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IN THE SUPREME COURT OF BRITISH COLUMBIA

REGINA	)	**REASONS FOR JUDGMENT**
	)	
v.	)	**OF THE HONOURABLE**
	)	
HUBERT PATRICK O'CONNOR	)	**MR. JUSTICE THACKRAY**
	)	
	)	**(IN CHAMBERS)**

Counsel for the Crown: Greg Jones

Counsel for the Accused: Christopher M. Considine

Heard at Courtenay, B.C.: November l9, l992

APPLICATION

The accused applied to quash each of the four counts in the indictment. The indictment reads as follows:

Hubert Patrick O'CONNOR stands charged:

COUNT l: between January lst, l964 and November lst, l967, at or near the City of Williams Lake, in the Province of British Columbia, did have sexual intercourse with a female person who was not his wife, without her consent, CONTRARY TO SECTION l35(a) (S.C. l953-54 c.5l) OF THE CRIMINAL CODE OF CANADA AND AGAINST THE PEACE OF OUR LADY THE QUEEN, HER CROWN AND DIGNITY.

COUNT 2: between December lst, l965 and September 30th, l966, at or near the City of Williams Lake, in the Province of British Columbia, did have sexual intercourse with a female person who was not his wife, without her consent, CONTRARY TO SECTION l35(a) S.C.

l953-54 c.5l) OF THE CRIMINAL CODE OF CANADA AND AGAINST THE PEACE OF OUR LADY THE QUEEN, HER CROWN AND HER DIGNITY.

COUNT 3: between July lst, l965 and July lst, l967 at or near the City of Williams Lake, in the Province of British Columbia, did indecently assault a female person, CONTRARY TO SECTION l4l (S.C. l953-54 c.5l) OF THE CRIMINAL CODE OF CANADA AND AGAINST THE PEACE OF OUR LADY THE QUEEN, HER CROWN AND DIGNITY.

COUNT 4: between August lst, l965 and December 3lst, l966, at or near the City of Williams Lake, in the Province of British Columbia, did indecently assault a female person, CONTRARY TO SECTION l4l (S.C. l953-54 c.5l) OF THE CRIMINAL CODE OF CANADA AND AGAINST THE PEACE OF OUR LADY THE QUEEN, HER CROWN AND HER DIGNITY.

The application is brought pursuant to section 58l of the Criminal Code which reads in part as follows:

> 58l.(l) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.
>
> (2) The statement referred to in subsection (l) may be
>
> (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
> (b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
> (c) in words that are sufficient to give to the accused notice of the offence with which he is charged.
>
> (3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

DEFENCE SUBMISSION

Defence counsel submitted that:

> Section 58l is designed to ensure that the accused will know with sufficiency the offence for which he has been charged so that he may defend himself. If, upon the face of the indictment or, in the alternative, upon the face of the evidence and the material which has been provided to the accused, the indictment does not contain sufficient information, then it is void *ab initio* and cannot be cured by amendment or particulars.

Mr. Considine carefully led the Court through case precedents and evidence given at the preliminary inquiry. He concluded his submission on the law with the following summary:

> l. If there is a defect on the face of the indictment, the application to quash the indictment ought to be made before plea;
>
> 2. If there is a defect which is not readily apparent on the face of the indictment but becomes apparent upon information becoming available to the defence such as preliminary inquiry information, statements provided by the Crown, etc. then the defence ought to make the application to the Court at a reasonable time. In the case at bar, that information is known to the defence and therefore it is proper to make it prior to plea;
>
> 3. That it is proper for the Court, when considering whether or not an indictment is defective, to consider not only the indictment but also evidence which may be presented to it such as preliminary inquiry evidence;
>
> 4. That where an indictment is defective,

> either on its face or as a result of other evidence which becomes apparent, so as not to give the opportunity to the defence to properly prepare, it is void ab initio and must be quashed. It cannot be cured by amendment or particulars.
>
> 5. That where there is a possibility of the accused being prejudiced by lack of sufficiency, the count ought to be quashed.

Defence counsel submitted that when the indictment is viewed in light of the evidence it will be evident that the indictment is a nullity. He then reviewed the evidence.

A significant amount of the evidence relied upon in this application has been set forth in earlier Reasons of October 22, l992, and November 5, l992. I will, as much as possible keep repetition of evidence to a minimum in these Reasons.

COUNT l - COMPLAINANT P.B.

At the preliminary inquiry P.B. appears to agree in cross-examination that she told a police constable that "forced intercourse" took place in a car at a drive-in movie. She said this was because she was "pressured to remember as fast as I could".

The police constable agreed that this was where he thought the first intercourse took place.

Mr. Considine characterized this as the first version. The "second version" was given in chief by P.B. She said the first intercourse was in the accused's room at the school and that it was after the movie.

The "third version" is that P.B. said in cross-examination that "I can't remember that" when Mr. Considine suggested that the first intercourse did not take place until two or three months after the drive-in movie.

Defence counsel submitted that:

> Count l is not sufficient because it does not allow the defence to:
>
> (a) identify which transaction is being complained of;
>
> (b) the time of the transaction - was it directly after the drive-in film or was it a transaction which is being complained of some two or three months later.

COUNT 2 - COMPLAINANT M.J.

Once again the defence submitted that there was more than one version from the complainant.

The first version is that intercourse took place in the accused's room. She appears to relate it to an illness which she had which kept her at the school over Christmas.

In cross-examination she reiterated that it was around Christmas and took place in the accused's room. However, she conceded that she told a police constable that the intercourse was in her room. At the preliminary inquiry she said that statement by her was not true. She then agreed that the incident at the school "was not the first time." From an earlier question it might be taken that this is in reference to "making love for the first time".

The submission of defence counsel is as follows:

> Because the complainant is so vague as to both time and place, it is extremely difficult for the accused to know what transaction he is to defend himself against. The possibility of prejudice against the accused is self evident, and accordingly this count ought to be quashed.

Crown counsel made a statement on the record that the incidents of intercourse being alleged in counts one and two are both the "first" acts of intercourse between the accused and the complainants.

COUNT 3 - COMPLAINANT R.D.

In chief the complainant said she was seventeen or eighteen at the time of the incident and still a student. In cross-examination she conceded that she told a police officer that she was twelve years old, the year was l960 or l96l and she was in grade 3.

Defence counsel submitted that the transaction and date are not sufficiently identified.

Crown counsel pointed out that the indictment gives the dates as between July l965 and July l967. Crown counsel further submitted that if defence counsel asked for particulars they would be supplied.

COUNT 4 - COMPLAINANT A.H.

Defence counsel submitted that the complainant alleged indecent assault in l966 but that because of illness she cannot now remember dates.

JUDGMENT

In ***Brodie v. The King*** (l936) 65 C.C.C. 289 (S.C.C.) Mr. Justice Renfret for the Court said that an "imperative requirement" of section 58l [then s. 852] is that there be a statement that the accused committed an indictable offence; that the offence be specified; and that the statement is "in words sufficient to give the accused notice of the offence with which he is charged". He said the object is so the accused may have a fair trial. Therefore, the indictment must "identify with reasonable precision the act or acts with which he is charged" so that he may prepare

his defence".

This principle was echoed in ***R. v. WIS Developments Corporation Ltd.*** (l984) l2 C.C.C. (3d) l29 (S.C.C.).

WIS Developments was commented upon by Esson, J.A. in ***R. v. Cook*** (l985) 20 C.C.C. (3d) l8 (B.C.C.A.). He quoted with approval the remarks of Renfret, J.:

> It will be sufficient if the substance of the offence is stated; but every count must contain such statement 'in substance'. In our view, this does not mean merely classifying or characterizing the offence; it calls for the necessity of specifying time, place and matter...
>
> ...in each case the act charged against the accused, though described in the words of the enactment, is identified by specifying the time, the place and the matter. We think the examples in Form 64 are referred to for the purpose of indicating that they ought to be followed in substance. It is not sufficient in a count to charge an indictable offence in the abstract. Concrete facts of nature to identify the particular act which is charged and to give the accused notice of it are necessary ingredients of the indictment.

Further in ***Cook***, supra, Mr. Justice Lambert said:

> An indictment may also be defective in a way which is not apparent on its face, but which is only apparent if the indictment is considered in conjunction with the facts. But when the charge is laid, it is laid on the basis only of the body of information that has then been given to the Crown. The body of information available to the person charged may well be different. Neither body of

> information may be complete. A person knowing the body of information available to the Crown might conclude that the indictment was properly framed. A person knowing the body of information available to the accused might perceive a defect in the indictment. And there might be prejudice to the accused's defence if the nature of the defect was raised before the Crown's case was disclosed. If the Crown's case turned out to be limited in a particular way, then the defence might be irrelevant.
>
> An objection to an indictment which is not defective on its face is not required to be made before plea. But it should be made when the defence, and its significance to the conduct of the defence, ought to be apparent to the accused. Often that will be after the Crown's opening statement. Sometimes it will be later on, during the course of the trial. but if the objection is not made within a reasonable time after the defect, and its significance to the conduct of the defence ought to have been apparent to the accused, then the trial judge may decline to grant a motion to quash, either because the accused has not been misled or prejudiced by the defect or, alternatively, because the accused by his failure to take a timely objection, has waived the defect: see ***R. v. Peremiczky*** (l973) l3 C.P.R. (2d) 242, 25 C.R.N.S. 399 [l974] 2 W.W.R. 386.

Mr. Considine said that these remarks by Mr. Justice Lambert capture the foundation of the accused's application.

In ***R. v. MacLean*** (l988) 45 C.C.C. (3d) l85 (B.C.C.A.) the accused had unsuccessfully submitted at trial that the information was a nullity for failing to comply with section 58l (then section 5l0). The accused was a school teacher charged with indecently

assaulting two of his former pupils over a ten month period. He submitted that the information failed to identify sufficiently, or with adequate particularity, details of the alleged offence and therefore he could not identify the transaction.

The appeal was dismissed and in doing so Mr. Justice Anderson said at page l88:

> In my opinion, if s.5l0(3) of the *Code* is read in isolation and not in context of other provisions of the *Code* and without reference to practice, it cannot be said that the information in the case on appeal meets the requirements of s. 5l0(3). In other words, when read in isolation, the information does not conform to the judgment of Mr. Justice de Grandpré in *R. v. Côté* (l977), 33 C.C.C. (2d) 353, 73 D.L.R. (3d) 752, [l978] l S.C.R. 8 (S.C.C.), where he said at p. 357: "... the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial.
>
> In my opinion, however, all of the leading authorities are based on the following assumptions:
>
> (l) that s. 5l0(3) is not to be construed in isolation but in the context of other provisions of the *Code* and the practice of the criminal courts;
>
> (2) that the court may order particulars where it is satisfied that such an order is necessary for a fair trial
>
> (3) that the Crown is required to make prompt and full disclosure of its case to the accused, and
>
> (4) that the trial judge has wide discretionary powers with respect to informations and indictments for the purpose of securing a fair trial for the

accused.

Anderson J.A. then went on to refer to ***Cook***, supra, and other cases including ***R. v. Colgan*** (l986) 30 C.C.C. (3d) l83 (Man. C.A.). In ***Colgan*** the information was held not to be defective even though, as in ***MacLean***, the period during which the alleged offence took place was lengthy, the information did not reveal whether the alleged offence was persistent or continuing and the information did not specify or describe in detail the nature of the alleged offence.

Mr. Justice Anderson noted other leading cases which came to the same conclusion and then referred to ***WIS Developments***, supra. He said that ***WIS*** was an "exceptional" case wherein the statute and/or regulations referred to in the information related "to diverse and unrelated matters, thereby causing the possibility of prejudice to the accused".

The conclusion of Anderson J.A. in ***MacLean*** states, at page l9l:

> The effect of the above cases, as already stated, is that if an information states the time of the offence (although a lengthy period), the place, the victim and the offence (in the language of the enactment", it will not, except where there is a possibility of prejudice to the accused (as in *R. v. WIS Developments Corp. Ltd.*), be quashed prior to plea.

Counsel for the accused made much of the phrase "except where there is a possibility of prejudice to the accused."

COUNT l - P.B.

I do not agree that there are three "versions" that the accused must defend. I do not even agree that there are three versions. What Mr. Considine did in cross-examination was illustrate that the complainant has not been consistent in her stories. This does not undermine the particularity of the charge.

COUNT 2 - M.J.

Defence counsel have, as with count l, illustrated that the complainant has varied her story. However, in my opinion, the evidence from the complainant makes it clear as to the alleged event giving rise to the charge.

Defence counsel, on both counts l and 2, might feel that he conducted "successful" cross-examinations of the complainants. In particular, that he demonstrated weaknesses or inconsistencies in the complainants' testimony. If this proves to be the case then the defence will be able to exploit that at trial. I cannot see how the evidence of these complainants undermined the sufficiency of the notice which the accused has of the alleged offences.

COUNT 3 - R.D.

In earlier noted reasons I said:

> The inability of the complainants to recall times, dates and places would appear to me to be a significant problem for the Crown. If P.B. has given two distinctly different accounts as to when intercourse first took place, it will be the credibility of P.B. that will first be tested. Similarly regarding R.D. who might be faced with versions that vary by as much as seven years. As was said by Mr. Justice Stevenson in *R. v. L.(W.K.)*: "The fairness of a trial is not, however, automatically undermined by even a lengthy pre-charge delay. Indeed, a delay may operate to the advantage of the accused, since Crown witnesses may forget or disappear."

The indictment puts the date at between l985 and l987. If Mr. Considine is concerned that the Crown's case refers to an incident in l960 or l96l he has been told by Crown counsel to ask for particulars and the answer will be given.

COUNT 4 - A.H.

My earlier remarks apply here as well. That is, that the inability of A.H. to be clear as to dates does not undermine the foundation of the indictment.

On all of the counts I am of the opinion, in keeping with

Brodie, supra, that the indictment "identifies with reasonable precision the act or acts with which he [the accused] is charged" and that he is not prejudiced, or even possibly prejudiced, in the preparation of his defence.

Mr. Justice Anderson in ***MacLean***, supra, referred to the "golden rule" from ***R. v. Côté*** (l977), 33 C.C.C. (2d) 353, 73 D.L.R. (3d) 752, [l978] l S.C.R. 8, 40 C.R.N.S. 308, [l977] 2 W.W.R. l74, l3 N.R. 27l and said that "the trial judge has wide discretionary powers with respect to informations and indictments for the purpose of securing a fair trial for the accused." This is not, in my opinion, an exceptional case in the sense of ***WIS Developments***, supra.

I am of the opinion that the accused is well informed of the cases against him.

In my Reasons of October 22, l992, I said that "it is far from clear how confusion on the part of the Crown's main witnesses would form the foundation for a stay of proceedings at the instigation of the defence. The difficulty would seem to be one for the Crown."

That statement applies equally on this motion. Defence counsel appears to be seeking some form of summary judgment based upon a theory that to convict based upon the evidence at the

preliminary inquiry is not possible. This is not the time to make that determination.

If I were of the opinion that the information is defective it is open to the Court, in my opinion, to allow amendments or order particulars. In that I am not of the opinion that the information is defective I am not required to make such orders. However, it is open to defence counsel to ask for particulars which, it appears to me, would refine the places and times of the alleged offences.

In ***R. v. B.(G.)*** (l990) 77 C.R. (3d) 347 (S.C.C.) Madam Justice Wilson said at p. 359:

> However, since *Brodie* there has been an increased tendency for the courts, including this court, to reject insufficiency arguments on the basis that they are overly technical and an unnecessary holdover from earlier times. Thus the earlier authorities called for a greater degree of specificity than seems to be required today, but there are also more extensive corrective measures available to the Crown in the present Criminal Code.

The application is dismissed.

"A.D. Thackray, J."

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Vancouver, B.C.

November 24, l992.