CANADA
PROVINCE OF NOVA SCOTIA

CBW 8187

IN THE COUNTY COURT OF DISTRICT NUMBER TWO

BETWEEN:

PETER ALLEN WALSH

- and -

HER MAJESTY THE QUEEN

HEARD: Before The Honourable Judge Gerald B. Freeman

PLACE Lunenburg, Nova Scotia

DATE March 9th, 1990

COUNSEL:

D. Atwood, Esq. for the Appellant
L. Tancock, Esq. for the Crown

D E C I S I O N

Freeman, J.C.C. (Orally):

The appellant, Peter Allen Walsh, has appealed from a charge that he breached an order of probation under s. 741 of the Criminal Code.

The facts are that when Mr. Walsh was in court on the 12th day of July, 1989, he was placed on a probation order and ordered to report within seven days to a probation officer and thereafter as directed by the probation officer. He apparently met that same day with Elizabeth Andrews, a probation officer, and was directed to meet with another probation officer, Mike Lee, at 11 a.m. on the 21st day of September, 1989. That was to be at the probation office at 91 High Street in Bridgewater and Mr. Walsh stated that he'd been there before and knew what to do. Miss Andrews indicated that he appeared to comprehend what was required of him. On September 21st, Mr. Walsh failed to keep his appointment.

The matter was heard before Judge Hiram J. Carver on February 21st, 1990 and Mr. Walsh was found guilty as charged of a breach of his probation order. At that time the Crown proved the appointment and proved that he had failed to keep the appointment. No further evidence was called.

The appellant has appealed against the conviction on the ground that the learned trial judge erred in recording a conviction where there was no evidence of the appellant's "wilful" failure to comply with his probation order, reference **R. v. Docherty** (1989) 51 C.C.C. (3d) p. 1, Supreme Court of Canada.

The issue that is raised by the **Docherty** case

is whether additional evidence of intent is required in a charge under s. 740(1) or whether the Crown is able to rely on the inference that the accused person intended the consequences of his actions.

The position of the Appeal Court is stated by MacDonald, J.A. speaking for the Nova Scotia Court of Appeal in **R. v. Gagnon** (1989) 91 N.S.R. (2d) 79 at p. 80 where he said:

> "The question for determination therefore is whether the evidence was of such a kind, description, cogency and character that it would be unsafe to rest a conviction upon it. In answering such question, the function of this court goes beyond merely finding that there was evidence to support the conviction. We must re-examine and to some extent reweigh the evidence. See **R. v. Yebes**, [1987] 2 SCR 168; 78 N.R. 351; 36 C.C.C. (3d) 417. We cannot, however, simply substitute our view of the evidence for that of the trial judge."

The **Yebes** case has been frequently cited in a number of the appeal court decisions as the basis of the Appeal Court's position with respect to the evidence that comes before it.

The **Docherty** case is one in which the accused was charged with, and pleaded guilty to an offence of having care and control of a motor vehicle under s.236 of the Criminal Code when his blood alcohol level exceeded 80 milligrams of alcohol in 100 milliliters of blood. At the time of the commission of the offence, he was bound by a probation order that required that he keep the peace and be of good behavior. The Crown alleged that the commission of the offence under s.236 of the **Code** constituted a breach of s.666(1), which is the present s. 740(1). At his trial on the charge of a breach of probation, the accused testified that at the time he committed the offence he was unaware that he

was breaking the law. He knew that the vehicle in which he was found could not be started. The trial judge accepted the evidence of the accused and acquitted him of the offence. An appeal by the Crown by way of stated case in a Newfoundland court was dismissed. And on further appeal by the Crown to the Supreme Court of Canada the appeal was dismissed.

The decision of the Supreme Court of Canada was delivered by Wilson, J. who stated at the commencement of her decision that:

> "The sole issue to be resolved in this appeal is the requisite **mens rea** for the offence of "wilfully" failing or refusing to comply with a probation order contrary to s.666(1) of the Criminal Code. More specifically, this court is asked to determine whether commission of a criminal offence by a person required by his probation order to keep the peace and be of good behaviour is sufficient to ground a breach of s.666(1) regardless of the mental element required to sustain a conviction for the underlying offence."

Very briefly, what the **Docherty** case stands for is that the intention to commit the underlying offence is a separate intention from the intention to commit the offence under what is now s.740(1).

The word "wilfully" was carefully considered by the Supreme Court of Canada and Wilson J. stated:

> "In short, the use of the word "wilfully" denotes a legislative concern for a relatively high level of **mens rea** requiring those subject to the probation order to have formed the intent to breach its terms and to have had that purpose in mind while doing so.
>
> At page 9 she stated:
> "It is I think consistent with the overall content and purpose of the probation provisions in the Criminal Code that those who unknowingly violate the terms of their parole not be convicted, but only those who "wilfully" breach

such terms or deliberately refuse to obey them."

She stated that the proof of the underlying offence is proof of the **actus reus**. Then on page 12 she states:

> "In other words, the court cannot enter a conviction under s.666(1) on proof of the **actus reus** alone. The accused may by his conduct have fallen short of whatever objective standard is required to constitute keeping the peace but this by itself is not enough. An actual intent to breach the term of the probation order must be established if a conviction is to be entered under s. 666(1)"

Her reasoning is to a large measure summarized on page 13 of the **Docherty** decision:

> The **mens rea** of an underlying offence cannot, in my view, be treated as the intent required under s.666(1). As I have stated earlier, the **mens rea** of s.666(1) requires that an accused intend to breach his probation order. This requires at a minimum proof that the accused knew that he was bound by the probation order and that there was a term in it which would be breached by his proposed conduct. The accused must be found to have gone ahead and engaged in the conduct regardless. The onus, of course, is on the Crown to prove that the accused had the requisite **mens rea**. To the extent that direct evidence of intent is almost always difficult to obtain, the Crown may ask the court, absent any evidence to the contrary, to infer intent from the fact of the conduct. Any doubt, however, as to whether the accused intended to do what he did must be resolved in favour of the accused. The important point is that an attempt to commit the underlying offence does not afford a basis for inferring the wholly distinct intent, i.e., to breach one's probation order.
>
> What then is the significance of the conviction for the underlying offence in relation to the undertaking in the probation order to be of good behaviour? It seems to me that it constitutes the **actus reus** under s.666(1).

> It establishes that the accused has violated the terms of his parole through the commission of a criminal offence. But it is not, in my view, **prima facie** evidence of an intent to do so, still less of a wilful intent to do so. This is a different intention from the intention to commit the **actus reus** of the underlying offence. A full **mens rea** offence under the Criminal Code demands that the accused have an intent to perform the acts that constitute the **actus reus** of the offence. S.666(1) is no different.
>
> In my view, where the **actus reus** of S.666(1) consists of the commission of a criminal offence, an honest belief on the part of the accused that he is not committing an offence means that the accused cannot be said to have "wilfully" failed to comply with the probation order. He did not, in these circumstances, have the necessary **mens rea** for the offence under s.666(1)."

Now to relate that to the present offence, we must briefly review the facts, and those are that Mr. Walsh, the appellant, had been told specifically that he had an appointment with the probation officer, Mr. Lee, that he was to keep at 11 a.m. on the 21st day of September. The Crown has proved that. The appellant is suggesting that the Crown should have brought in some additional evidence as to intent, perhaps from associates of the accused, but I think that is imposing too heavy an onus upon the Crown.

The criteria I think is in the portion of Wilson's judgment that I quoted before, where she says:

> "This requires at a minimum proof that the accused knew that he was bound by the probation order and that there was a term in it which would be breached by his proposed conduct."

Now he knew that he was bound by the probation order. I think that's clear. He knew that there was a term in that order that he was to report to the Probation Services as directed. He knew when, and where,

and to whom he was to report. He failed to report. In those circumstances, again in the words of Wilson, J:

> "...the Crown may ask the court, absent in any evidence to the contrary, to infer intent from the fact of the conduct."

That is sufficient to prove a **prima facie** case. It is then open to the accused to raise a reasonable doubt. The onus is always on the Crown to prove its case beyond a reasonable doubt, but when, as here, the conduct of the accused, or in this case the appellant, is consistent only with a "wilfull" refusal to obey what he's required to obey, then I think that it is a reasonable inference that this was his intent and the provisions of the **Docherty** case do not come to his assistance. I dismiss the appeal against the conviction.

With respect to the second ground of the Notice of Appeal that the sentence was so manifestly excessive as to be erroneous, I have heard the representations by counsel and I have considered the circumstances of the sentence.

The sentence of 3 months incarceration for this breach of appeal I think is a severe sentence, but in the circumstances of that sentence I think Judge Carver was entitled to take into account that not only had the accused failed to report for probation but he'd also failed to appear in court for his trial and the matter had to proceed **ex parte**. It's most important for the benefit of the public, and in particular for the benefit of accused persons, that the probation procedure be respected. When the probation procedure is flouted, as it has been by Mr. Walsh, then the court must resort to strongly deterrent sentences in order

to preserve the integrity of the system.

I am unable to find that the sentence imposed by Judge Carver was so manifiestly excessive as to be erroneous, and I therefore dismiss the appeal as to sentence, as well.

J.C.C.

Lunenburg, N.S.
March 9th, 1990