

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

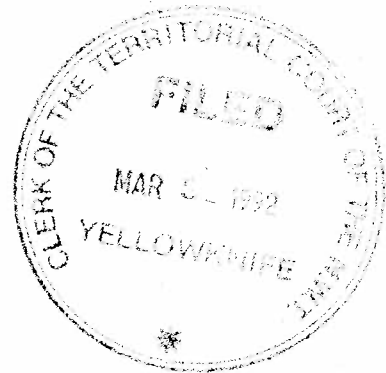
IN THE MATTER OF:



HER MAJESTY THE QUEEN

- and -

BRYONY TESAR



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Reasons for Judgment delivered by His Honour  
Judge R.M. Bourassa, sitting at Yellowknife, in  
the Northwest Territories, on June 21st, 1991.

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APPEARANCES:

MR. A. FERGUSON, Counsel for the Crown  
MS. W. HUTCHINSON, Counsel for the Defence

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(CHARGE UNDER SECTION 140(1)(b) OF THE CRIMINAL CODE)

1 THE COURT:

The accused is charged under Section

2 140(1)(b) of the Criminal Code. That section reads,

3 "Everyone commits public mischief who, with  
4 intent to mislead causes a peace officer to  
enter on or continue an investigation by

5 (b) doing anything intended to cause some  
6 other person to be suspected of having  
7 committed an offence that the other person  
has not committed."

8 The "doing anything" in subparagraph (b) is refined  
9 in the Information, which reads:

10 "...With intent to mislead, did cause a peace  
11 officer to wit Constable Larry Litke to  
12 continue an investigation by withholding  
13 information, which act was intended to cause  
Mary Arsenault to be suspected of having  
committed the offence of forgery..."

(which she had not committed)

14 "contrary to Section 140(1)(b) of the Criminal  
15 Code."

16 I have heard the evidence of the investigating  
17 constable, Mary Arsenault, Lisa Tesar, sister of the  
18 accused, and the accused herself, with respect to the  
19 events culminating in the charge before the Court.

20 I have assessed the credibility of the witnesses  
21 as best I can, their demeanor, and analyzed their  
22 evidence. There is little conflict except in one  
23 critical area. This is the aspect of dates and times  
24 that were elicited in chief and by cross-examination.

25 With this before me I make the following findings  
26 of fact:

27 On March 3, 1991, someone appeared at the IGA

1 checkout and charged groceries to "Arctic Day Care"  
2 signing "Bryony Tesar" on the purchase order. The  
3 accused Bryony Tesar did not make that purchase, nor  
4 did she sign her name or authorize anyone else to.

5 On March 6, 1991, a representative of IGA  
6 telephoned the accused to clarify a processing problem  
7 with respect to this purchase order. Bryony Tesar was  
8 associated with "Arctic Day Care". In this way the  
9 accused became aware of the fact that someone had used  
10 her name to obtain groceries.

11 That same day, the accused went to the RCMP  
12 detachment to complain of the forgery or theft. This  
13 was the trigger which precipitated all the subsequent  
14 events.

15 She made a written complaint to the Police which  
16 has been filed as an exhibit. A very brief recitation  
17 of the facts was followed by a very lengthy  
18 explanation of why she believed Arsenault was the  
19 culprit. There were no reasonable grounds for the  
20 accusation. She was pointed out by the accused  
21 perhaps because of some personal antipathy or as a  
22 result of a dispute they had had a few days earlier.

23 The Police, having received a complaint, were  
24 duty bound to investigate. They did so.

25 On March 13th, I find that Lisa Tesar telephoned  
26 her sister, the accused, and told her in no uncertain  
27 terms that it was she, Lisa Tesar, who had purchased

1 the groceries and forged the accused's name. There  
2 were two phone calls, one being earlier than this  
3 date. I accept and prefer the evidence of Lisa Tesar  
4 who testified that on both occasions she stated  
5 clearly and unequivocally that she had used the  
6 account and forged her sister's name.

7 By March 17th, the RCMP had pursued the matter in  
8 the normal course. Their investigation revealed the  
9 name of the clerk to whom they presented a number of  
10 photographs for identification. One of them was Mary  
11 Arsenault. I pause here and note that both she and  
12 Lisa Tesar are of a generally similar build and  
13 appearance. I say generally in its broadest context.  
14 The clerk identified a photograph of Arsenault.

15 Now, on the 19th of March -- four days after the  
16 accused knew without a doubt that it was her sister  
17 who had forged her name -- the police called her. The  
18 investigating Constable wanted Arsenault's address;  
19 additionally he told Tesar that the clerk had  
20 "identified" Arsenault. The accused provided the  
21 address, and said not a word about her sister's  
22 confession to her.

23 The Police carried on. On the 19th day of March  
24 they arrested the suspect Arsenault at her home in the  
25 midst of a dinner party. She was processed and  
26 released on the 20th of March.

27 Upon release, Arsenault, understandably agitated,

1 confronted the IGA clerk. The clerk immediately  
2 confirmed that she had made a mistake in  
3 identification. So much for eye-witness evidence.  
4 Arsenault then went on to confront Lisa Tesar, who  
5 confirmed that it was she who had made the purchase.  
6 This information was communicated to an RCMP Corporal.

7 On March 22nd, Bryony Tesar was arrested and  
8 charged with the offence before the court.

9 In her defence, Bryony Tesar testified that she  
10 "attempted" to call the investigating Constable two  
11 times. No particulars were given with respect to the  
12 dates, times, messages or just exactly what the  
13 attempt was (was there a busy signal?). She testified  
14 that it was around the 13th.

15 I find this assertion peculiar in light of the  
16 fact that there was definite verbal contact between  
17 the investigating Constable and the accused on the  
18 17th of March. Bryony Tesar did not use that  
19 opportunity to tell the Police that she had  
20 information that would absolve and clear Arsenault of  
21 any wrong doing.

22 With respect to credibility, I have rejected some  
23 of the evidence of the accused and preferred the  
24 evidence of her sister, especially on the crucial  
25 matter of dates and the particulars of the confession.  
26 Lisa Tesar was not by any stretch of the imagination  
27 happy to be in this courtroom. She clearly did not

1 want to implicate her sister and she knew the evidence  
2 would do so. Yet she was candid and honoured her  
3 oath.

4 The accused was less than forthright. Nor was  
5 she completely candid with the Court. I found her  
6 anxious and even eager to colour her evidence, qualify  
7 it and lace it with surplus adjectives and innuendo.

8 That basically is the factual foundation, as I  
9 found it. Now, that's not enough, of course; there  
10 must be a finding of an actus reus, and there must be  
11 a finding of a mens rea. Defence argues strenuously  
12 that this is an act of "omission" as it were, and no  
13 criminal liability should attach; there is no evil  
14 intention.

15 As I understand the law to be reflected in *R. v.*  
16 *Miller*, (1983) 1 All ER 978, a decision of Lord  
17 Diplock. That case has been specifically referred to,  
18 approved and followed in at least four decisions of  
19 the British House of Lords and other English courts.  
20 It has as well been approved of and followed by Mr.  
21 Justice Tallis of the Saskatchewan Court of Appeal in  
22 *R. v. Fisher*, 1989, 53 SR 263. This case stands for  
23 the proposition that, although an initial act may be  
24 innocent, the evil intention may arise subsequent to  
25 the innocent act which is enough to create a criminal  
26 liability. In *Fisher*, Tallis, J.A. stated:

27 "The appellant may not have intended to  
steal the money at the time he opened the

1 account by depositing the cheque. However,  
2 he may have formed the intent subsequent to  
3 this event. The requisite intent does not  
4 have to relate to the taking, particularly  
5 where there are alternative modes of  
6 committing theft."

7 In **Miller**, the term "actus reus" was analyzed,  
8 and Lord Diplock points out this is not confined to  
9 positive action. "A failure to act", he states, "may  
10 give rise to criminal liability. Refraining from  
11 acting imputes an intention for the damage to occur  
12 under certain circumstances.", and this is what  
13 **Fisher** approves of and incorporates into Canadian  
14 jurisprudence.

15 The cases of **Fisher** and **Miller**, do not involve an  
16 innocent bystander. An innocent bystander is under no  
17 positive duty to act, however, I don't think the  
18 accused can fall under the umbrella of an innocent  
19 bystander.

20 The accused herself started the chain of events.  
21 She initiated the investigation and pointed an  
22 accusatory finger at Mary Arsenault. That act in  
23 itself may be totally innocent, but I don't think that  
24 is conclusive of the matter. This act is what started  
25 the chain of events, and it is the accused's  
26 identification and casting suspicion with virtually no  
27 grounds upon Mary Arsenault that created a danger for  
that particular person.

The **Miller** case dealt with a charge of arson

1 following an innocent act, which was the dropping of  
2 the cigarette and the igniting of the bed clothes. The  
3 subsequent fire was within the accused's power to  
4 counteract. He could have stopped the danger he  
5 created. In this case, applying the same rationale, I  
6 ask, was it within Bryony Tesar's power to stop,  
7 minimize or counteract the danger that she he created  
8 by her groundless accusation? On the 13th of March it  
9 was within her power.

10 This conduct of failing to advise the Police that  
11 her sister had virtually confessed to her, that she  
12 was the one that charged the goods and forged the  
13 signature preceding the foreseeable arrest of Mary  
14 Arsenault. It preceded the foreseeable additional  
15 steps taken by the Police. At that point in time,  
16 Bryony Tesar's action or inaction in light of her  
17 knowledge constitutes the mens rea. She ignored and  
18 withheld contrary evidence. That the Police stated  
19 that they had a photo lineup and photo identification  
20 of another is of no help to her. That photo  
21 identification was in absolute contradiction to her  
22 information from her own sister. In my view, to  
23 withhold that contradictory evidence constitutes at  
24 that point in time a Mens rea, and at that point in  
25 time constituted the offence.

26 It may also be argued that the accused was  
27 willfully blind. As I understand willfull blindness,



1 it arises where a person who has become aware of the  
2 need for inquiry declines to make inquiries because he  
3 does not or she does not wish to know the truth and  
4 would prefer to remain ignorant. In that case, an  
5 accused person is fixed by law with the actual  
6 knowledge and his/her belief, and another state of  
7 facts is irrelevant.

8 Again, going back to March 13th, which in my view  
9 is the pivotal turning point in the case. Bryony  
10 Tesar knew her sister had forged her signature. She  
11 did absolutely nothing about it. She was in contact  
12 with the Police before an innocent person was  
13 arrested, and did not inform them of the facts.

14 In my view, the mental element crystallized on  
15 the 13th, and it operated in conjunction with the  
16 danger that she created. I have both the mental  
17 elements and the factual elements necessary for  
18 criminal liability.

19 In my view, the case made by the Crown attorney  
20 is proven beyond a reasonable doubt. The reasons I am  
21 given, I'm satisfied beyond a reasonable doubt, and  
22 the accused is convicted.

23  
24 ORIGINAL SIGNED BY  
R.M. BOURASSA

25  
26 \_\_\_\_\_  
Judge R.M. Bourassa

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