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Constitutional Law – provision for the imposition of mandatory minimum sentence for repeat offenders – whether unconstitutional – Section 27A Penal Code (Seychelles)

A and N were convicted of offences relating to burglary and house breaking and sentenced to a minimum mandatory term of five years imprisonment pursuant to section 27A of the Penal Code of Seychelles. That section provides that a person who is convicted of robbery and extortion or burglary, housebreaking and similar offences shall be sentenced to a minimum term of five years and where the offence is a repeat offence, a minimum mandatory sentence of 3, 5 or 7 years, depending on the term imposed for the first offence.

A and N referred the following question to the Supreme Court for determination:

“Whether or not the imposition of a mandatory minimum sentence by any Act in general, and section 2(b) of Act no. 16/95 in particular, is unconstitutional and whether such sentence infringes Articles 16 and 27 (1) of the Constitution”

Section 2(b) of Act no. 16/95 became section 27A of the Penal Code Cap 158 of the Laws of Seychelles.

➔ **Held:** Upholding the provision

1. One of the intentions of the minimum mandatory sentences as stated in the “objects and reasons” of the Bill amending the penal Code is arresting a growing tide of offences involving violence against the person and house breaking. By introducing a minimum sentence, especially for repeat offenders, it was hoped that society’s abhorrence for these crimes and its concern about the unwelcome trend of criminality would be emphasised.

2. The issue for the courts determination centred on whether the imposition of mandatory sentences violates the cardinal rule that the “punishment must fit the crime”. The mandatory sentencing policy is based on the concept of retribution. This concept is traceable to the Lex Talionis (retaliation Law of Exodus 21 – the Mosaic law). The rationale of the concept is based on the assumption that all offenders who have violated the same provision of the penal code are alike and thus deserve the same punishment. The critics of this policy contend that no two offenders who have committed the same crime are completely the same in capacity, depravity, intelligence and potential for rehabilitation. On the face of it, the mandatory provisions of

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section 27A, by removing the power of judicial discretion, affect the right of a convict to plead in mitigation of sentence. In *Smith v. R* [1988] L.R.C. (Const.) 361, the Canadian Supreme Court expressed the view that the effect of a punishment must not be grossly disproportionate to what would have been appropriate. The relevant provision of the law in that case was very wide in its application and created a certainty of a term of imprisonment. However, the provision under consideration in this case, did not have as wide an application. Section 27A applies to repeat offenders convicted of robbery, extortion, etc. Its aim and object was to arrest the rising tide of criminality in respect of these offences and thus the consequent need for deterrent mandatory sentences. The offenders and offences had been identified with certainty, and there was no generalisation of offenders and punishments to be imposed.

3. Whereas section 27A contains presumptive mandatory sentences, Article 16 of the Constitution contains an absolute prohibition, permitting of no derogations. The Court must, albeit grudgingly, uphold the will of the people as expressed by the Legislature. "If the Legislature decides to subjugate subjective considerations of an individual in the interest of the society, it is not the function of courts to frustrate such policy". Section 27A does not constitute cruel, inhuman or degrading punishment. The prescribed sentences were necessary for the achievement of a valid social aim, and are not grossly disproportionate so as to outrage the standards of decency.

4. Regarding the question whether the right to equal protection of the law contained in Article 27 of the Constitution was a natural corollary to a consideration of Article 16, equal treatment means the right to equal treatment in similar circumstances. Article 27 permits reasonable classification, which necessarily causes distinction or discrimination between persons so classified. The basis of classification being inequality, mere inequality alone is not forbidden. Dissimilar treatment does not necessarily offend the guarantee of equality in Article 27. It prohibits invidious or hostile discrimination which is arbitrary, irrational and not reasonably related to a legitimate objective. It prohibits discrimination within a class of persons of similar circumstance. Thus, those who stand in substantially the same position in respect of the law should be treated alike. The

distinguishing factor between repeat offenders of offences in section 27A and other repeat offenders was the nature of the offences they had committed. The object of the provision having been established, the mode adopted by the Legislature was the introduction of mandatory minimum sentences for repeat offenders. There was therefore a clear nexus between the basis of the classification and the ultimate object of the Act.

Brian Azemia v. the Republic; Jeffrey Napoleon v. the Republic, Constitutional Cases Nos. 1/97 and 2/97

Proceeds of Crime – whether the power conferred on the court by section 2 of the Drug Trafficking Act to order confiscation of property following conviction for drug trafficking constitutes a breach of Article 6 of the European Convention on Human Rights – (United Kingdom)

P was convicted of being concerned in the importation of a large quantity of cannabis resin, contrary to section 170(2) of the Customs and Excise Management Act 1979 of the United Kingdom. He was sentenced to nine years' imprisonment. An inquiry was conducted into the applicant's means, pursuant to section 2 of the Drug Trafficking Act 1994 ("the 1994 Act"). A written statement pursuant to section 11 of the 1994 Act was filed with the court. The statement mentioned that the applicant had no declared taxable source of income, although he was the registered owner of a house converted into four flats, in which he operated a bed and breakfast business. He also had other properties and incomes. The statement concluded that P had benefited from drug trafficking and that the total benefit was to the value of GBP 117,838.27.

P filed a written statement in response, in which he denied having benefited from drug trafficking.

At trial, the judge commented generally that in seeking to displace the assumption and to counter the prosecutor's allegations, P had failed to take obvious, ordinary and simple steps, which would clearly have been taken if his account of the facts had been true. For example, instead of calling as witnesses, X, the alleged purchaser of the house, and other individuals whom P claimed had bought and sold cars, P had called only himself, his father and a

solicitor. The judge found the prosecution's allegation that the applicant still owned the house to be correct, and held that X's purported purchase payment of GBP 50,000 had in truth been a benefit of drug trafficking. The judge assessed the applicant to have benefited from drug trafficking to the extent of GBP 91,400.

P went to the European Court of Human Rights alleging that the statutory assumption made against him by the court, which issued a confiscation order following his conviction for a drugs offence, violated his right to the presumption of innocence under Article 6:2 of the European Convention on Human Rights.

➤ **Held:** dismissing the application;

The Scheme of the Drug Trafficking Act 1994

1. Section 2 of the 1994 Act provides that a Crown Court should make a confiscation order in respect of a defendant appearing before it for sentencing in respect of one or more drug trafficking offences, who the court finds to have received at any time any payment or other reward in connection with drug trafficking.

Under section 5 of the 1994 Act, the confiscation order should be set at a sum corresponding to the proceeds of drug trafficking assessed by the court to have been gained by the defendant, unless the court is satisfied that, at the time the confiscation order is made, only a lesser sum could be realised.

In determining whether and to what extent the defendant has benefited from drug trafficking, section 4 (2) and (3) of the 1994 Act require the court to assume that any property appearing to have been held by the defendant at any time since his conviction or during the period of six years before the date on which the criminal proceedings were commenced was received as a payment or reward in connection with drug trafficking, and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking. This statutory assumption may be set aside by the defendant in relation to any particular property or expenditure if it is shown to be incorrect or if there would be a serious risk of injustice if it were applied (section 4(4)).

2. The required standard of proof applicable throughout the 1994 Act is that applied in civil proceedings, namely on the balance of probabilities (section 2(8)).

Recent British case law on the application of the Convention to drug confiscation orders have

not been consistent. Whereas, the Scottish Court of Appeal in *McIntosh v. Her Majesty's Advocate*, (judgment of 13 October 2000) held that the confiscation procedure was incompatible with Article 6:2 of the Convention, The English Court of Appeal had held in *R. v. Benjafield and Others* (judgment of 21 December 2000) that the imposition of a drug confiscation order did not give rise to a violation of Article 6 of the Convention.

Violation of Article 6 of the Convention

3. P had complained that the statutory assumption applied by the Crown Court when calculating the amount of the confiscation order breached his right to the presumption of innocence under Article 6:2 of the Convention. Article 6 provides, so far as is relevant:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;..."

The Government of the United Kingdom submitted that the confiscation order should be regarded as a penalty for the drug trafficking offence of which P had been tried and found guilty; the confiscation proceedings did not amount to his being charged with any additional offence and Article 6:2 did not, therefore, apply.

P contended that, rather than simply forming part of the sentence for the crime of which he had been convicted, the proceedings leading to the setting of the confiscation order were a discrete judicial process which involved his being "charged with a criminal offence" within the meaning of Article 6:2. He relied upon the analysis of Lord Prosser in the Scottish Court of Appeal's *McIntosh* judgment.

It was not in dispute that during the prosecution which led to his conviction P was "charged with a criminal offence" and was therefore entitled to - and received - the protection of Article 6:2.

The questions for the Court regarding the applicability of this Article to the confiscation proceedings were, (1) did the prosecutor's application for a confiscation order following P's conviction amount to the bringing of a new "charge" within the meaning of Article 6:2 and (2) even if that question was answered in the negative, should Article 6:2 nonetheless have some application to protect the applicant from assumptions made during the confiscation proceedings?

In order to determine whether in the course of the confiscation proceedings the applicant was "charged with a criminal offence" within the meaning of Article 6:2, the Court must have regard to three criteria, namely the classification of the proceedings under national law, their essential nature, and the type and severity of the penalty that the applicant risked incurring (see *the A.P., M.P. and T.P. v. Switzerland* judgment of 29 August 1997, § 39, and, *mutatis mutandis*, the *Welch v. the United Kingdom* judgment of 9 February 1995, Series A no. 307-A, §§ 27-28).

An application for a confiscation order does not involve any new charge or offence in terms of national criminal law. "[I]n English domestic law, confiscation orders are part of the sentencing process which follow upon the conviction of the defendant of the criminal offences with which he is charged": *Benjafield*.

In contrast to the usual obligation on the prosecution to prove the elements of the allegations against the accused, the burden was on P to prove, on the balance of probabilities, that he acquired the property in question other than through drug trafficking.

However, the purpose of this procedure was not the conviction or acquittal of P for any other drugs-related offence. Although the Crown Court assumed that he had benefited from drug trafficking in the past, this was not, for example, reflected in his criminal record. In these circumstances, it cannot be said that P was "charged with a criminal offence". Instead, the purpose of the procedure under the 1994 Act was to enable the national court to assess the amount at which the confiscation order should properly be fixed. The Court considered that this procedure was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to impose upon a properly convicted offender. Whilst Article 6:2 governs criminal proceedings

in their entirety, and not solely the examination of the merits of the charge, the right to be presumed innocent under Article 6:2 arises only in connection with the particular offence "charged". Once an accused has properly been proven guilty of that offence, Article 6:2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning. Article 6:2 was not applicable to the confiscation proceedings brought against P.

4. Regarding the right to a fair trial under Article 6:1, the Court considered that, in addition to being specifically mentioned in Article 6:2, a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6:1. This right is not, however, absolute, since presumptions of fact or of law operate in every criminal law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence

The statutory assumption was not applied in order to facilitate finding P guilty of an offence, but instead to enable the national court to assess the amount at which the confiscation order should properly be fixed. Thus, although the confiscation order calculated by way of the statutory assumption was considerable and although P risked a further term of two years' imprisonment if he failed to make the payment, his conviction of an additional drug-trafficking offence was not at stake. The Court found that, overall, the application to P of the relevant provisions of the Drug Trafficking Act 1994 was confined within reasonable limits given the importance of what was at stake and that the rights of the defence were fully respected. It follows that the operation of the statutory assumption did not deprive P of a fair hearing in the confiscation procedure, and there was no violation of Article 6:1 of the Convention.

5. P had also complained that the powers exercised by the court under the 1994 Act were unreasonably extensive, in breach of Article 1 of Protocol No. 1, which states:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The compensation order constituted a “penalty” within the meaning of the Convention. It therefore falls within the scope of the second paragraph of Article 1 of Protocol No. 1, which, *inter alia*, allows the Contracting States to control the use of property to secure the payment of penalties. However, this provision must be construed in the light of the general principle set out in the first sentence of the first paragraph and there must, therefore, exist a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

The aim of the confiscation order procedure was to confer powers on the courts as a weapon in the fight against the scourge of drug trafficking. Thus, the making of a confiscation order operates in the way of a deterrent to those considering engaging in drug trafficking, and also to deprive a person of profits received from drug trafficking and to remove the value of the proceeds from possible future use in the drugs trade.

Although the figure payable under the confiscation order was considerable, it corresponded to the amount to which the Crown Court judge found P to have benefited from drug trafficking over the preceding six years and was a sum which he was able to realise from the assets in his possession. The procedure followed in the making of the order was fair and respected the rights of the defence. Therefore, the Court does not consider that the interference suffered by P with the peaceful enjoyment of his possessions was disproportionate. It follows that there had been no violation of Article 1 of Protocol No. 1.

Phillips v. the United Kingdom Application no. 41087/98, final opinion delivered on 12/12/2001
www.hudoc.echr.coe.int/hudoc

Criminal Law – importation of firearms – mens rea – whether knowledge of presence of firearm amongst imported goods necessary for conviction – whether there was a presumption of strict liability – Firearms Law 1998, s. 3 – (Cayman Islands)

M imported personal items into Cayman Islands with the intention of setting up a home in the Island. At the port of entry at Grand Cayman, custom officials searching his personal items found some ammunition in one of the chests of drawers in the container. He had not declared the ammunition when he signed his customs declaration form. He was charged with illegally importing ammunition into the Cayman Islands contrary to section 3 of the Firearms Law 1998 Revision. He pleaded not guilty.

He claimed that he had hired shippers to pack his belongings from his house in Canada and ship them to the Cayman Islands. He was not present when they were packing and did not realise that they had packed the chest of drawers in which he kept the ammunition. He explained that he had not intended to take that particular chest of drawers to the Cayman Islands and had in fact instructed the packers not to take it along.

The prosecution on the other hand argued that the offence of illegal importation of firearms was a strict liability offence and that his lack of knowledge that they were among his belongings did not constitute a defence.

➤ **Held:** acquitting M:

1. The word “import” was not defined in the Firearms Law. There was no clear indication that the intent of the law was to create a strict liability offence. It could therefore not be said that *mens rea* was not a necessary element of the offence of illegal importation of ammunition. As a matter of policy, it must be presumed that the legislature did not intend to criminalize unintentional behaviour unless it expressly said so or irresistibly infers it in the law as a whole. Moreover, section 3 contained a restriction, not a prohibition on importation. Accordingly the prosecution must show that M intended to import the ammunition.

2. The court was not satisfied that M deliberately concealed the ammunition with the intention of evading import restrictions. He had no particular need for it in the Islands and had taken no great precaution to conceal them. The

court found that M had invested a lot of money in the Island and stood to lose a great deal if he was discovered. Notwithstanding that he had been advised of the stringency of Cayman Law on illegal importations and despite his attempt to evade payment of duty on other goods imported into the island, the prosecution had failed to discharge its burden of proof.

R. v. McCafferty, Grand Court of Cayman Islands, 31 May 2000

Criminal Procedure – aiding and abetting the harbouring of illegal immigrants – whether subletting of premises without proper checks amounts to intentionally shutting eyes to the commission of the offence by the principal – (Singapore)

S was the joint owner of premises together with his sister-in-law. In July 1998, the premises were raided by police who arrested 12 illegal immigrants, who were later charged and convicted of the offence of illegal entry into Singapore.

The prosecution in S's trial led evidence that S collected rents from the illegal immigrants, and maintained the premises at all material times. S on the other claimed that he had let the premises to one Shohel who then sublet them to some Bangladeshi nationals. He said that Shohel assured him that the sub-tenants were legally resident in Singapore and gave him photocopies of their work permits. He was able to verify the information on the permits. As far as he was aware, only 24 persons lived on the premises and all were legal immigrants. Shohel then left to get married in Bangladesh and handed over control of the premises to one Anwar. Thereafter S dealt with Anwar.

The trial judge found that Anwar had harboured the illegal immigrants. As regards S, the judge found that the *actus reus* of the offence of harbouring had been established in that he had allowed Anwar to be in charge of the premises during the material times and had permitted him to collect rent from sub-tenants and pay the rent to him. He had assisted in the upkeep of the premises. In respect of the *mens rea* of the offence, the judge held that the presumption of knowledge under section 57 of the Immigration Act as well as the due diligence test in the section were both inapplicable in this case, since they only applied to persons actually harbouring the illegal immigrants. However the Court went

on to find that it was sufficient for the prosecution to show that S intended to allow Anwar to harbour persons whom he knew to be illegal immigrants.

S appealed. He contended that the prosecution's witnesses were not credible and their evidence ought to have been rejected; that the judge failed to appreciate the poor quality of the identification documents produced by the illegal immigrants; she drew the inferences most unfavourable to S which were also incorrect; and she erred in finding that the requisite *mens rea* had been made out.

➤ Held: dismissing the appeal;

1. The discrepancies pointed out by S were immaterial and had no direct bearing on the facts in issue such as to affect the judge's assessment of the credibility of the illegal immigrants.
2. While the failure to conduct an identification parade can sometimes affect the evidence of witnesses, the circumstances of this case were such that the failure to hold one did not adversely affect the probative value of the prosecution's identification of S as the person who collected the rent and carried out the repairs.
3. The giving of aid did not, of itself, amount to an offence of abetment by intentionally aiding. There had to be evidence of knowingly facilitating in the harbouring of the illegal immigrants. As the prosecution did not in this case have the benefit of any presumption of knowledge, it still bore the burden of proving the *mens rea* beyond reasonable doubt. S must be shown to have known or ought to have known that the sub-tenants were illegal immigrants.
4. S expected to have no more than 24 people in the premises, but it must have been obvious during some of his visits that more than the permitted number of tenants were in the premises. Yet he did not make any enquiries with any one as to the number of people on the premises. The evidence showed that he was not in the least worried about them. His conduct went beyond mere failure to make enquiries - he had refrained from enquiring because he suspected the truth and did not want to confirm it.
5. The evidence showed that even though he had photocopies of the work permits, he did not use them for verification, but kept them only as an attempt to cover his tracks.

6. S either knew or was at the very least deliberately wilfully blind to the immigration status of the sub-tenants and the fact that Anwar was using the premises to harbour illegal immigrants.

Atwar Singh s/o Margar Singh v. Public Prosecutor [2000] 3 SLR 439

Sentencing – Factors to be considered – gravity of offence, balance between public interest and interest of the accused – whether deterrent sentence should be imposed – offence: splashing acid at the face of victim – s. 326 of Penal Code – (Malaysia)

R splashed acid onto the face of his wife during a quarrel, as a result of which she sustained injury to her face and upper body. R was charged and convicted under section 326 of the Malaysian Penal Code. He was sentenced to three years imprisonment. The Public Prosecutor appealed contending that the sentence was too lenient having regard to the severity of the offence and did not act as a deterrent to future offenders.

➔ **Held:** allowing the appeal;

1. The trial judge had found that the offence for which R was convicted was a very serious offence, which had brought about a disfigurement to the victim's face. R was convicted of an infinitely serious offence under section 326 of the Penal Code, which carries a maximum term of 20 years. Yet the trial judge found it fit to impose only a three-year imprisonment term. This was indicative of a complete lack of understanding on the part of the trial judge of the gravity of the offence. The trial judge downplayed the offence by referring to it as an offence of "excessive violence". He did not also appreciate that throwing acid at someone was a heinous and barbaric act. The aggravating circumstances and the public interest demanded that a deterrent sentence should be passed for the offence.

2. The trial judge omitted to strike a proper balance between the interest of the public and that of the offender. He placed too much emphasis on the personal circumstances of the offender, namely, (i) R's clean record and that he was not a common criminal, (ii) the offence originated from a 'family crisis'; and (iii) R's advanced age and the probable loss of his

family. All these considerations, were far outweighed by the public interest to deter the commission of such crimes and a deterrent sentence should have been imposed.

3. " Given the undoubted public interest, the heinous nature of the offence, the veil design of the respondent, the permanent disfigurement to the victim's face, the total absence of all remorse, the fact that the respondent had not saved any judicial time, when all things were considered, it could only be said that the sentence of three years imprisonment was manifestly inadequate. The sentence was manifestly wrong, for it was totally unsuitable to the proven facts and circumstances. The severest penalty is called for in all cases of acid throwing. At the very least, the minimum sentence must be half the maximum penalty."

Public Prosecutor v. Md Rashid bin Harun [2000] 3 MLJ 503

Corruption – mens rea – conspiracy to corrupt – prove of dishonesty not necessary – Prevention of Corruption Act 1906, section 1 – Criminal Law Act 1977 section 1(1) - (United Kingdom)

W was convicted of conspiracy to corrupt contrary to section 1(1) of the Criminal Law Act 1977 and section 1 of the prevention of Corruption Act 1906. He appealed contending that for the offence of corruption to be proven, there had to be dishonesty, which had not been proven in his case. He also argued that his case was distinguishable from *R. v. Ian Harvey* (No. 1) [1999] Crim. L.R. 70, because his alleged corruption had involved a private organisation as opposed to a public body.

➔ **Held:** Dismissing the appeal;

It was not necessary to show dishonesty for the purposes of an offence under section 1(1) of the 1906 Act regardless of whether the offence involved a public or private body. *R. v. Harvey* and *R. v. Parker* [1986] 82 Cr. App. R. 69 applied.

The meaning of corruption in the context of public bodies was established for many years, in the Common Law and the Public Bodies and Local Councils Act 1889, section 1. There was no reason why Parliament would have intended to accord a different meaning in its use of the word corruptly under the 1906 Act, which sought to regulate civil corruption.

R. v. Godden-Wood [2001] EWCA Crim 1586

Criminal Law – Illegal possession of weapon in vehicle – Whether coincidence of occupancy and knowledge necessary for conviction – whether accused must have reasonable opportunity to remove himself or weapon from vehicle after acquiring knowledge of presence of weapon in vehicle – Judge instruction to jury: failure to instruct jury on the use that could be made of witness criminal record – Section 91(3) of Criminal Code – (Canada)

Police received a confidential tip that S and J were travelling in a vehicle with a weapon in it. They followed the car and soon after, saw it stop and J run out of it into a nearby backyard. S who was driving the car then drove off. The police searched the backyard and found a restricted handgun. J was arrested. He pleaded guilty to a charge of possession of an illegal weapon and was convicted. S was charged *inter alia* with being an occupant of a vehicle knowing that there was present an unlicensed restricted weapon contrary to section 9(3) of the Criminal Code of Canada.

At S's trial J was used as a witness for the prosecution. J testified that the gun belonged to S and that upon seeing the police S instructed him to jump out of the car and dispose of the gun for him. S on the other hand claimed that the gun belonged to J and that he (S) did not know of the presence of the gun in his car until J told him to stop and jumped out of the car to dispose of the gun. He said that when he saw J panic upon seeing the police car following them, he thought that J had drugs with him. The jury did not believe J. S was convicted.

He appealed, raising the question whether the trial judge properly answered the jury's question regarding the time at which the S knew of the gun, and whether he should have instructed the jury on the use it could make of the criminal record of J.

➤ **Held:** allowing the appeal;

For an offence under section 91(3) to be proved, the prosecution needed to establish a coincidence of the two elements of occupancy of the vehicle and the accused knowledge of the weapon. The prosecution must also prove that

the coincidence was attributable to something amounting to voluntary conduct on the part of the accused. Although the section did not contain any explicit defence, it must be interpreted to exclude the possibility of conviction for what might appear to be an involuntary act.

If a person acquires knowledge of an illegal weapon while travelling in a moving vehicle, criminal liability cannot be said to attach immediately. There must be some period of time afforded to the person to deal with the situation, such that if he tells the person carrying the weapon to leave the vehicle or leaves the vehicle himself, he would not have committed an offence. It is the conduct of the driver of the vehicle following the knowledge of the presence of the weapon in the vehicle that counts, and if the driver acts with appropriate dispatch to get either the gun or himself out of the vehicle, there is no voluntary act for the criminal law to punish. Therefore if S acquired knowledge of the presence of the weapon in his car while it was in motion, he would have been allowed reasonable opportunity to either remove himself or the weapon from the vehicle. If S only acquired knowledge of the gun at the point when J was leaving the vehicle, he should be acquitted. The Judge should have fully explained to the jury the necessary elements of the offence for which S was charged. He should have dealt more thoroughly with the circumstances in which guilt would follow if knowledge of the weapon were acquired after the vehicle was set in motion.

The trial judge was wrong in failing to instruct the jury on the use that it could make of the criminal record of J. J's credibility was very much under attack and was weakened both by his criminal record and by suggestions that his irregular immigration status would be affected by his involvement in the crime. Although the judge had a discretion in determining whether and how to instruct juries in this area, that discretion is not completely unfettered and in appropriate cases, it is subject to appellate review. The jury was entitled to know that J's criminal record could be taken into account in assessing his credibility.

R. v. Swaby [2001] 54 Ontario Reports 577