequivocal identification of the suspect. The Code was intended to be an intensely practical document which gave police officers clear instructions on what to do when faced with a particular set of circumstances. Therefore the whole purpose and intention of the Code would be defeated if the paragraph was to be given any other interpretation than its ordinary literary meaning. The paragraph makes it mandatory for the police to hold identification parades in certain circumstances. There was no need to read additional conditions into the text or for drawing a distinction between cases where a suspect was produced by the police to a witness rather than by a witness to the police. The paragraph must however not be construed to cover all possible scenarios. Where for instance, an eye witness had made it clear that he/she could not recognise the suspect, it would be futile to hold an identification parade. So also if the suspect is already well known to the witness.

3. The effect of paragraph 2.3 was therefore clearly that "if the police had sufficient information to justify the arrest of a particular person for suspected involvement in an offence, an eye witness had identified that person, and the suspect disputed his identification as a person involved in the commission of that offence, an identification parade had to be held if the suspect consented and the exceptions did not apply." The police had therefore breached Code D. While the existence and cogency of other identifying evidence including the identification of the accused by the victim in the street, might have been relevant to the trial judge's decision whether or not to admit the evidence despite the breach of the Code, it was not relevant to the separate and prior issue of whether there had been a breach.

4. However, it did not follow that the evidence of the eye - witness's identification should have been excluded as a result of the breach of the Code. There would need to be an exercise of

discretion under section 78 of PACE which would take into account all the circumstances of the case. Although their Lordships agreed with F that the trial court did not exercise this judgement, it also agreed with the finding of the Court of Appeal that despite the breach of the Code of Practice, the eye - witness evidence was rightly admitted. The evidence was compelling and supported by other evidence. It was not tainted by matters such as the suspect being in police custody at the time of the identification. There were two separate formal identifications. It could not be said that F's right to fair hearing had been infringed.

*R. v. Forbes* [2001] 1 All ER 686

**Criminal law – Sentencing – Lawyer convicted of breach of trust - Accused sentenced to two years' incarceration – New legislation introducing conditional sentencing regime after trial but before appeal – Conditional sentence available when sentence of less than two years imposed – Whether accused eligible to conditional sentence on appeal. Criminal Code, R.S.C., 1985, C-46, s.742.1. – (Canada)**

B was a practicing lawyer in Canada. He was retained by some lawyers in the former Soviet Union to recover and remit inheritances of money from the estates of six deceased Manitoba and Saskatchewan residents. The money was sent to B by the executors of the estates or their solicitors, and he acted for the beneficiaries pursuant to a power of attorney signed by each of the beneficiaries. The respondent was also the executor of one estate. He converted part of the trust money received for each of the beneficiaries totaling \$86,000 from his trust account to his general account. The Law Society of Manitoba suspended his right to practice and later disbarred him.

B was also prosecuted and convicted of six counts of breach of trust and six counts of theft, although the theft charges were stayed. At the time of sentencing, the respondent was 45 years old and employed with a local corporation, his wife was disabled and he had a teenage daughter. He was sentenced to two years' incarceration. Under Canadian law sentences of imprisonment of two years or more had to be served in a penitentiary. B appealed his convictions and sentence, and the Crown

cross-appealed the sentence. After trial but prior to the appeal, an amendment to the Criminal Code came into force that introduced a regime of conditional sentence. The Court of Appeal dismissed his appeal against conviction and the Crown's cross-appeal, but allowed B's appeal from sentence and substituted a conditional sentence of two years less a day.

The Crown further appealed to the Supreme Court of Canada arguing that the Court of Appeal erred in the following respects:

- (1) It should not have reduced the two-year sentence imposed by the trial judge by one day so as to make B eligible for a conditional sentence.
- (2) It should not have concluded that a conditional sentence was warranted in this case, particularly because a conditional sentence could not provide sufficient denunciation and deterrence.

The issue before the Supreme Court was whether the Court of Appeal improperly interfered in substituting a conditional sentence for the two-year penitentiary term imposed by the sentencing judge.

The Crown argued that pursuant to s. 742.1(a) of the *Criminal Code*, conditional sentences were only available in cases where a sentence of less than two years was imposed and a conditional sentence was unavailable, unless that sentence was demonstrably unfit and reduced to less than two years on appeal. In this case the two-year sentence was not demonstrably unfit and should not have been disturbed, and a conditional sentence should not have been imposed.

➤ **Held:** dismissing the appeal (by majority of 6 to 3);

The Crown's argument presupposes that the respondent was not entitled to the benefit of the sentencing amendments introduced by Bill C-41 on appeal. But the truth is an offender is entitled to the benefit of any amendments to sentencing provisions introduced after sentencing but prior to appeal that provide for a reduction or mitigation of punishment. To accept the argument of the Crown would amount to a very narrow construction of the mitigating effect of the new sentencing amendments. While the law and the introduction of the conditional sentencing regime constitute a mitigation of punishment for offenders sentenced to less than two years' imprisonment, the new amendments may also constitute a mitigation of punishment

for offenders who were sentenced to short penitentiary terms, particularly those sentenced to terms of exactly two years.

Two of Parliament's principal objectives in enacting Bill C-41 were to reduce the use of prison as a sanction and to expand the use of restorative justice principles in sentencing. It was noted that these two objectives were linked, as the objectives of restorative justice would generally be achieved more efficiently by sanctions other than incarceration: *Gladue*, [1999] 1 S.C.R. 688 and *Proulx*, [2000] 1 S.C.R. 61. These objectives are reflected in the amendments to the Criminal Code. A clear example is section 718.2(e) which provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of the aboriginal offenders". These changes to the law raise the distinct possibility that a judge who sentenced an offender to a short penitentiary term prior to the introduction of Bill C-41, particularly a term of exactly two years, would have found that a sentence of less than two years was appropriate had the new provisions been in force at the time of the sentencing. The offender would therefore have been eligible for a conditional sentence. Accordingly, the new amendments constitute a potential mitigation of punishment for such an offender, and should apply on appeal.

Moreover, the Court of Appeal noted important mitigating circumstances in this case. The accused was the sole provider and caregiver for both his disabled wife and their daughter. The Court of Appeal's sentence provided sufficient denunciation and deterrence, and was not disproportionately lenient.

B was entitled to the benefit of the changes to the law on appeal. As a result, the Court of Appeal was entitled to conduct a re-sentencing. "Absent an error in principle, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit": *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at paragraph 90. Where there has been an intervening change in the law between sentencing and appeal, it is as though the sentencing judge has committed an error in principle, albeit for reasons beyond his or her control, because relevant principles have not been considered. The Court of Appeal therefore did not need to defer to all of the trial judge's findings, and could proceed to re-sentence the respondent in light of the new principles.

There was no reason to interfere with the Court of Appeal's sentence. None of the offences of which the respondent was convicted carried a minimum term of imprisonment and the Court of Appeal's decision to reduce the sentence to less than two years was justified in light of the changes in the law. The effect of ss. 718.2(e) and 718(e) and (f) was sufficient to warrant a reduction of the respondent's sentence, thereby satisfying the requirement of s. 742.1(a). There was also no reason to interfere with the court's finding that the respondent did not pose any danger to the community. Besides, the ruin and humiliation that B had brought down upon himself and his family, together with the loss of his professional status, could provide sufficient denunciation and deterrence when coupled with a conditional sentence of two years less a day with house arrest. Moreover, the fact that B was the sole provider and carer for both his disabled wife and teenage daughter were important mitigating circumstances.

The Court of Appeal's sentence provided sufficient denunciation and deterrence, and was not disproportionately lenient.

#### **Dissenting opinion of three minority judges:**

The trial judge's sentence should be restored. An intervening change in the law did not necessarily give rise to re-sentencing by the Court of Appeal. Rather, it gave rise to a right of review to determine whether the sentence of the trial judge was inconsistent with the new sentencing principles and therefore in error. The Court of Appeal did not have sufficient reason to interfere with the trial judge's decision to impose the penitentiary term. The two-year sentence of incarceration was neither unfit, nor inconsistent with the new principles of sentencing introduced by Bill C-41.

While the changes to the *Criminal Code* would in a proper case permit a reduction of a sentence to two years less a day, thereby triggering the consideration of a conditional sentence, this was not an appropriate case for community sanctions. The focus of the sanction for criminal breach of trust was denunciation and general deterrence. Lawyers convicted of criminal breach of trust have generally been sentenced to jail. This emphasis on denunciation and general deterrence was particularly important when courts punish lawyers who have committed criminal breach of trust. First, the criminal dishonesty of lawyers has profound effects on the public's ability to

conduct business that affects people far beyond the victims of the particular crime. Second, as officers of the court, lawyers are entrusted with heightened duties, the breach of which brings the administration of justice into disrepute. Thirdly, judges are drawn from the legal profession and there is a duty to ensure public confidence in the pool from which members of the bench are selected. Finally, judges must be particularly scrupulous in sentencing lawyers in a manner that dispels any apprehension of bias. A lawyer should receive, and be seen to receive, the same treatment as any other person convicted of a similar crime. Any perception that a lawyer might receive more lenient consideration by the courts must be guarded against.

Even if the Court of Appeal correctly relied on the introduction of the conditional sentencing regime to revisit the sentence, given that denunciation and deterrence are the primary principles of sentencing engaged by a breach of trust by a lawyer, a conditional sentence would be disproportionately lenient in this case. The facts display a significant level of criminal culpability and the short penitentiary sentence imposed by the trial judge was proportionate to the gravity of the offence. The severity of this sentence is seriously undermined by the substitution of a conditional sentence of two years less a day. This is more than a reduction of a single day, it is also significantly less severe in terms of incarceration.

*R. v. Bunn* [2000] 1 S.C.R. 183

#### **Drugs – possession of controlled drugs – knowledge as to contents of packages – whether knowledge could be inferred from surrounding facts – Failure to disclose identity of informer – whether adverse inference could be drawn – Misuse of Drugs Act – (Singapore)**

Z was charged with being in possession of controlled drugs for purposes of trafficking in contravention of section 5 of the Misuse of Drugs Act of Singapore. The case against him was that officers of the Central Narcotics Bureau apprehended Z with drugs in a block of flats. Z had a plastic bag containing 5 packages of cocaine. Z contended that he did not know what was in the plastic bag since it did not belong to him. He said that on the night preceding his arrest, he was offered a job by a

man called "Ah Boy". The following day, "Ah Boy" called him on his mobile phone and instructed him to collect the plastic bag from a Chinese man whom he did not know. He collected it for onward transmission to "Ah Boy". Following further instructions from Ah Boy and others, he took the plastic bag to the flat where he was arrested.

The prosecution's argument was that Z knew what was in the 5 packages in the plastic bag and that knowledge coupled with the requisite element of control, established the requisite elements for the offence possession. Counsel relied on section 17 of the Misuse of Drugs Act for the presumption that Z was in possession of the drugs for purposes of trafficking.

The trial judge rejected Z's claim to ignorance and convicted him accordingly. He appealed.

➤ **Held:** dismissing the appeal:

1. Possession within the meaning of section 17 of the Misuse of Drugs Act required not only the presence of physical control of the drugs, but also requisite knowledge as to the contents. Although the fact that the contents of the packages could not readily be seen may have been a relevant factor in determining whether the requisite knowledge was absent, this factor could not be given much weight. To give it weight would have the undesirable result of allowing drug peddlers to escape liability simply by ensuring that they securely cover up drugs that came into their possession.

2. Z's story relating to how he came into contact with the drugs was most unconvincing. It was hard to believe that although he hardly knew "Ah Boy" he meticulously followed his instructions given on the phone to the letter. The court did not believe that Z could afford such servility to a total stranger. The only reasonable conclusion that could be drawn from the facts was that Z's story was a cook-up in an effort to distance himself from the drugs.

3. A bailee will be held to have refuted the inference of knowledge of a package when he has no reason to suspect that its contents were drugs or some other illicit material. It was not enough for him to just say that he did not know what the contents were. The court will look at the whole facts surrounding the case to see whether he had good reason for suspecting that what he was carrying was drugs.

4. The contention advanced on behalf of Z that an adverse inference should have been

drawn against the prosecution for failing to disclose the identity of the informer must be rejected. Z was caught red-handed with the drugs and the informer's evidence was not vital to the prosecution of the case. As such, nothing would be gained if the informer's identity had been disclosed. Z had suffered no injustice by the non-disclosure.

*Zulfikar bin Mustafah v. Public Prosecutor* [2001] 1 S.L.R. 633

### **Confiscation orders – burden of proof – whether defendant must prove that no realisable assets or proceeds have diminished – Criminal Justice Act 1988 – (UK)**

A confiscation order was made against B in relation to a conviction for theft and evading liability by deception. The evidence was that he had befriended three women and then persuaded them to lend him money totalling more than £500,000 which he never intended to repay and in fact did not repay. At trial he pleaded guilty to the charges. The trial judge made a confiscation order in the sum of £450,000.

He appealed the order arguing that the judge had erroneously placed upon him the burden of proving that he had no realisable assets and showing how the money received through the offences had been spent. He argued that the burden was on the prosecution to prove that he benefited from his crimes and to establish the amount of tangible assets that he owned. Unless the prosecution could do so, the court could not make any confiscation order. Furthermore, the judge was wrong to have increased the value of the actual proceeds that might be realised by adjusting the figure in accordance with the inflation rate.

➤ **Held:** dismissing the appeal:

Under section 71 of the Criminal Justice Act 1988, once the prosecution has established that receipt of a benefit, the court has power to impose a confiscation order. Thereafter it is for the accused person to prove on a balance of probabilities, that he no longer has the proceeds or that the amount that was realisable has been diminished: *R. v. Rees* (Unreported) July 19, 1990. An accused person was required by section 73(6) of the Act to establish that the

realisable amount was less than the court's assessment of the benefit he had acquired from his criminal activities. The judge was entitled to infer that B had invested the money, he was therefore entitled to take into account the changes in the value of the money in determining the starting figure for the actual proceeds of B's offences.

*R. v. Barwick*, The Times, 10 November 2000

### **Murder – whether “psychological autopsy” of victim admissible to show likelihood of suicide (UK)**

G was charged with the murder of his wife. Her body had been found hanging in their garage. At his trial, G did not adduce evidence in his defence and he was convicted. His appeal to the Court of Appeal was dismissed.

The case was later submitted to the Criminal Cases Review Commission. G sought to adduce evidence of a psychologist, whose main area of expertise was the systemic analysis of human behaviour, in order to identify the dominant strands within it. At the time of the trial, the professor had prepared a report in which he expressed the view that it was unlikely that G's wife had committed suicide but that evidence was ruled inadmissible. He later wrote to G's solicitors stating that at the time of his report he was unaware of certain factors relating to the dead woman and that a much more thorough psychological autopsy could now be carried out.

In a report to the Commission, he said that his initial findings were wrong and that it was very likely that G's wife had committed suicide. The Commission declined to receive the evidence of the professor.

➤ **Held:** dismissing the appeal;

The professor's evidence was not of the kind properly to be admitted by the court because:

“(1) He had never previously carried out the task which he set himself in this case.

(2) There were no criteria by reference to which the quality of his opinions could be tested.

(3) His views were based on one-sided information, in particular from the appellant and his family.

(4) None of the points he made were outside the experience of a jury.

(5) English, Canadian and United States authorities pointed against admission of such evidence.

(6) If the evidence were admissible, there would be no reason in principle to reject evidence psychologically profiling a defendant, and this would open up avenues for enquiry which would be of little or no help to the jury. Psychiatric evidence as to the state of mind of defendant, witness or deceased, falling short of mental illness might be admissible in some cases when based on medical records and or recognised criteria, but the present academic status of psychological autopsies was not such as to permit them to be admitted as a basis for expert opinion before a jury”

*R. v. Gilfoyle* [2001] Crim. L.R. 312

