

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 28 October 2010

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR ORDER FOR
PRODUCTION OF VAN BAAL NOTES

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves, pursuant to Rule 54, for an order directing prosecution witness General Adrianus van Baal to produce the contemporaneous notes he made during his time in Sarajevo.

2. On 27 October 2010, General van Baal indicated that he had contemporaneous notes from his time in Sarajevo, had reviewed those notes prior to giving testimony in this and other ICTY trials, and those notes had refreshed his memory.¹ He declined to voluntarily make those notes available for inspection.²

3. Although there appears to be no jurisprudence on this precise issue from the international Tribunals, it is well established in national systems that material used by a witness to refresh his or her memory before testifying should be made available to the parties.

4. The United Kingdom case of *Owen v Edwards* (1983) 77 Cr App R 191 is directly on point. There, a policeman, outside the court room and before giving evidence for the prosecution, refreshed his memory from a notebook which he did not use in the witness box. The Divisional Court held that defence counsel was entitled to inspect the notebook and to cross-examine the witness upon the material in the notebook from which the witness has refreshed his memory.³

5. The Canadian case of *R. v. Mugford* (1990), 58 C.C.C. (3d) 172 (Nfld. C.A.) is also on point. There, the defendant contended that he was denied the right to cross-examine a witness on the basis of a report from the Federal Bureau of Investigation which the witness testified he had looked at prior to giving his testimony. The Court of Appeals held that the trial judge should have ordered the production of the report to allow defence counsel to review the relevant portions.⁴

6. In the United States, Federal Rule of Evidence 612 provides that:

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

¹ Transcript of 27 October 2010, p. 8453

² Transcript of 27 October 2010, p. 8411

³ A copy of this decision is provided for the Trial Chamber's convenience as Annex "A".

⁴ A copy of this decision is provided for the Trial Chamber's convenience as Annex "B". See para. 27

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

7. The issue of production of a prosecution witness' notes arose earlier in this trial during the testimony of Colm Doyle. During the discussion, Judge Morrison observed that "normally the position is where a diary is referred to in court then it becomes a matter which can be disclosed to the Defence. For instance, if a police officer is giving evidence from his notebook, the same principle applies whether it's called a notebook or a diary, but the same principle of nondisclosure also applies in that those parts of the notebook which are not relevant to the case are not disclosed, and in your case it would be those parts personal to you."⁵ The witness agreed to disclosure of the notes and the Trial Chamber was not required to adjudicate the issue.

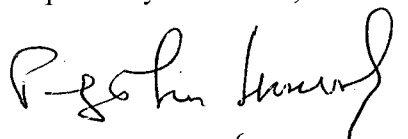
8. During his testimony, General van Baal has referred to statements made by General Milovanovic on their first meeting on 16 March 1994 in Pale indicating that the VRS would be sniping at trams in Sarajevo. No report of this meeting has been found. It would be important to determine whether any references to this meeting exist in the contemporaneous notes taken by General van Baal. Similarly, his notes of other meetings, telephone conversations, and events that are the subject of his testimony would be important for ascertainment of the truth and determination of the witness' credibility.

9. Therefore, it is respectfully requested that the Trial Chamber issue an order directing General van Baal to produce the contemporaneous notes he made during his time in Sarajevo, redacted to exclude matters of a personal nature.

Word count: 940

⁵ Transcript of 26 May 2010 at p. 2725

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', written in a cursive style.

Radovan Karadzic⁶

⁶ The assistance of Legal Interns James Jackson of the United Kingdom and Sanja Popovic of Canada in the research for this motion is gratefully acknowledged.

ANNEX "A"

***191 Owen v Edwards**

[Divisional Court]

21 March 1983

(1983) 77 Cr. App. R. 191

Mr. Justice McNeill and Mr. Justice Nolan

March 21, 1983

Evidence— Prosecution Witness Refreshing Memory from Notebook Outside Court— Defendant Entitled to Examine Contents of Notebook and Cross— Examine Witness upon Relevant Matters in it.

Where a prosecution witness refreshes his memory from a notebook outside court before giving evidence in the witness-box at the trial of a defendant, the latter is entitled to examine the contents of the notebook and cross-examine that witness on relevant matters contained in it. If such a witness is cross-examined beyond those limits into other matters, the cross-examiner takes the risk of the material being evidence and the document being exhibited and therefore available for use by the fact finding tribunal.

The defendant was charged with an offence against section 5 of the Public Order Act 1936. A policeman, who was a prosecution witness, made notes about the incident and refreshed his memory from his notebook outside court but did not refer to the notebook while giving evidence at the defendant's trial. Counsel for the defence then asked to see the notebook to check whether there were any discrepancies between the notes contained therein and the oral evidence which had been given. The police witness informed the court that he had only looked at part of his notes, but did not formally object to the proposed inspection. The justices ruled that the defence could inspect the notebook but could not cross-examine on matters contained in it which had not been referred to by the witness. Counsel for the defence then closed her cross-examination without inspecting the notebook and, no adjournment being sought, the justices proceeded to hear the whole of the evidence including that of a civilian witness and the police witness as to identity and that of the defendant himself.

The defendant was convicted and appealed on the ground that on the basis of the ruling on admissibility the case ought not to be remitted to the justices but the only proper course was to quash the conviction.

Held, that

(1) on the question of admissibility the justices had erred in law in ruling as they did, for the defendant was entitled to examine the notebook and cross-examine the police witness on the relevant matters contained in it; nevertheless,

(2) having regard to the way the matter was put before the justices and the absence of an application to adjourn for determination of the point in question, the Court did not think it right to remit the case to the justices; nor, in view of the fact that the defendant's evidence was clearly disbelieved, was it a case for quashing the conviction. Accordingly, the Court would, pursuant to its powers under section 6 of the Summary Jurisdiction Act 1857, make no order.

Taylor v. Wilson (1912) 76 J.P. 69 and Rigby v. Woodward (1957) 41 Cr.App.R. 73; [1957] 1 All E.R. 391 considered. *192

[For cross-examination as to documents, see Archbold [41st ed., para. 4-324.]

Case stated by West Yorkshire Justices sitting at Leeds.

1. On May 19, 1982, a charge was preferred by the prosecutor against the defendant that he on May 19, 1982, at East Stand, Elland Road, Leeds 11, contrary to section 5 of the Public Order Act 1936 in a public place, used threatening, abusive or insulting words or behaviour whereby a breach of the peace was likely to be occasioned.

2. The justices heard the said charge on October 5, 1982. The facts of the case are irrelevant to the question posed by the appellant, which relates to the following procedure: (a) after considerable cross-examination of Police Constable Edwards, a witness for the prosecution, he was asked by counsel for the defence whether he had made any notes of the incident of May 19. Constable Edwards had made notes of the incident, and although he had brought the notebook to court, he had not referred to the notebook whilst giving evidence; (b) counsel for the defence asked to see the notebook, to see if there were any discrepancies between the notes in his notebook, and the oral evidence which had been given; and (c) the officer informed the court that before the case had started he had looked only at the pan of his notebook which detailed the defendant's alleged replies.

3. It was contended by the defendant that he had a right to inspect the notebook and that he had a right to cross-examine the witness upon all entries relating to this case contained in his notebook.

4. It was contended by the prosecutor that the defendant did not have that right, as the notebook was not an exhibit and had not been referred to by the witness when giving evidence, although the prosecutor did not formally object to the proposed inspection.

5. The justices were not referred to any cases.

6. The justices were of opinion that as the prosecutor had no objection, the defendant could inspect the notebook but was not entitled to cross-examine the witness on matters contained therein, which had not been referred to by the witness. Accordingly the defendant was not allowed to cross-examine on those matters on which the witness had not refreshed his memory. Counsel for the defence then closed the cross-examination of the witness without inspecting the notebook. The hearing proceeded with the defendant giving evidence. He was convicted and was sentenced to two months' imprisonment suspended for one year. In addition he was ordered to pay witness expenses of £79.84.

The defendant appealed.

7. The question for the opinion of the Court was whether the justices were wrong in law in respect of their ruling that the defendant could inspect but was not entitled to cross-examine a prosecution witness upon relevant matters contained in and arising out of a written statement contained in a notebook and made by the witness at a time prior to his giving of oral evidence at the hearing.

Miss Felicity Davies for the defendant. *Alistair McCullum* for the prosecutor.

McNeill J.:

This is an application by way of case stated by justices sitting at Leeds in respect of a determination on October 5, 1982, when the defendant was charged with an offence under section 5 of the Public Order Act 1936, that is to say that he in a public place used threatening, abusive or insulting words or behaviour whereby a breach of the peace was likely to be occasioned. *193

The event was a rugby league match at the Elland Road ground in Leeds and it was alleged against the defendant that he, being a member of the crowd, had thrown a bottle towards the pitch which had struck a barrier close to a police constable.

The evidence presented against the defendant, as appears from what counsel has

told us, was that of a civilian witness who identified the defendant as the bottle thrower, a police officer who did not purport to identify the defendant but spoke of his arrest and a police officer named Edwards, who is the prosecutor and respondent.

The application is directed to a question which arose in the cross-examination of the prosecutor. Counsel who now present the application appeared for the defendant at the Magistrates' court. The issue for the justices was a plain one: was it proved that the defendant was the person who threw the bottle? The prosecutor was cross-examined and, in the course of cross-examination, was asked whether he had made any notes of the incident. He had not in his examination-in-chief sought to refresh his memory from any notebook and in answer to questions said that he had made notes; he had brought his notebook to court; he had not referred to it whilst giving evidence but that he had looked at that part of his notebook which detailed the accused's alleged replies to him before he came into court, that is to say in so far as he had refreshed his memory, he had done it outside the court and not in the witness-box.

Counsel for the defendant asked to see the notebook for the purpose of seeing whether there were any discrepancies between the notes and the oral evidence. The prosecutor at first indicated no objection but the justices and their clerk said that it was not permitted, and then argument developed and as a result the justices gave a limited permission to counsel to see the notebook. According to the case, the matter went in this way: " It was contended by the defendant that he had a right to inspect the notebook and that he had a right to cross-examine the witness upon all entries relating to this case, contained in his notebook. It was contended by the prosecutor that the defendant did not have that right, as the notebook was not an exhibit and had not been referred to by the witness when giving evidence, although the prosecutor did not formally object to the proposed inspection." No cases were referred to. The justices said this: " We were of opinion that as the prosecutor had no objection the defendant could inspect the notebook but was not entitled to cross-examine the witness on matters contained therein which had not been referred to by the witness. Accordingly the defendant was not allowed to cross-examine on those matters on which the witness had not refreshed his memory. Counsel for the defence then closed the cross-examination of the witness without inspecting the notebook." The matter then proceeded with the defendant giving evidence. At the end of the day he was convicted and he was sentenced to a term of imprisonment which was suspended.

The question posed for the opinion of this Court is " whether the justices are wrong in law in respect of their ruling that the defendant could inspect but was not entitled to cross-examine a prosecution witness upon relevant matters contained in and arising out of a written statement contained in a notebook and made by the witness at a time prior to his giving of oral evidence at the hearing."

It is right, as counsel accepts today, that the ruling or the advance warning of the ruling having been given counsel completed cross-examination before looking at the notebook to see whether there was any material upon which cross-examination might have taken place. Again, it does not appear from the case but we are told by counsel that there was, in her view, one matter which might have gone to identification in the *194 notes in the notebook. It might have gone to identification in the sense not of some positive averment but because of the absence of certain matters.

It is also right to say that having taken that course, counsel informs us that when the justices gave their ruling— that ruling which is now questioned by the case stated— she did not ask the justices to adjourn so that the opinion of this Court

could be taken upon the question of law because having informally raised that matter with the clerk he had forcibly dissuaded her from doing so.

Curiously, the point whether or not an accused's representative may ask to see the notebook of a police officer, or indeed the statement of a witness, from which the witness has refreshed his memory not in the witness-box but outside the door of the court, has not been decided in England. There is a passage in Archbold (41st ed., 1982) para. 4-324, which reads as follows: " If the witness has not referred to any book in his evidence for the purpose of refreshing his memory, and has merely admitted in cross-examination that he did make a note, it has been held in Scotland that he cannot be compelled to produce the book: *Hinshelwood v. Auld* (1926) S.C.(J.) 4 (police officer's notebook)." The learned editors continue: " It is unlikely that this decision would be applied in England or Wales. If, for example, the witness admitted that he had been refreshing his memory from the notebook outside the court door, it would be odd indeed if he could not be required to produce the document after entering the witness-box."

We have been referred to cases on the general proposition as to the production of documents. It is of course clear and hardly needs authority but we were referred to *Senat v. Senat* [1965] 2 All E.R. 505 and the words in particular of Sir Jocelyn Simon P. on p.512 that where a document has been used to refresh memory in court then clearly the defendant is entitled to see it. Equally, the right to cross-examine on previous inconsistent statements is well recognised: see, for example, the judgment of this Court in *Worley v. Bentley* (1976) 62 Cr.App.R. 239; [1976] 2 All E.R. 449, where Kilner Brown J. giving the judgment of this Court, seemed to accept it as axiomatic that a statement would have been shown to the defence if inconsistent with the testimony, and the opinion of the Privy Council in *Baksh v. R.* [1958] A.C. 167, where Lord Tucker makes observations to the same effect. Those observations are to my mind also in line with the guidelines that were issued by the Attorney-General, to be found in (1982) 74 Cr.App.R. 302 as to the making available to the defence of what is called " unused material." Those guidelines, of course, as I read them, apply only to proceedings on committal and have not been applied so far as the Court has been informed to proceedings in the Magistrates' court. ¹

The whole tenor of authority appears to indicate that the defence is entitled to see such documents, including notebooks and statements, from which memory has been refreshed subject, of course, only to the well-established rules that a witness can be cross-examined having refreshed his memory upon the material in his notebook from which he has refreshed his memory without the notebook being made evidence in the case, whereas if he is cross-examined beyond those limits into other matters, the cross-examiner takes the risk of the material being evidence and the document being exhibited and therefore available for use by the fact finding tribunal.

As I say, the justices came to the conclusion that counsel was entitled to inspect the notebook but not entitled to cross-examine the witness on matters contained in it and which had not been referred to by the witness. It seems to me that on that *195 aspect of the case I am in total agreement with the learned editors of Archbold in saying that the rules which apply to refreshing memory in the witness-box should be the same as those which apply if memory has been refreshed outside the door of the court or, in the words of the learned editor. " It would be odd if it were otherwise." It is not for this Court on these facts to determine how much earlier than giving evidence the line is to be drawn. That will be for the fact-finding tribunal or some other court to consider, if necessary. On the point of law as posed by the justices, my answer would be that they were wrong in law.

However, that does not conclude the matter since, in the events which I have

described, no adjournment having been sought, the justices proceeded to hear the whole of the evidence which included, as I have said, the evidence of the civilian witness and the police officer as to his identity and the evidence of the defendant himself. He clearly was not believed.

Counsel for the defendant has urged upon us that in the circumstances we should quash the conviction. I confess to some surprise at that submission when the case does not invite that course. Counsel has drawn attention to two decisions of this Court. The first is *Taylor v. Wilson* (1912) 76 J.P. 69 and the second is *Rigby v. Woodward* (1957) 41 Cr.App.R. 73; [1957] 1 All E.R. 391.

In both those cases this Court took the view that it was proper to quash a conviction. In the first case *Taylor v. Wilson* the question was on the admissibility of evidence, the evidence being a prior relevant conviction upon the information then against the appellant for being the holder of a justices' licence to sell intoxicating liquor at the Bay Horse Inn in Bolton, that he unlawfully suffered his premises to be used in contravention of the Betting Act. Apparently it had earlier been proved that he had used those premises for the purpose of betting with persons resorting thereto, and that conviction was allowed by the justices to be received in evidence upon the charge then before them. The court took the view that that was not proper, and in the course of his judgment Lord Alverstone C.J. said this at p.71: " I express no opinion as to the court's powers beyond saying this— that I should require strong arguments to convince me that where a conviction has been arrived at on a wrong ruling of law the court ought to send the case back to be tried again unless the justices, as is sometimes done, ask for directions and adjourn the proceedings in order to obtain those directions." Bankes J. in the course of the same case, refers at p.71 to the right of the parties to apply for a case to be stated and if necessary to ask for the matter to be remitted on the determination by this Court of the point of law on which they had made a ruling.

In *Rigby v. Woodward* (1957) 41 Cr.App.R. 73; [1957] 1 All E.R. 391 the material passage is in the judgment of Lord Goddard C.J. at p.77 and p.393G of the respective reports as follows: " Sometimes justices before they have decided a case have some question of law arising before them and they state a case and ask for the opinion of the court. There are often cases in which justices dismiss the information and the prosecution brings the case up, saying that there has been a mistake of law or on the facts proved and that it follows that the only proper decision should have been a conviction; or again a defendant may bring up the case and say that on the facts found by the justices he was entitled to be acquitted. There is no power here to order a retrial. From time to time where justices have dismissed an information, this court has, on finding they were wrong in dismissing the information, ordered that they should resume the hearing of the case because, for example, they have not heard the defence. If we sent the present case back, I do not see how the justices could deal *196 with it." He then went on to deal with the circumstances of that case which explained that proposition.

The circumstances were that the appellant had been charged with another man with an offence of unlawful and malicious wounding. It was a serious matter but in the course of the trial before the justices the co-defendant went into the witness-box and said it was not he but the appellant who hit the complainant. In the ordinary way he was open to cross-examination on that. The justices decided that they would not allow the cross-examination and they acquitted the co-defendant Lord Goddard's view of the possibility of sending the case back for retrial was founded on the fact that the co-defendant, having been acquitted, could no longer be available (by compulsory process) as a witness whom the appellant could cross-examine.

It is said that in the circumstances and on the basis of the ruling as to admissibility the matter ought not to be sent back and the only proper course is to quash the conviction. I have come to the conclusion that that would not be appropriate here. I am very conscious of the fact that this Court is disinclined to express a conclusion on what is in reality an academic question in the events which happened. I do not think, having regard to the way in which the matter was put before the justices and in the absence of an application to adjourn for determination of this point, it would be right to remit the case. Having indicated the view on the law which I have formed, it seems to me the only proper course open to this Court under section 6 of the Summary Jurisdiction Act 1857, which empowers the court to make such other order in relation to the matter as the court may think fit, is to say that there should be no order.

Nolan J.:

I agree.

Representation

Solicitors: Samuel & Green agents for John Spittle & Howard, Warrington, for the defendant. M. D. Shaffner, Wakefield, for the Crown.

ANNEX "B"

1990 CarswellNfld 76
58 C.C.C. (3d) 172, 86 Nfld. & P.E.I.R. 91, 268 A.P.R. 91

R. v. Mugford

Walter Douglas Mugford Appellant v. Her Majesty The Queen Respondent

Newfoundland Court of Appeal

Morgan, O'Neill, Marshall JJ.A.

Judgment: July 30, 1990
Docket: Doc. 66

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Counsel: *Graham Watton* for the Appellant.
Thomas Eagan for the Respondent.

Subject: Criminal

Criminal Law --- Appeals — Appeal of indictable offence — Appeal of conviction or acquittal — Grounds — Verdict unreasonable or unsupported by evidence

Criminal Code, R.S.C. 1985, c. C-46, s. 338(1)(b)(i).

Accused was convicted of 24 counts of fraud and appealed from said convictions on a number of grounds of error of law, specifically in the trial Judge's interpretation of the element of dishonesty in criminal fraud, his failure to exclude certain opinion evidence of the investigating peace officer and his refusal to allow counsel to examine a report from the Federal Bureau of Investigation in the United States to which the witness had referred prior to testifying. Held, the appeal was allowed, the convictions were set aside and a new trial was ordered. There was a misapplication of the law relative to the essential ingredients of criminal fraud.

Judgment of The Court (*delivered by Marshall, J.A.*):

1 *May 3, 1990*

2 The appellant was convicted by a Provincial Court Judge of twenty-four counts of fraud. Count No. 1 reads as follows:

The informant says that he has reason to believe and does believe that Walter Douglas Mugford of 5A Doyle Apartments, Corner Brook, Newfoundland, between the 1st day of July, A.D., 1983, and September 6, A.D., 1984 at or near Corner Brook in the Province of Newfoundland did by deceit, falsehood or other fraudulent means defraud Narciso

Pereyras of a sum of money not exceeding two hundred dollars by selling advertising that was not delivered, contrary to Section 338(1)(b)(i) of the Criminal Code.

3 Each of the other counts charged a similar offence, the only variation being the name of the person allegedly defrauded and the time periods within which the fraud was alleged to have been perpetrated.

4 As I am of the opinion that there should be a new trial, reference will only be made to such evidence as in necessary for this opinion.

5 The trial judge found as a fact that some time prior to July 1, 1982, the appellant had made a general inquiry of Universal Plastics Limited in the State of Tennessee with a view to setting up some type of advertising business relating to the sale of advertisements upon telephone book covers. By letter dated July 1, 1982, Universal outlined the company's policies with respect to the granting of a franchise for its covers and indicated the cost for an order of 10,000 of them. No further action was taken by Mr. Mugford in that regard prior to his effecting sales of advertising space on covers which he undertook to provide in time for the new telephone directory being printed in the Corner Brook area.

6 The telephone book covers containing the advertisements sold by Mr. Mugford were not delivered as promised and on March 26, 1984, one of the purchasers made a complaint to the Department of Consumer and Corporate Affairs whereupon the matter was referred to the Royal Canadian Mounted Police. Mr. Mugford was interviewed by Constable Michael Renchko on April 2nd, 1984, and following a lengthy investigation, he was arrested and charged on April 30, 1985.

7 The Crown contended that the circumstances surrounding these sales established that Mr. Mugford defrauded the purchasers in contravention of the Criminal Code. The trial judge agreed and convicted him laying emphasis on Mr. Mugford's dishonesty in telling each customer that he or she was buying either the last or next to last ad.

8 The appeal from conviction was taken on a number of grounds of alleged errors of law. The most significant relate to errors by the trial judge in his interpretation of the element of dishonesty in criminal fraud, his failure to exclude certain opinion evidence of the investigating peace officer and his refusal to allow counsel to examine a report from the Federal Bureau of Investigation in the United States to which the witness had referred prior to testifying.

9 Before dealing with the reasons for concluding that a new trial is warranted, it will be useful to set out those aspects of the law relating to fraud in the criminal context which brings me to my opinion.

The Nature of Fraud:

10 The charges in this case were laid under s. 338(1)(b)(i) of the Criminal Code of 1970 as amended which reads:

Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security,

...is guilty of an indictable offence and liable to a term of imprisonment for a term not exceeding two years,

11 The principal Canadian authority which deals with the substantive offence of criminal fraud is *R. v. Olan et al.*, [1978] 2 S.C.R. 1175. In that case three accused were charged with fraud in connection with the diversion and use of corporate assets for their own personal purposes in relation to their takeover of the company's shares. In referring to the test for fraud, Dickson J. stated at p. 1182:

Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of "defraud" but one may safely say, upon the authorities, that two elements are essential, "dishonesty" and "deprivation". To succeed the Crown must establish dishonest deprivation.

12 Since in my view the trial judge erred in failing to properly direct himself to the standard of dishonesty required for criminal fraud, some general observations concerning the test to be employed in determining whether this key element is present are in order before discussing its application to the circumstances of this case.

The test of dishonesty:

13 In addressing what constitutes dishonesty in its criminal context, one must bear in mind that not all conduct which falls short of that which is generally accepted as being forthright will be deemed dishonest. This point was made in *R. v. Doren* (1982) 66 C.C.C. (2d) 448. There Dubin J.A., in taking issue with the trial judge's premise that business practices falling short of "straightforward or honourable dealings" formed a basis of fraud, stated at p. 452:

...it cannot be said that in every case where the trier of fact determines that conduct falls below the highest standard of straightforward or honourable dealings that that finding alone would be sufficient to make out a case of fraud or conspiracy to defraud. I think that imposes too high a standard against which to measure criminality.

Shortly afterwards, while directing himself to conduct in the commercial world, Dubin J.A. went on to state at p. 453:

A person's business conduct or ethics may fall short of being of the highest standard of straightforward or honourable dealings and yet it could not be said that such a failure would constitute a crime in every case.

14 These words have, perhaps, particular relevance where the alleged fraudulent act was, as in the case at bar, a misrepresentation. In such an instance, the initial task is to determine whether the representation was deliberately dishonest and amenable to

criminal sanction. This requires that the misrepresentation be categorized by the trier of fact with the objective of determining whether it was of such a nature that it could be said to have resulted in the victim being deprived of his or her property in furtherance of the perpetrator's own interests. Further, the dishonest representation must have preceded or have been contemporaneous with the deprivation as there must be a causal link between the deprivation and the dishonesty. These elements having been established, a further enquiry ensues as to whether the accused in fact acted with mens rea.

The misdirection as to the nature of fraud:

15 In this case the only representation of the accused found by the trial judge to be antecedent or contemporary to the payment of monies by the alleged victims was his statement, made to each one of them, that they were buying the last or next to last ad. This finding, and the effect ascribed to it, was expressed in the following passage of his judgment:

Here in the present case each were was told that they were buying either the last ad or the next to last ad. That to my way of thinking is deliberately withholding information, and is therefore, in my estimation dishonest. I base that primarily on the grounds that each witness stated clearly and unequivocally that had they known that they were buying only the ninth or tenth or fifteenth or twentieth ad out of fifty odd, would have said "No, I am not interested". Each particular witness was clear and unequivocal on that point ... It may be viewed by the accused as a selling tactic, but in the court's view it was a dishonest selling tactic and amounts to deception. After all, to deceive is to believe or induce a man to believe a thing is true which is false in which the person practising deceit knows or believes it to be false. He induced, in each particular instance, each individual to bring about a state of mind which was not correct.

16 With respect, it is not sufficient to base fraud merely upon a finding that the appellant induced a state of mind in his customers which was not correct. Any misrepresentation may have that effect. Criminal dishonesty extends further. As already noted one must first ask whether the misrepresentation caused a deprivation to the alleged victim of such a nature that on an objective view he or she could be said to have been cheated out of his or her money.

17 In the present case it is important to note that the misrepresentation held to have induced the fraud does not by itself necessarily connote criminal dishonesty. It would be a startling extension of criminal liability if every statement urging the public to purchase one's wares because only a limited supply remain were by itself to be visited with criminal sanction. Since the statement does not in itself patently evoke potential criminal dishonesty, before such a characteristic may be ascribed to it, its import must be assessed in relation to all surrounding circumstances.

18 In this case the trial judge did review acts of the accused subsequent to his sale of the advertising. These related primarily to the accused's contacts with victims of the alleged fraud and a prospective supplier of the telephone book covers. However, these actions appear to have been viewed by him from the aspect of the accused either not

being entirely straightforward with his customers in his excuses for non-delivery of the advertising or his taking steps to hide his inaction following commencement of the investigation. They were not directly related to the acts of deprivation or considered from the perspective whether they served to cast a criminally dishonest hue upon the impugned representations.

19 In convicting the appellant solely on the basis of his "deception" in misrepresenting the number of ads remaining to be sold, the trial judge was in error. There was evidence which, if accepted by the trial judge, could have been taken as establishing that the appellant's misrepresentations went beyond mere "puffing" or even a civil wrongdoing and amounted to "dishonest deprivation". The trial judge, however, failed to properly direct his mind to that evidence and to make a specific finding upon it. That misdirection amounted to a non direction necessitating a new trial.

Other Grounds of Appeal:

20 Although the finding of misapplication of the law relative to the essential ingredients of criminal fraud disposes of this appeal, I deem it necessary to deal with two of the other grounds of appeal.

21 The first of these relates to the complaint by counsel for the appellant that the trial judge permitted the Royal Canadian Mounted Police constable who had conducted the investigation to voice certain opinions and conclusions about four different gimmicks and schemes allegedly used by the appellant in inducing individuals to purchase advertising. This objection was centered on the premise that the constable's opinion amounted to a conclusion on the ultimate issue which was entirely within the purview of the trial judge.

22 In *Gratt v. The Queen*, [1982] 2 S.C.R. 819, Dickson, J. at pp. 836-837 rejected the general proposition that a non-expert witness's opinion upon the ultimate issue must be excluded when he stated at p. 837:

I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived.

23 Thus, where a witness is in a better position than the court - such as was the police officer who had personally observed the degree of the accused's impairment in that case - such evidence is admissible even if it touches upon the ultimate issue to be decided. Such was not the case here, however, since the opinions formed and the inferences drawn by the investigating constable were not based upon facts perceived by him but upon what he had been told by third parties. With respect to such evidence, Dickson J. also had pointed out at p. 836:

If the court is being told that which it is in itself entirely equipped to determine without the aid of the witness on the point then of course the evidence is supererogatory and unnecessary. It would be a waste of time listening to superfluous testimony.

24 The evidence of Constable Renchko should have been confined to the facts obtained by him during his investigation. His opinions based upon information obtained from the complainants were irrelevant and should not have been admitted. Accordingly, I would allow that ground of appeal.

25 The other ground which merits comment is the allegation of counsel for the appellant that he was denied the right to cross-examine a witness on the basis of a report from the Federal Bureau of Investigation which that witness testified he had looked at prior to giving his testimony. Crown counsel had refused to produce the report claiming it was an internal police document and it had been not used to refresh the witness's memory. The trial judge sustained this latter position.

26 Where a witness uses a memorandum to refresh his or her memory, opposing counsel has the right to look at it when cross-examining. Where that memorandum is written by a third party real questions arise as to whether a witness ought to be allowed to refresh his or her memory from another's notes (see McWilliams: Canadian Criminal Evidence, second edition, pp. 1004-1005).

27 In this case the transcript does not establish whether the document was in fact used to refresh the witness's memory for the purpose of the evidence which he gave at the trial. Had it done so the trial judge, in my view, should have ordered the production of the report to allow defence counsel to review the relevant portions. I would accordingly dismiss that ground of appeal.

28 In the result, I would allow the appeal, set aside the conviction and order a new trial.

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