FC 00304
CA 86 010

Appeal No.: N.W.T.620

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

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THE COURT:

THE HONOURABLE CHIEF JUSTICE LAYCRAFT
THE HONOURABLE MR. JUSTICE HARRADENCE
THE HONOURABLE MR. JUSTICE KERANS

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BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

FREDERICK ALLEN AVERY

Respondent

APPEAL FROM THE JUDGMENT OF HIS HONOUR JUDGE R. M. BOURASSA OF THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES GIVEN AT YELLOWKNIFE ON OCTOBER 15, 1985

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE KERANS
CONCURRED IN BY THE HONOURABLE CHIEF JUSTICE LAYCRAFT
DISSENTING REASONS BY THE HONOURABLE MR. JUSTICE HARRADENCE

COUNSEL:-
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for the Crown appellant

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for the accused respondent

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE KERANS

This is a Crown appeal from an acquittal on a charge, under s. 98(12) C.C.C., of possession of a weapon in violation of an earlier judge's order prohibiting possession as a consequence of a conviction for violent crime.

The fact was not denied that the accused was in possession of a gun in contravention of the terms of a prohibition order made March 20, 1985 and entered June 18, 1985 pursuant to s.98 C.C.C.. The learned trial judge nevertheless acquitted because, he said, the earlier order (which by happenstance had been made by him) was "defective". This was correct in the sense that he had failed to make any order under s. 98(13) C.C.C. nor indeed to address his mind to the issue posed by that sub-section, which provides:

> An order made pursuant to subsection (1), (2), (6) or (7) shall specifiy therein a reasonable period of time within which the person against whom the order is made may surrender to a police officer or firearms officer or otherwise lawfully dispose of any firearm or any ammunition or explosive substance lawfully possessed by him prior to the making of the order, and subsection (12) does not apply to him during such period of time.

This provision is not without relevance in this case because the offence occurred within four months after the order and came to light because the accused was trying to sell his gun in an apparent attempt to rid himself of it in rough compliance with the prohibition. The learned trial judge, admirably aware of his own earlier failing, perceived that he had unfairly exposed the accused to this charge.

Notwithstanding sympathy for the embarrassment of the learned trial judge, the appeal must be allowed. The governing rule, stated on the narrowest basis, is that a territorial judge exercising the powers of a magistrate under the Criminal Code cannot refuse to treat as lawful an order of record of another judge, of co-ordinate jurisdiction. The rule was recently re-stated by Dickson, C.J. in R. v. Wilson [1984] 1 W.W.R. 481 (S.C.C.), Dickson, C.J., for example, said at p.488:

> I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs.

In this case the accused could have, and did not, seek relief from the original error by appeal if not writ. In the face of his having failed to do so, he must obey the order which he chose to let stand. When he argues now that he should not be convicted for the breach of it because it is bad, he is saying he did not have to obey it. A collateral attack is nothing less than a request for an affirmation of defiance.

The reason for the rule is that the law must encourage respect for due process by itself respecting it. It is a rule of practical necessity. For example, in R. v. Adams [1978] 45 C.C.C. (2d) 459 (B.C.C.A.) an accused appealed a conviction for escape from lawful custody on the ground that his original detention was illegal. Craig, J.A. observes at p. 469:

> . . . if a trial judge permitted an accused to go behind it . . . the judge would be holding, in effect, that the jailer had no right to detain the accused, yet the jailer would have to detain the accused because the warrant was still subsisting.

Worse, can a jailer refuse to detain because he thinks the committal bad, and wait until he is charged before demonstrating it is bad? The rule is designed to avoid an invitation to anarchy.

The great difficulty with the rule is that it can work a harsh result on an unsophisticated accused who, like the accused before us, fails to appreciate the need to make a direct attack on a bad order. His relative lack of blameworthiness cannot avoid favourable contrast, in cases of this sort, with errors by judicial officers, as often as not compounded by other errors by governmental officials. The accused's situation in such a case obviously stirs sympathy. Very often, I suspect, the Crown does not proceed with charges ex debito justitiae. Sometimes, as here, the Crown is less sympathetic than are the courts. Unfortunately, perhaps, the Crown discretion is not directly reviewable. Fortunately, the power to grant a

discharge permits Canadian courts in most cases to offer relief where the blameworthiness of the accused is minimal. See R. v. Campbell [1973] 2 W.W.R. 246.

R. v. Green [1958] 1 All E.R. 471 (U.K.C.A.) offers a good example of the difficulty sometimes encountered. The rule against collateral attack was not discussed in this case, but was certainly breached. A 19-year-old, while on probation for shoplifting, stole a bicycle. His crime pales in comparison with the comedy of errors which followed. He was convicted of theft but given an illegal jail sentence. When the mistake was discovered, the Home Office released him but left the sentence order undisturbed. He was then charged also with a breach of probation on account of the theft and, because mandatory statutory requirements were triggered by the outstanding theft sentence, he had to receive a Borstal sentence. He appealed. The Court of Appeal seemed powerless in the face of yet another law giving only Queen's Bench jurisdiction to quash the illegal sentence, a remedy which the accused had failed to seek. The Court nevertheless decided that the sentence under appeal was illegal because the pre-requisite sentence was illegal.

The accused also relies upon R. v. Beam [1954] 109 C.C.C. 381 (Ont. C.A.). The accused in that case appealed a jail sentence for breach of probation. Several terms of the original order were, in the Court's view, illegal As a result, it first extended the time for appeal from the original sentence

because "justice must be done" (p. 384). Then it said that the sentence for the breach "must be set aside" (p. 385). The accused was again released on probation. This is not authority against the rule. On the contrary, the conviction of the accused on the breach charge was left to stand. In this case, we have not essayed a similar summary savaging of the original order because the point is now moot.

The accused also relies upon two Saskatchewan cases dealing with s. 666 C.C.C. See R. v. Piche [1976] 31 C.C.C. (2d) 150 (Sask. Q.B.), and R. v. Foulston [1983] 6 C.C.C. (3d) 236 (Sask. Q.B.). In each, an accused was acquitted on a charge of breach of a probation order on the ground that the original order was unlawful. A more limited view was expressed by the British Columbia Court of Appeal in R. v. Bara (1981) 58 C.C.C. (2d) 243. In that case, nobody explained the terms of the probation order to the accused as required by law. The majority held that this fact created a good defence to a charge of breach of probation but it did not affect the validity of the order.

It may be, although I doubt it, that these cases can be distinguished, as the Crown contends, on the basis that the other charging section makes it an element of the offence that an order be "lawful" and thus creates a statutory exception to the governing rule.

It is said in response that Parliament, by enacting ss. 13, mandated a grace period, and that the correct

view of the charging section before us is that an order without a grace period is not an order within its contemplation. Assuming this to be so, it follows that Parliament has ordained that the existence of a valid order is an ingredient of the offence. By this analysis, two rules are in conflict: one provides that the Crown must prove all the elements of the offence including the validity of the order beyond a reasonable doubt; the other forbids an accused from placing the validity of the order in issue. The second must prevail because it is essential to the administration of justice. The alternative is to abandon it. I prefer to say that the rule, by preventing the accused from contesting the validity of the order, effectively offers a presumption of validity to aid the Crown in the discharge of its onus.

The accused also relies on R. v. Stewart [1972] 21 C.R.N.S. 111 (B.C.C.C.), where a person found driving a motor vehicle was acquitted of driving while prohibited because the prohibition order was a "nullity". Aside from my doubt whether the order in that case was in any respect unlawful, I consider the case to have been wrongly decided for permitting a collateral attack. The issue was not discussed in the reasons for judgment in the case.

The accused cites many cases where, on habeas corpus, an order was attacked as unlawful. The simple answer is that these were direct attacks, not collateral attacks. Skied v. R.

[1975] 24 C.C.C. (2d) 93 is a habeas corpus case which is a little closer to this case. The accused had been sentenced to a prison term which was beyond the jurisdiction of the sentencing judge and, one week later, had been brought back before that judge and re-sentenced. He abandoned his appeal against the first sentence and successfully attacked the second by habeas corpus. The judge on the return of the habeas corpus also corrected the original sentence. One can view this as an expansion of the scope of the habeas corpus before him, and not a collateral attack. In any event, it does not persuade me to ignore the governing rule.

The learned trial judge here purported to comply with the governing rule. He said:

> I am not saying the whole order is falling. . . . I can't make that kind of declaration. The most I can do is . . . simply acquit him on the basis that the order is defective and can't support a conviction. That is not to say that the whole order is invalid.

With respect, I cannot accept this view, nor a similar view expressed in R. v. MacCallum [1982] 66 C.C.C. (2d) 414 (N.B.Q.B.). Curiously, I can only find authority for an exception exactly the opposite of that stated by the learned trial judge. He says that the rule applies to "invalid" orders but not "defective" orders. But, in Adams, for example, Craig, J.A. acknowledged that the rule might only apply to an order which is "valid on its face".

Perhaps the learned trial judge meant to say that a defective order is one not valid on its face. It can be argued here, I suppose, that the failure of the Prohibition Order to make any disposition of the issues raised by s. 98(13) demonstrates an error by the learned territorial Court judge which is evident on the face of the record. Is this what is meant by "invalid on its face"? In my view, the whole point of the governing rule is to refuse to countenance defiance of an order evidencing such an error. I accept at the most that I can safely defy an order of a tribunal which is egregiously usurping power over the life, liberty or property of a citizen. No reliance should be permitted in this context on those cases which expand the concept of jurisdictional error to permit direct attack. To permit collateral attack, which is to say defiance, the error must be so extreme that, in the words of Dennistoun, J.A. in Tufts v. Thomson (1929) 38 Man. R. 51 at 55 (Man. C.A.), ". . . the Court is forced to find that the whole matter was coram non judice . . . for to do otherwise would be a violation of the first principles of justice."

Nothing remotely close to such a thing occurred here.

While it is not critical for this case, I acknowledge also that the "valid on its face" rule arguably has no application to a court of record such as the Territorial Court. The origin of the rule lies in the lack of an official record to

which the citizen might have recourse. As Baron Parke said in Gossette v. Howard 10 Q.B. 411 at 52,

> In the case of special authorities given by statutes to justices or others acting out of the ordinary course of the common law, the instruments by which they act . . . ought . . . to show the authority on the face of them by direct averment or reasonable intendment.

Turning now to other arguments made, it does not matter that the earlier order was made by a judge of limited jurisdiction (sometimes inaptly called an inferior court judge). As Drake, J. said of a Master's order in Bridgman v. McKenzie et al (1897) 6 B.C.R. 56 (B.C.C.S.) 57:

> However bad or imperfect an order may be, when it once is passed and entered by a proper officer, it becomes a part of the court records, and must be set aside by a court of competent jurisdiction.

Nor does the coincidence that the same judge was twice involved affect the rule if, as everybody assumes was the case here, the judge was functus officio in the first proceeding. See Preston Banking v. Alcopp [1895] 1 Ch. 141 at 143 (H.L.).

Nor is this a case where the interpretation of the wording of the order is the issue. A rule of construction provides that the interpretation favourable to validity should be adopted if the words permit it. Here, the words of the order do not permit us to read in a sub-section 13 proviso. Indeed, the learned trial judge made no such claim.

I would allow the appeal and declare the accused guilty of a breach of the order which he indubitably breached. In the circumstances, however, I would invoke s. 662.1(1) C.C.C. and grant him an absolute discharge.

DATED AT YELLOWKNIFE, N. W. T.

THIS 8 DAY OF SEPTEMBER A.D. 1986.

KERANS, J.A.

I concur:

LAYCRAFT, C.J.

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE HARRADENCE

The Respondent Frederick Allen Avery was convicted of an offence under Section 85 of the Criminal Code. Following this conviction, a Firearms' Prohibition Order was entered against Mr. Avery on June 18, 1985. The Order prohibited the Respondent from possessing firearms, ammunition or explosive substances for a period of five years.

On August 13, 1985, the Respondent was charged with violating the Firearms Prohibition Order, contrary to Section 98(12) of the Criminal Code, when in an apparent attempt to comply with the Order Mr. Avery sold a rifle to one Mr. Bourque. The rifle was impounded and the Respondent charged.

The Trial Judge dismissed the charge on the ground that the Firearms Prohibition Order, made pursuant to Section 98(1) of the Criminal Code, was defective in that it did not contain the mandatory provision required by Section 98(13) specifying a reasonable period of time within which the Respondent could dispose of firearms already in his possession. The Crown appeals.

The predecessor to the present Section 98 was enacted in S.C. 1968-69, c. 38, s.6 in the following terms:

> "95.(1) Where a person is convicted of an offence involving the use, carriage or possession of any firearm or ammunition, the court, judge, justice or magistrate, as the case may be, may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting him from carrying or having in his possession any firearm or ammunition during any period not exceeding five years from
>
> (a) the time of his conviction for that offence, or
>
> (b) if he was sentenced to imprisonment for that offence, the expiration of his sentence.
>
> (2) Every one who carries or has in his possession any firearm or ammunition while he is prohibited from doing so by any order made pursuant to this section is guilty of
>
> (a) an indictable offence and is liable to imprisonment for five years, or
>
> (b) an offence punishable on summary conviction."

If a person were in lawful possession of firearms or ammunition at the time that such an order was made against him, he would be guilty of an offence eo instanti. This would work an injustice.

Section 95 was repealed and substituted by S.C. 1976-77, c. 53, s.3; and although the section was considerably expanded, the subsection creating the offence, Section 98(12), was in nearly identical terms:

> "(12) Every one who has in his possession any firearm or any ammunition or explosive substance while he is prohibited from doing so by any order made pursuant to this section
>
> (a) is guilty of an indictable offence and is liable to imprisonment for five years; or
>
> (b) is guilty of an offence punishable on summary conviction."

Although there was apparently no case in the interim where a conviction under this subsection could have been based on a possession antedating the order, the possible mischief was addressed for the first time in subsection (13):

> "98(13) An order made pursuant to subsection (1), (2), (6) or (7) shall specify therein a reasonable period of time within which the person against whom the order is made may surrender to a police officer or a firearms officer or otherwise lawfully dispose of any firearm or any ammunition or explosive substance lawfully possessed by him prior to the making of the order, and subsection (12) does not apply to him during such period of time."

The "mischief rule" of statutory interpretation was propounded in Heydon's Case (1584) 3 Co. Rep. 7a, 76 E.R. 637. At page 76:

> "[T]he office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress inventions and evasions for the continuance of the mischief, and pro privato commodo [for private advantage], and to add force and life to the cure and remedy, according to the true intent of makers of the Act, pro bono publico [for the public good]."
>
> (Emphasis added)

Although Heydon's Case involved interpretation of a statute which replaced the common law, the same principle should be applicable with respect to a change in the statute law. The principle was stated by Lindley, M.R. in Re Mayfair Property Co. [1898] 2 Ch. 28, at page 35 thusly:

> "In order properly to interpret any statute it is as necessary now as when Lord Coke reported Heydon's case to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

The Interpretation Act, R.S.C. 1970, c. I-23 as am., provides as follows:

"3(1) Every provision of this Act extends and applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

11. Every enactment shall be deemed to be remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

(Emphasis added)

"3(2) The provisions of this Act apply to the interpretation of this Act."

"28. In every enactment

. . .

'shall' is to be construed as imperative."

In R. v. Scott (1980) 56 C.C.C. (2d) 111, the majority and the dissent both recognized that when the word "shall" appears in a statute it is indicative of Parliament's intention that the subsequent words be considered mandatory rather than merely permissive.

The cases cited and this Act say that it is imperative that the enactment be interpreted to best ensure the attainment of its object, which is to remedy the previous state of the law.

Although Section 98(13) is couched in "imperative" terms, i.e. "shall specify therein a reasonable period of

time", there is nothing in Section 98 to indicate the effect of a failure to comply with those terms.

I deal firstly with the argument that a prosecution under Section 12 may be supported where the Order fails to comply with subsection (13). Such an interpretation is to construe the word "shall" as other than imperative.

Further, this construction continues to expose the person against whom the Order is made to criminal prosecution, not because of wrong-doing on his part but because he has been denied the benefit of the protection Parliament has mandated he shall have. He has been denied this protection through no fault of his own but because the Court failed to give effect to the mandatory provisos of subsection (13) of the Criminal Code of Canada.

Given that Parliament has by subsection (13) sought to eliminate that exposure, this interpretation is contrary in principle to great and long-standing authority on statutory construction. It also flies in the face of Section 11 of the Interpretation Act, which directs that an enactment "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects"

(emphasis added). This applies as much to one subsection as to the entire section.

Where statutory provisions have been enacted for the protection of an accused, Courts have assiduously enforced those provisions for his benefit.

In R. v. Piche (1976) 31 C.C.C. (2d) 150 (Sask.), a case involving violation of a probation order, Bence, C.J.Q.B. found that certain procedural requirements were for the benefit of the accused and fundamental to his rights. He said, at page 153:

> "I agree that the making of the probation order is not predicated on such conditions but in my view they are necessary for its enforcement."

Similarly, in R. v. Foulston (1983) 6 C.C.C. (3d) 236 (Sask. Q.B.), at page 240, Grotsky, J. found that compliance with the Code in the making of a probation order "is a condition sine qua non to conviction [for violation of the order]".

The requirements of Section 13 are substantive and not procedural.

I next consider that the provisions of subsection (13) need only be complied with where the accused is in lawful possession of the firearms or ammunition at the time the Order is made. The plain wording of Section 98 will not bear such a construction. Parliament has seen fit to make the provisions mandatory and to make no exceptions. Clear and explicit language would have to be employed to create any exception to those provisions and none exists.

Counsel for the Crown argued that the operation of subsection (12) might still be suspended for a "reasonable period of time", and that the order would certainly support a conviction beyond the expiration of such a period. While there may be agreement that a period of, say, six months was more than reasonable, and that this interpretation would cure the mischief, it still fails to give effect to the word "shall", and has the effect of rendering the criminal law uncertain to the extent that there may be different views on what length of time is reasonable. Further, the application of subsection (12) can only be triggered by the expiration of a "reasonable period of time" "specified" in the Order by the sentencing justice. I would reject the submission of the Crown.

I am therefore of opinion that if the period required by subsection (13) is not contained in the Order, then the

legal mechanism by which subsection 12 can be brought to bear is not in place and the section is not available to create an offence for breach of the prohibition. This in no way detracts from the validity of the Order and the prohibition it contains is in full force and effect. An offence for its breach is created by another section of the Criminal Code. I have in mind Section 8 of the Criminal Code of Canada. However, a prosecution under that section would enjoy little chance of success if a firearm was in lawful possession prior to the making of the Order and a reasonable time for its disposition had not expired at the time the charge was laid. The protection contained in Section 13 against the mischief created in the previous enactment would not be contravened.

Alternatively, there is a burden-of-proof reason why s. 98(12) cannot render a conviction based on the facts of this case and the prohibition section charged. Undisputed principles of criminal law demand convictions of a true "crime" (which this crime is due to its position in the C.C.C.) be entered only after both actus reus and mens rea have been proven beyond a reasonable doubt. This is evidenced by the constitutional guarantee of the presumption of innocence as is found in s. 11(d) of the Charter of Rights:

> "11. Any person charged with an offence has the right . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;"

Although it is likely that even the mens rea could never be proven in this case as the accused was unaware of the weakness due to the absence of the buffer period as required by s. 98(13), I need not discuss mens rea because the following discussion of actus reus will prove dispositive.

For purposes of this discussion on actus reus, my perspective is centered entirely on the onus which prosecutors are charged with in our accusatorial system.

We must first understand the Criminal Code's treatment of actus reus. The Criminal Code will either:

(1) specify quite clearly or by reference to other sections what the actus reus of a crime is, or

(2) it will be unspecific and references cannot be made to other sections.

The second category entails cases where it is up to the trier of law to decide or read into the crime alleged, a wrongful physical act (Hutt v. The Queen (1978) 38 C.C.C. (2d) 418 (S.C.C.)). Examples of crimes in the second category where the actus reus is not defined are found in s. 195.1 which was broached in Hutt. This section reads:

> "195.1 Every person who solicits any person in a public place for the purpose of prositution is guilty of an offence punishable on summary conviction."

The actus reus as listed is to "solicit", but the actus reus had to be interpreted judicially by the Supreme Court of Canada to mean "pressing or persistent activities". Many other crimes of a moral nature leave the definition of the actus reus up to the mind of a judge. On the other hand, there are many sections in the Criminal Code which fall in the first category and define very specifically the actus reus. In these instances Parliament has indicated precisely the physical act which the law prohibits. For example, the crime of "breaking and entering" is listed in s. 306(1):

> "306.(1) Every one who
>
> (a) breaks and enters a place with intent to commit an indictable offence therein,

(b) breaks and enters a place and commits an indictable offence therein, or

(c) breaks out of a place after

(i) committing an indictable offence therein, or

(ii) entering the place with intent to commit an indictable offence therein,

is guilty of an indictable offence . . ."

But the actus reus of "breaking" can only be understood by reference to another section in the C.C.C. where Parliament has expressly defined the physical element which is an integrated part of the gravamen of s. 306(1). Section 282 is the section which helps define the physical act prohibited in s. 306(1), and 282 reads:

"282. In this Part

'break' means

(a) to break any part, internal or external, or

(b) to open any thing that is used or intended to be used to close or to cover an internal or external opening;"

There are other examples. To illustrate, if one decides to prosecute under s. 421 (attempts/accessories), then one must

look back to s. 23(1) for a definition of "accessory after the fact" in order to understand the actus reus of s. 421 (attempts/accessories).

Turning to the present case, I interpret the actus reus as falling into the first category, i.e., where Parliament has expressly defined the actus reus in the Criminal Code. This is so, because of the legal apparatus summoned by the wording of s. 98(12). The components of the actus reus in this section are:

(1) unlawful "possession", contrary to:

(2) an "order made pursuant to this section [98 generally]". As was the case in other Code sections already examined, the actus reus inquiry in s. 98(12) shifts to an order made under s. 98(1), and then to s. 98(13) for the final element of the wrong physical act which is:

(3) the accused failing to dispose of the weapon within the "reasonable period of time".

Defendant's counsel in this case surely is not concerned about the validity/invalidity of the order. Further, this is not a

collateral attack upon the order and even if it was, proof of the actus reus must be overcome. In saying so, I repeat that every element of a criminal offence must be proven and in this case the wrongful deed by definition requires an order that conforms physically to the requirements mandated by Parliament in s. 98 generally. An order with key substantive parts is the sine qua non of s. 98(12)'s actus reus. That an order must form part of the actus reus is a very unique situation, but this is what we have here.

Glanville Williams supports my opinion. In the Criminal Law "General Part" he says at pp. 16-17:

> It is not enough to create criminal responsibility that there are *mens rea* and an act: the *actus* must be *reus*. In other words, the act must be one that (assuming the requisite mental element) is proscribed by the law. If I carry off my own umbrella thinking that I am stealing somebody else's, there are the *mens rea* of larceny and an act, but not the *actus reus* of larceny . . .
>
> Again, the specification of a crime requires various circumstances to accompany the physical act. In perjury the accused must have been sworn as a witness, and in bigamy he must already be married; in treason he must be a British subject or otherwise owe allegiance; in receiving stolen goods the goods must already be stolen, and in burglary the physical act must take place at night."
>
> [Emphasis added]

To this I add that Avery's wrongful possession may be the actus, but the actus reus in s. 98(12) is wrongful possession after the disposal period. These two elements illustrate the "actus plus the reus". Emphasizing the reus, Glanville Williams again says [id at 17]:

> "When we use the technical term *actus reus*, we include all the external circumstances and consequences specified in the rule of law as constituting the forbidden situation. It will be observed that *reus* does not signify that the act in itself creates criminal responsibility, for that neglects the requirement of *mens rea*. *Reus* must be taken as simply a technical way of indicating that the situation specified in the *actus reus* is one that, given any necessary mental element, is forbidden by law. In other words, *actus reus* means the whole definition of the crime with the exception of the mental element - and it even includes a mental element in so far as that is contained in the definition of an act. This meaning of *actus reus* follows inevitably from the proposition that all the constituents of a crime are either *actus reus* or *mens rea*."
>
> [Emphasis added]

There is one final point to illustrate the important nexus of the reasonable disposal period in s. 98(13) to the actus reus in s. 98(12). The prosecution must not only prove the wrongful deed; it is legally incumbent upon the Crown at some point in the proceedings and whether or not by a primary or secondary burden of proof, to show that the crime was

committed without a legal excuse. By the addition of s. 98(13), and limited to the facts of Avery, Parliament has preempted this Crown argument. This proposition is consistent with the genesis of this unique actus reus. As Glanville Williams explains [id at 19]:

> "A further step must now be taken. *Actus reus* includes, in the terminology here suggested, not merely the whole objective situation that has to be proved by the prosecution, but also the absence of any ground of justification or excuse, whether such justification or excuse be stated in any statute creating the crime ore implied by the courts in accordance with general principles."
>
> [Emphasis added]

As the accused could not through his conduct have committed the wrong physical act which Parliament contemplated, dismissal of the charge under s. 98(12) was proper and the appeal will be dismissed.

DATED at YELLOWKNIFE
this 8 day of SEPTEMBER,
A.D. 1986.

HARRADENCE, J.A.