

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

HER MAJESTY THE QUEEN

- versus -

RICHARD ALLAN LUPTON

HEARD: At Annapolis Royal, Nova Scotia, the 14th  
day of September, A.D. 1982

BEFORE: His Honour Judge Peter Nicholson, J.C.C.

DECISION: The 7th day of October, A.D. 1982

COUNSEL: David Cottenden, Esq., for the Crown  
Stephen Mattson, Esq., for the Accused

NICHOLSON, J.C.C.

The Accused was charged under Section 4(2) of Narcotic Control Act for having in his possession a narcotic for the purpose of trafficking. He elected to be tried by a Court composed of a Judge sitting without a Jury.

Constable Robert Brian Oldford, a member of the Royal Canadian Mounted Police at Bridgetown, testified that he was patrolling the highway at Torbrook, in the County of Annapolis, Nova Scotia, on the 25th of September, 1981, at or about the hour of 9:00 in the evening when he overtook a motor vehicle bearing an Ontario license plate. The vehicle was in the process of turning into a driveway into the residence of one Fred Johnson. At this point Oldford turned on the emergency lights on the roof of his police vehicle. He observed that there were two persons in the car ahead of him. The car ceased its turning manoeuvre and proceeded straight on down the highway, just after he put the emergency lights on.

Oldford followed with his headlights on the highbeam, and saw the Accused sitting in the passenger seat looking back towards the police vehicle that was following him. He described the movements that the Accused made as he watched him and asserted that these movements were consistent

with the Accused having reached around to hide something under the seat.

The car was then stopped and the driver came out and came back to the police vehicle. Oldford went immediately to the Ontario car and got the Accused out of it and locked it up pending a search of it. He identified the driver as Alec Taylor of Port George, Annapolis County. By means of the police radio system he then called for help to search the car. While he was waiting the Accused came to Constable Oldford and asked permission to get his jacket out of the police car. Oldford refused to open the car.

Shortly thereafter Constables Mitchell and Roy arrived and a search of the car was undertaken, and on the passenger side of the car, jammed in the separation of the back and the bottom of the seat, Exhibit C-1 was found containing 89 cigarettes which were later identified as containing marihuana.

The Crown proved the continuity of possession of the Exhibits and also proved that a proper notice of the Certificate of Analysis had been given to the Accused before the trial.

On the 25th of September at 10:45 p.m., the

Accused gave a written Statement to Constable Oldford which Defence Counsel admitted as being a voluntary statement.

That Statement was as follows:

"Q. Rick, I read you the police warning in the police car, Do you understand it?

A. Yes

Q. Do you realize that you are going to be charged under the Narcotic Control Act and you don't have to give a statement if you don't want to?

A. Yes.

Q. Do you want to tell me anything about the joints I am showing you? (Said he'd like time to think) Are they yours or the drivers?

A. They're not mine and I don't think they are the drivers.

Q. You are denying they are yours are you?

A. I didn't grow them, I didn't produce them, and therefore they are not mine. Also, I didn't buy them.

Q. Did you touch them just before I stopped the car?

A. Yes.

Q. Under what circumstances?

A. I don't want to say anything more."

There was ample evidence to support a finding that Exhibit C-1, a bag containing 89 cigarettes found in the vehicle, was with the exception of 10 cigarettes removed

for the purpose of analysis, the same cigarettes as were taken from the motor vehicle at Torbrook on the seat where the Accused had been seen sitting at the time the motor vehicle was stopped.

After considering the evidence and hearing Counsel on the issue of possession I found that there was evidence to support a finding that the Accused had (a) knowledge, (b) control and (c) custody of the narcotic, and having no doubt about that part of the case I found that the Accused was in possession of the narcotic that had been seized as Exhibit C-1.

Once that finding had been made, Counsel for the Crown proceeded under the provisions of Section 8 of the Narcotic Control Act to move that the second stage of the trial commence under which the Accused would be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking. Counsel for the Accused then declined to call evidence but moved that the Court should find that the onus placed on the Accused under Section 8 of the Narcotic Control Act offends the provisions of the Constitution Act, Part I, Schedule B, the Canadian Charter of Rights and Freedoms, Section 11(d) of which reads:

"Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair

and public hearing by an independent and impartial tribunal."

The Constitution Act further provides under Part 7, Section 52, as follows:

"(1) The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect."

Counsel for the Accused was of course arguing that the Constitution Act has primacy over the Narcotic Control Act and he was urging that Section 8 of the Narcotic Control Act was in conflict with Section 11(d) of the Constitution Act.

In assessing whether there is an actual conflict one must have regard to Section (1) of the Constitution Act which recites:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In judging what can be so justified one should have recourse to the jurisprudence built up relating to the Bill of Rights, which, by the way, is still in force in Canada. Its provisions relating to the presumption of innocence are almost identical to Section 11(d) of the Charter save that the former is expressed in the negative and the

latter in the positive.

Section 2(f) of the Bill of Rights is as follows:

"2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

.....  
(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or"...

Some jurisprudence is available with respect to testing out the application of Section 2(f) of the Bill of Rights. The Supreme Court of Canada in a majority judgment in R. vs. Appleby (1971) 3 C.C.C. (2) 354 (S.C.C.) recognized that if a statute purports to raise a presumption as to the guilt of an accused upon the establishment of certain facts by the Crown, as distinct from the presumption of certain specific factual ingredients of an offence, such an enactment would be contrary to the Bill of Rights, and I presume also to the Charter. The Court went on to find that the burden imposed under statutes such as Section 8 of the Narcotic

Control Act can be reconciled with the Bill of Rights when one considers that the kind of burden imposed by Section 8 is evidentiary in nature and merely imposes a secondary responsibility of establishing the nonexistence of a particular fact or of facing the automatic presumption of the contrary fact. Laskin, J, at page 365, observed:

"In my opinion, the test for the invocation of s.2(f) is whether the enactment against which it is measured calls for a finding of guilt of the accused when, at the conclusion of the case, and upon the evidence, if any, adduced by Crown and by accused, who have also satisfied any intermediate burden of adducing evidence, there is reasonable doubt of culpability. Section 224A(1)(a) is not of this character."

\*Now Section 237 of the Criminal Code.

On this authority, the concept of a reasonable doubt is therefore not irrelevant during the second stage. Its application cannot be directed towards the attempt by the accused to meet his statutory burden of proof; rather it must be directed to some other fact or matter which is still in issue at the conclusion of the trial.

Interesting dicta of Laskin, C.J.C., appears in Appleby at 365:

"I do not construe s.2(f) as self-defeating because of the phrase 'according to law' which appears therein. Hence, it would be offensive to s.2(f) for a federal criminal enactment to place upon the accused the ultimate burden of establishing his innocence



with respect to any element of the offence charged.

.....  
Hence, I do not regard s.2(f) as addressed to a burden of adducing evidence, arising upon proof of certain facts by the Crown, even though the result of a failure to adduce it would entitle the trier of fact to find the accused guilty."(emphasis added)

Following this line of thinking, the Nova Scotia Supreme Court (Appeal Division) in R. vs. Vincent (1975), 26 C.C.C. (2d) 236 found that in his attempt to rebut the presumption of an intention to traffic, no evidence whatsoever need be led by the accused, as he is entitled to reply upon any evidence coming before the court during the course of the entire trial.

That case specifically ruled in favour of applying the effect of the Appleby decision to prosecutions under the Narcotic Control Act.

The principles in these cases are binding upon me. Applying them to the case at Bar I find that Section 8 of the Narcotic Control Act does not offend either Section 11(f) of the Charter, or Section 2(f) of the Bill of Rights. It is my further opinion that Section 1 of the Charter must be read in the context of the jurisprudence on Section 2(f) of the Bill of Rights in that Section 8 of the Narcotic Control Act has been held to be a reasonable limit

prescribed by law and is demonstrably justified in a free and democratic society.

The motion made by defence counsel is therefore dismissed, and the Accused is at liberty to call evidence if he so wishes.

DATED at Annapolis Royal, Nova Scotia,  
this 7th day of October, A.D. 1982.



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JUDGE OF THE COUNTY COURT OF  
DISTRICT NUMBER THREE

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