EXPLANATIONS BY AN ACCUSED: TRUTH V. REASONABLENESS.

The question whether a Court in a Criminal Prosecution should consider the truth of an explanation given by an accused, or merely whether the explanation is reasonable, has given rise to irreconcilable statements by Canadian Judges, resulting in a series of conflicting decisions.

In endeavouring to trace the history of this problem in Canada, the case of **R. v. Searle,**[1] may be taken as the starting point. This was a decision of the Alberta Appeal Court, delivered by Harvey, C.J.A. on an appeal from a conviction on a charge of receiving stolen goods. After referring to **R. v. Schama,** where Lord Reading, C.J. said:[2]

> But if an explanation is given which may be true it is for the Jury to say on the whole of the evidence whether the accused is guilty or not; that is to say, if the jury think the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal . . . .

The Alberta Court concluded:

> It appears from these authorities that it is the reasonableness of the explanation rather than the tribunal's belief in its truth that should guide. . . . .
>
> In the present case if the magistrate thought it was sufficient that he should disbelieve the story told he was wrong in his law.

This conclusion, it is submitted, is erroneous: it is not founded on sound reason or principle, but rather on a misunderstanding of the meaning of the words of Lord Reading. If the explanation of the accused is not believed then there is no explanation to consider. If on the other hand the Court or Jury is unable to decide whether or not to believe the accused, then it must direct its mind in accordance with the rule enunciated in the **Schama** case namely whether the explanation might reasonably be true.

The principle in the **Schama** case was affirmed by the Supreme Court of Canada in **Richler v. R.**[3] Duff, C.J.C., citing with approval the words stated by Lord Reading, concluded:

> The question, therefore, to which it was the duty of the learned trial Judge to apply his mind, was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true. . . . .

Nowhere in the judgment was there a suggestion that if the Trial Judge did not believe the explanation given that he must consider whether it might reasonably be true. Rather Duff, C.J.C., affirmed the principle that if the trial Judge is uncertain of its truth, then he must direct his mind to the further question whether it might reasonably be true.

1. 51 C.C.C. 128
2. 11 C.A.R. 45
3. [1939] 4 D.L.R. 281

Unfortunately the British Columbia Appeal Court, in **R. v. Davis**[4], like the Alberta Court in **R. v. Searle**, did not appreciate the real principle contained in the **Schama Case**, and approved in the **Richler** case. In fact Sloan, J. A., in his Judgment, shows that he did not appreciate the effect of the **Schama** case by his words "The learned Chief Justice then reproduces the somewhat involved language of Lord Reading in **Schama's** case".

When the British Columbia Court of Appeal again considered the same question in the case of **R. v. Nelson,**[5] some seven years later, it disregarded the situation when the Judge absolutely disbelieved the explanation of an accused, and agreed with the **Richler** Case that in cases where the Judge was in doubt, the proper test was, "not whether he was convinced that the explanation given was true explanation, but whether the explanation might reasonably be true."

The problem was again considered by the Supreme Court of Canada in the case of **Ungaro v. R.**[6] This was an appeal from a conviction for receiving stolen goods. The trial Judge stated the explanation given by the accused was "fantastic", but did not state whether he disbelieved him. The Supreme Court ruled that he had not directed himself properly, namely, whether the explanation might reasonably be true. This direction, of course, as explained by Rinfret, C.J.C., arises only in a case where the Judge has not decided that he disbelieves the accused. The learned Chief Justice stated:

> I do not understand Chief Justice Duff's statement in *Richler v. The King* as meaning that if the trial judge does not believe the accused it is, nevertheless, his duty to apply his mind to a consideration as to whether the explanation given by the accused might reasonably be true. If the trial judge does not believe the accused the result is that no explanation at all is left.

However, in the judgment of Estey, J, with whom Kerwin, J (now C.J.C.), concurred, there is an unfortunate passage in which the words used seem to lead to a confusion of meaning. Estey, J, stated:[7]

> On the assumption that he is, in the latter referring to the explanation as to the source of the goods, it is clear the learned judge is directing his mind to whether the explanation is a reasonable one. He therefore falls into the same error that those who consider the truth, the reasonableness or the probability of the explanation rather than direct their attention to whether that explanation as made by the accused, having regard to all the circumstances, might reasonably be true and therefore set up in the mind of the judge reasonable doubt to which the accused is entitled to the benefit.

The passage has been urged by some Counsel to mean that the Judge must not determine whether he believes the accused or not, even though he believes that the story of the accused is purly fictitious and false. It is argued that if the story **might** reasonably have been true, under the circumstances, the accused must be taken to have rebutted

4. [1941] 1 D.L.R. 557
5. 93 C.C.C. 344
6. [1950] S.C.R. 430
7. Ibid., p. 437

any presumption of guilt. It is submitted, however, that this is not the proper meaning of the statement and that, considering the judgment as a whole, Estey, J., went no further than the conclusions of Chief Justice Rinfret.

In 1951 in the British Columbia case of **R. v. Schlosser**[8] O'Halloran, J.A., and Bird, J.A., both held that the truth of an explanation was not the criterion. O'Halloran, J.A., cited **R. v. Schama, Richler v. R.** and **Ungaro v. R.**, as authorities for the proposition and continued:

> That it was not enough for them to disbelieve that explanation of possession of the stolen bill, but that even if they did not believe it, yet in order to convict they must find the explanation was not a reasonable one in the circumstances.

Bird, J.A., also purporting to follow the **Richler** and **Ungaro** cases, stated:

> in my view, with great respect, an essential factor was omitted in this direction, in that the jury were not told that in their consideration of the appellant's explanation, even though they did not believe his account of possession of the stolen bill, nevertheless they must determine whether that explanation might reasonably be true.

Surely such a direction is improper. If such were the state of the law, a jury and judge would be precluded from administering true justice. An accused, although committing perjury, would be entitled to be acquitted if he were intelligent or smart enough to concoct a plausible story or explanation. Such cannot be the meaning of the **Richler** and **Ungaro** cases.

It is refreshing to refer to a decision of the English Court of Criminal Appeal in the case of **R. v. Aves.**[9] Lord Goddard, C.J., in delivering judgment in an appeal against a conviction for receiving, stated:

> Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge, (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offered is one which leaves the jury in doubt whether he knew the property was stolen, they should be told that the case has not been proved.

This statement, it is submitted, concisely and correctly defines the law. To the same effect is a judgment of the Quebec Court of Appeal in **Kushner v. R.**[10] The Court not only purported to follow the principles laid down by the Supreme Court of Canada in the **Richler** and **Ungaro** cases, but it is submitted for the first time, properly interpreted, and applied those principles. Pratte, J., in delivering a judgment similar in reasoning to that of Barclay J. and Missonette J., stated the whole situation as follows:[11]

> If, then, an accused found in possession of goods recently stolen gives an explanation which the judge or the jurors are not certain is true, but which suffices to raise in them a reasonable doubt about his

8. 13 C.R.C. 433
9. [1950] 2 All E.R. 330
10. 14 C.R.C. 30
11. Ibid., p. 47.

> knowledge, that is sufficient to destroy the presumption that arises from the possession, and it will be necessary to seek proof of his knowledge elsewhere.
>
> If the accused does not attempt to justify his possession or if he gives an explanation that is found to be false, the presumption will continue and will be sufficient to bring about his conviction, because, then, it will be reasonable to presume that the accused was knowingly in possession of stolen goods.
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> An affirmation may well appear false to one but true to a second and doubtful to a third; but it is impossible for it to appear to an individual as false and doubtful at the same time; the certainty of the falsity excludes the possibility of the truth. Hence it follows that if the accused's explanation is found to be false by the judge, there is no reason why the latter should ask himself whether it would not be reasonable to believe this explanation.

The **Kushner** case states concisely and brings out the basic reasoning which was, or should have been applied, in the various judgments, commencing with the **Schama** case. If this reasoning is followed in other cases in which a presumption arises, requiring an explanation by the accused, the work of the Courts will be greatly facilitated and the confusion of conflicting decisions ended. For too long in this area of the law little caution has been taken against the danger of abstracting statements found in reported decisions, without considering the case as a whole, and without considering the basic reasoning and principles behind the statement.

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