

C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.H. 40159

I N T H E C O U N T Y C O U R T
O F D I S T R I C T N U M B E R O N E

BETWEEN:

GARY RICHARD WELSH,

Appellant

- and -

HER MAJESTY THE QUEEN, by
her Attorney General for
Nova Scotia,

Respondent

Michael Cooke, Esq., for the defendant, appellant.
Adrian Reid, Esq., for the Attorney General, respondent.

1983, January 24, O Hearn, J.C.C.:— The defendant was
convicted summarily by Randall, J.P.M.C., on a charge that

...at or near Halifax in the County of Halifax,
Nova Scotia, on or about the 11th day of May
1982 did unlawfully with intent, mislead Cst.
Gary Sutherland, a peace officer for the City of
Halifax. By causing him to enter upon an investi-
gation by reporting that the offence of theft had
been committed, when it had not been committed,
contrary to section 128(c) of the Criminal Code
of Canada.

The grounds of the appeal are

- (1) That the Learned Trial Judge failed to properly
consider whether or not a theft, in fact, had taken
place;
- (2) That the conviction was contrary to the weight
of all the evidence;
- (3) Such other grounds as may appear from the
record.

At the hearing of the appeal counsel argued (1) that the
trial judge actually found that the car had been stolen, and this
was in accord with the evidence of the thief who had admitted
stealing it; (2) that the conduct of the trial was contrary to

natural justice and that the judge acted as prosecutor, having intervened so as to take up 18 pages of the transcript by his examination, by asking leading questions and by showing bias.

Mr. Reid, for the respondent, pointed out that the second ground could hardly be said to be covered by any of those in the notice, and objected to this whole argument. The proper administration of justice is, however, of such primary importance that I would be prepared to allow any necessary amendments to be made to ensure justice if the ground has any real substance. It cannot be treated in a vacuum however: what actually transpired goes far to explain why the trial judge intervened as he did.

The Crown's evidence was that Constable Gary Sutherland, of the Halifax City Police Force, was acting as dispatcher on May 11, 1982 and received a report of a stolen vehicle at 9:25 a.m. from Gary Welsh by telephone. The details of the report were reduced to writing in ex.C/1, which contains a description of the vehicle, including its motor vehicle license and serial numbers and the information that the vehicle was in good condition and was stolen from 5620 South Street 'May 10-11/82' and time stolen 2000 hr- 0900 hr'. Constable Sutherland testified that he got this information from the Gary Welsh that telephoned him and that as a result he initiated an investigation, which involved getting the information to the patrol cars and feeding it into the Canadian Police Information Centre for stolen cars. Constable Sutherland took no further steps but I respectfully agree with the trial judge that his initiation of the investigation constituted entering upon an investigation within the meaning of the Code, in view of the routines necessarily established for this kind of investigation.

As a result, Constable Alex Carmichael, of the Halifax City Police Department, was assigned to follow up the investigation. He went to the defendant's service station, at 5620 South Street, Halifax (which apparently was undergoing extensive construction work), and interviewed the defendant there, taking a statement

introduced in evidence as ex. C/2. The text of this reads:

I took the 78 Chrysler plate #50-32-50 out of the taxi business sometime the first part of April 82. I had the car here on my lot to do some major repairs to it in order to sell the car. I just fixed the car up and painted it between the time I took it out of the taxi business within a few weeks.

I put the Chrysler for sale on my lot before I fixed it. After I fixed it I had the car for sale again on my business lot since the repairs were completed.

There were two black males come in to look at the Chrysler and test drive it shortly after I painted it. The same two blacks were in again the end of last week. They had the car out for another test drive again. That would have been last Thursday or Friday. We were here in the shop until 8 P.M. Monday night May 10/82 and the Chrysler was still here on the lot. Question. Who would have locked up the car last? Answer. I really couldn't say it may not have been locked.

Question. What about keys? The only set there is I have. Question. Who was here working with you Monday night? Answer. Just me and Doug MacDonald painting a car. Question. When was the car first missed and what did you do. When I came in the morning I checked the lot and when I looked around the car couldn't be found. I then called the insurance man Richard Nix and he told me to call the police. I got the plate number for the car from the insurance man and the serial number so I could make a stolen car report.

Gary W. Welsh - signed

On May 13th the defendant gave a further statement, introduced as ex.C/4, to Mr. K.M. Connors, a staff adjuster for Royal Insurance. This reads as follows:

Statement of Gary Richard Welsh. Born 9 Sep 49
Address Box 33 Site 24 RR.6 Armdale, Halifax County.
I have a business relationship with Cecil Murphy.
We have been in business since February/82. The
business we have is registered as Wel Smith Enterprises.
But, to keep things straight when we went for insurance,
the insurance man suggested we call the business
C & G Leasing. The business now has 11 cars that are
leased out as cabs. About 6 months ago I bought the

1978 Chrysler Newport from Dartmouth Dodge. I bought the car wholesale from Ron Basque. I don't recall the price now; but, I should have a receipt around. I had to repair the transmission right away before it went into the cab business. I got the car cheaper because of the transmission problems. I fixed the car within a week or 2 and I started leasing it as a cab. It was leased out pretty well every day. Guys kept bringing the car back complaining it was too hard on gas, asking for another car cheaper on gas. Around the end of March or beginning of April 1982 I bought a Caravelle to replace the Newport. I took the equipment out of the Newport and put it in the new one. Around the first of April I put the word out to cab drivers the car was for sale as is. The left front fender was damaged about \$300 worth. I put a "for sale" sign in the window and it was left in my lot and I parked it on the street with the sign in the window. I had no real offers on it in the damaged condition. A couple of cab drivers wanted to buy it with payments; but, I wouldn't sell it. Shortly after I took it out of the business I took it in for repair of the fender. It wouldn't have passed the cab inspection in April if I had to put it back into the business. On Thursday or Friday last week 2 black guys came in to look at the cab. They had been here the week before that also near the end of the week. I don't know who they are and I didn't ask their names. Both times they test drove the car for 10 or 15 minutes and brought it back. I didn't ask them their names and I don't know their names. I didn't go out with them. On Monday the 10th of May 1982 at about 8 PM I left the garage. The Newport was parked with the "For Sale" sign in it. I don't know if the car was locked or not. The keys were hanging on an orange tag in my office at the garage. They are still here. I have another set at home somewhere. On Tuesday morning I came back around 7:30/AM or 7:45/AM. I saw it was missing, but I figured it must have been in the lot around back. I figured someone moved it. Later that morning before 9 AM I found the car was gone. I called my agent and called the police. Detective Carmichael came to see me 12 May 82 and took a statement. I wanted to get as close to \$2000 for the car as I could. Cab Drivers had offered me \$1200 or \$1500. but, I would not sell. I could have sold it for \$3000 on a monthly payment plan, but I didn't want to sell it that way. It was a green 4 door, hard top Chrysler Newport with a Vinyl roof. I don't know how many kilometers were on it.

I don't recall looking. It had power windows, power steering and power brakes as well as an AM Radio. The car was in good condition before the theft. I painted it once completely since I bought it for a cab and to pass inspection as well, I painted the fender again when I did the repairs. I didn't advertise the car in the paper. The above statement of 3 pages 4 1/2 lines is true and correct to the best of my knowledge. Taken _____ 13 May 82 at the South Street Irving.

Witness:

Gary R. Welsh

K. Connors

It was against this background of detail concerning the time of disappearance of the vehicle from the service station lot on South Street, that it transpired that Mr. David Harvey had come across the vehicle 10 days before May 11th, i.e., on May 1, as far back as it could be driven on a deserted woods road, in the woods behind his house on Beaver Pond Road, Hants County. Three of the wheels were missing, the windows were broken, brush from the alder bushes had been piled up against it. The vehicle had, in fact, been stripped of anything usable and left in a quite damaged condition. Mr. Harvey did not get in touch with the R.C.M.P. until May 4, but on the evening of that day he showed the vehicle to Constable Harry Ullock, R.C.M.P. where it was resting in the woods. At that time the brush was no longer piled against it and two Halifax taxi stickers, which had been on the front and rear bumpers, were gone. The license plates were missing when the vehicle was first found, and the serial number had been removed from the dash and from the windshield near the safety sticker, which had also been defaced so as to remove its number. In fact, the only identifying numbers left on the vehicle were the serial number on the federal identification sticker which is placed on the driver's front door, and the secret identification numbers which are placed in secret places on the vehicle at the manufacturer's. These were subsequently checked and verified by an expert, who testified that the vehicle was in fact the vehicle owned by the defendant.

Everybody seems to have initially overlooked the identification sticker on the driver's door. On May 11th it occurred to Constable Ullock to go back to check this and as a result he retrieved the serial number, and later that day (or possibly on the 12th—Constable Carmichael said he did not learn of the discovery until after he interviewed the defendant—Constable Ullock checked his information with the Halifax City Police.

At the request of the R.C.M.P. Mr. Roger Nichol had removed the vehicle to his towing compound on May 10—apparently it had to be winched out part of the way. The police arranged for the defendant to view the vehicle there and so he met Constable Ullock at Mr. Nichol's yard on May 31. The defendant was accompanied by Mr. Kenneth Messervey, who drives one of the vehicles owned by Mr. Welsh as a taxi. Messervey testified later, in the defence, that he was familiar with the vehicle that went missing, having driven it as a replacement five or six times. According to Constable Ullock, on May 31 the defendant was quite positive that the vehicle was not his, and when the serial number on the driver's door was pointed out to him, suggested that the door might have been taken from his vehicle and put on the one found. Mr. Nichol testified that there were no signs of the cracked paint that would inevitably have been on the door hinges in such a case. Mr. Nichol was involved in the wrecking business for many years.

During the course of the Crown's case the trial judge questioned several of the witnesses. In one or two instances these appeared to have been merely to make sure that he had heard properly. In the other cases he put some more extensive questions to Ullock, Nichol and a Mr. Chisholm (the expert on identification numbers) after counsel had finished their examination, but the content of these questionings was, again, of a clarifying nature, helping to tie down and make more precise some details of the examination. The intervention by the trial judge to the end of the Crown's case could thus be characterized as unexceptional and unexceptionable,

although rather more extensive than one usually encounters.

To meet this rather suggestive circumstantial case the defence first led the evidence of a 21 year old man, Timothy Caldwell. The gist of his story was that he was a good friend of Kenneth Messervey, whom he had worked with in Alberta, and that last Easter weekend (which would be April 11) he had borrowed the car for a couple of days from Messervey. Messervey testified that he rented it to Caldwell. While using it he was 'caught with the Breathalyzer' and was subsequently convicted and lost his license. He didn't tell Messervey about the Breathalyzer.

On a subsequent day he was in Halifax looking for a job. He found nothing on Barrington Street so he went a little 'deeper' in. He didn't know Halifax very well, having been there only two or three times. He noticed the car on the lot—it is a little uncertain whether he admitted seeing the 'For Sale' sign on it—and he thought it was the same car. He happened to have another set of keys, which he had had made on the previous occasion, so he tried the keys and it was the same car. Accordingly he took the car to Windsor and while he was driving it he put it off the road, so he took it and parked it at Cagmagun, in the Burlington area, on a woods road and left it there.

Caldwell said he 'tried to get hold of Kenny' but couldn't so he didn't do anything because he was scared.

Caldwell professed never to have seen Gary Welsh before the day of the trial. He denied stripping the car of the useful articles. The only thing wrong with the car was the damage to the left fender.

On cross-examination, it came out that Caldwell claimed this was the merest coincidence, as he had no idea that Messervey had any connection with the service station. According to Caldwell

he did not in fact get in touch with Messervey until after the police found the car, when Messervey called him; then he told Messervey that he had smashed the car up and parked it.

Caldwell claimed that he saw the car on the lot when he was walking by at night, around 7 he thought. He was carrying the keys to give them to Messervey. He thought the car was Messervey's and although he had not been given any permission to take it, he used to borrow Messervey's car before. He could not remember if the car had a For Sale sign on it, but Messervey had told him that he was 'thinking of selling it, like'. He and Messervey were close enough friends that he could take Messervey's vehicle without asking him for it. Caldwell agreed that he did not know whether Messervey had sold the vehicle or not but thought it was Messervey's. He was scared of what Messervey might say when he put the car off the road. He did not know where to get in touch with Messervey in Halifax.

The cross-examination, while it brought much more detail, left many questions hanging in the air: Why was the car borrowed in the first place? Why did Caldwell have keys made for it? Why did he keep the keys and not give them to Messervey when he returned the car? What was he doing in that part of the city? Why did he take the car when Messervey might need it for himself?, and so on.

A trial judge in a civil case is pretty well confined to what the parties choose to put before him, although even there he is entitled to clear up obscurities and difficulties of his own motion. In a criminal case he is much more actively a minister of justice and is entitled to explore any important questions that arise, if the parties do not do so. This is for the benefit of the defence as well as the prosecution, so that ultimately justice may be done. There is often enough a question as to which can be more bizzare—conduct that is actually criminal or conduct which, although innocent, arises from abnormal motivations. In

the instant case, the explanation put forward by Caldwell involved not only the coincidence of his coming across the car he had already borrowed in Halifax, but also the coincidence of having the keys with him, and the further coincidence or abnormality that he should be looking for a job in that part of Halifax around 7 o'clock in the evening. As I have already noted, an appreciation of the last point depends upon a knowledge of Halifax geography and the general character of different parts of the city, a knowledge that I am confident that the trial judge and most jurors would possess. Even apart from the last point, however, Caldwell's story raised problems.

Even wilder tales have been told in the criminal courts only to be later substantiated by good solid evidence. That fact, however, is not in itself sufficient to raise a reasonable doubt, and my own reaction is that I would not be tempted to accept Caldwell's evidence without getting reasonable answers to some of the questions listed above. I think that it was in some such frame of mind that the trial judge subjected Caldwell to a very extensive examination (seven transcript pages) after counsel had concluded their examinations. He asked Caldwell for what reason he had the car on the first occasion, why he got the keys made ('If I lost one set'), whether it was because he intended to steal the car, how many sets of car keys he had lost in his life ('About four'), how he knew exactly where to go to find the car, was he familiar with the city ('No'), did he know where Messervey lived ('No'), where he worked ('Armdale Taxi—but I wasn't sure if he did or not'), did he contact Armdale Taxi to see if Messervey worked there ('No'), how long was he in the city that day ('About eight hours'), when did he decide that he was going to take the car ('Well, I seen it that night, when I was heading home'), where was it located ('It was at a garage'), did he apply for a job at that particular garage that day ('No'), where else did he apply that day? So far, I have paraphrased and abridged the judge's examination and some of the answers to indicate that the

questions dealt with matters left unanswered by the direct and cross-examination of counsel, matters that would have to be answered to come to any reasonable conclusion about the story. It is probably the manner in which the judge conducted the examination that the defence most objects to, because the examination to the point, which I have just described, while extensive, deals with matters that obviously needed clarification. During the course of this examination, however, the trial judge twice put a question in the form of a suggestion to the the witness. Thus:

Q. I suggest to you sir, that you needed it for a reason? Did you?

A. Yes...Well...

Q. Well, what was the reason you needed it for... that's all I want to know?

A. Well, my mother and them haven't got a car, and I have to get stuff for them, and that.

and a little later

Q. I suggest to you - that the reason you got the second set of keys made off it, was because you had an intention of stealing that car in the future... Am I right?

A. No.

When the trial judge asked Caldwell where else he had applied for work that day, Caldwell answered that he didn't know the name of the companies. The trial judge then decided to call a recess of ten minutes, during which Caldwell was required to think without discussing the matter with anyone, and on resumption of the court was to tell the judge exactly what he did on the day that he took the car. On the resumption of the sitting, however, while that line of questioning was resumed, very little more detail was elicited. The court then switched to asking Caldwell about being caught 'on the Breathalyzer' and whether he had lost his license as a consequence by the time he took the car the second time.

Defence counsel re-examined on the last point and brought out that Caldwell could not remember any other place that he went to look for a job because he was not familiar with the streets; also that he had a grade seven education.

The defence then called Kenneth Messervey, who drives a taxi for Gary Welsh, Armdale Taxi being the company. Messervey testified that he was in Windsor on Easter weekend and had too much to drink to drive, so he lent or rented his car to Caldwell for the weekend. The car was actually one lent to Messervey by Welsh while Messervey's car was being fixed over the Easter weekend (it was a Valiant, which was also owned by Welsh). After the Easter weekend Messervey took the Chrysler car back to the service station lot on South Street and recovered the Valiant.

About a week or two later Welsh mentioned something about the Chrysler to Messervey, and the latter when he was 'up in the country there' started to talk to Caldwell about what he knew and Messervey mentioned this to Welsh.

Messervey's account of the visit with Welsh to Nichol's junk yard to identify the car was very vague. The car at the junk yard had a serial number on the door and was pretty well the same type of car and looked something like the car. He, Messervey, had driven the Chrysler but only occasionally and never as a taxi, although it was a good car to use for a taxi. The Mountie at the junk yard had asked him if it was the missing car and he said 'No': it looked even a different colour, a different shade of green. The car at the junk yard had a trailer hitch and it was not usual for a taxi to have a trailer hitch.

On cross-examination Messervey thought he was asked by Welsh to go along to identify the car at the junk yard because he had it so recently—a week but possibly a month before. The vehicle looked similar to the missing one but was damaged and

seemed to be a different shade of green. He had driven the vehicle four or five times as a temporary replacement for his own taxi. It would make a good taxi because it was a big car and a comfortable car, and more people like a big car than a small car.

As to Caldwell, Messervey said that he saw him a week after the Easter weekend and then again after about a good month at Caldwell's mother's place. Messervey saw Caldwell walking to the store and blew the horn at him, whereupon Caldwell volunteered the information about the car: he did not go looking for Caldwell to find out about it.

On transcript pp.77 and 78 the trial judge took part in the cross-examination of Messervey concerning when he learned the car was stolen, but I think this was an attempt to clear up confusion. Prosecuting counsel's initial question on this was 'Q. And do you know when this car [was] reported as having been stolen? A. No I don't.' Messervey said that he learned of the car being stolen in a conversation with Welsh at his garage, and that it was after he was in the junk yard that he saw Caldwell in Windsor. After that he told Welsh about it and went and saw a lawyer.

Messervey testified, quite clearly, that he would never have know of Caldwell's connection with the taking if Caldwell had not volunteered the information and that he did not telephone him to find out or go looking for Caldwell to ask about it.

Messervey admitted that he told the policeman at the junk yard that it was not the car, although he had made no detailed examination of the car in the junk yard. On re-examination, Mr. Cooke brought out the effects of damage on the appearance of the vehicle.

After the re-examination the trial judge questioned Messervey about his denial that the car in the junk yard was

Welsh's missing Chrysler (four and a half pages of transcript). This could be fairly characterized as a cross-examination--at one point the judge's suggested 'You were pretty damn sure that it was that car, wasn't it?' Later the questioning turned to the keys that Caldwell said that he had made, and Messervey testified that he did not know about this or about Caldwell being picked up for impaired driving.

The questioning then turned to contacts between Messervey and Caldwell, and more especially how Caldwell would be able to get in touch with Messervey in Halifax. Messervey said that Caldwell did not know where he lived in Halifax but 'He would get me at the taxi stand.' A few questions later, however, Messervey said he didn't take messages--I read this to mean through the two-way radio--and seldom went to the office. On further re-examination, Messervey said that Caldwell knew where he lived but had never been to his house, to his knowledge. (What seems to be an earlier denial of part of this may be ambiguous.)

The judge's examination of Messervey was concerned with an area that had been reasonably well explored by prosecuting counsel's cross-examination, except for that part dealing with contacts with Caldwell and Caldwell's means of getting in touch with Messervey in Halifax. On the latter question there would thus be some reason for the judge to question the witness, but on the question of identifying the vehicle the judge's examination seems, on the surface at least, to have been more for the purpose of testing and weighing the witness rather than for clearing up unresolved problems.

Undoubtedly, many excellent judges in non-jury cases have from time to time put questions to witnesses to help in sizing up the witnesses' testimonial capacity and worth. Intelligence, memory, ability to estimate distance and time, quickness of preception and response, verbal adroitness, etc. have all been

tested on the stand by prudent judges well aware of the need to be impartial and to appear impartial, but mostly in non-jury cases. The difference is important, because any questioning a judge does in front of a jury is for the benefit of the jury-- except where he is merely trying to complete a note of evidence.

The dangers in an examination of this type are, however, obvious, because it tends to become a contest between the interrogator and the witness, and any contest can implant a bias as well as giving the obvious impression of bias.

In sum, the trial judge's examination of Mr. Messervey is more difficult to justify than in the case of his examination of Caldwell.

The defendant's own testimony, in chief, was that he owned close to twenty cars, of which fifteen would be rented out, on the average, as taxi cabs. They were all Chrysler products, of which five or six would actually be Chryslers but none was of the model and year of the Chrysler in question: one other car was a green but a different green. Mr. Welsh said that he didn't drive the taxis himself and didn't see the cars very often. He could not, in fact, identify half the cars he had except by the taxi roof light number. He recalled lending the missing car at Easter to Mr. Messervey.

He explained that he told the police and the insurance adjuster that the car was on the lot on May 10th, because he thought it was. There was a lot of construction going on at his service station, with daily disruption of business and moving the cars, and, on the other hand, he, Welsh, was not always there. May 11th was the first time that he noticed it missing. He denied that he had ever seen Caldwell before the day of the trial, but mentioned that the police called him at one point to see if he knew the name.

On cross-examination, he was asked about the discrepancy between two of his statements concerning the keys. Mr. Welsh was pretty vague about the black buyers and protested 'I can't remember dates. I got too many things on my mind.' He denied very firmly that he had told Constable Ullock that the vehicle in the junk yard was not his.

At the conclusion of the cross-examination the trial judge questioned Mr. Welsh (four pages of transcript) about how the statement to the insurance adjuster was given, what the defendant paid for the car originally and what he expected to realize on the claim, all matters more or less left untouched by the previous examination by counsel. At the conclusion of his examination, the judge remarked that he was amazed Mr. Welsh was still in business, 'You don't seem to know anything about what you do in your business...', to which Welsh replied that he had a partner that took care of most of that part of the business. Mr. Cooke then re-examined on that point and on some other questions about the keys.

This résumé indicates that the trial judge's questioning in this case was quite extensive and probing, much more so than is usually the case, and with respect to Messervey went over ground that had already been pretty well covered by counsel. On the other hand, while there was some questioning that could be characterized as cross-examination, the trial judge does not seem to have committed any of the major sins in the category of judicial intervention. He did not interrupt counsel or prevent them from making their case, and he did not take over the case for the prosecution, although much of his questioning dealt with matters that could and probably should have been brought out by prosecuting counsel. It is undoubtedly correct that it is not the function of the judge to make good the omissions of prosecuting counsel, except to the extent that justice requires it. In this case, the judge's questioning also brought out one or two aspects of the

defence that had not previously emerged.

The judge seems to have treated the witnesses with reasonable courtesy, although in one or two instances his disbelief may have been obvious. It is not always possible, however, to dissemble: in this respect a judge is not showing partiality or bias in allowing his disbelief to become apparent in a case such as this.

In my opinion the examination made by the trial judge taken as a whole was somewhat excessive and was, on occasion, too forceful. In its character, however, it did not go beyond what is permitted to a trial judge in clearing up unanswered questions and in weighing the testimony of a witness in a criminal trial. It did not exhibit partiality or a bias against the defendant or his witnesses, except in the sense that their testimony precipitated some display of disbelief. In my opinion the appeal cannot succeed on this ground, especially as I find that there was no miscarriage of justice.

The other ground was that the trial judge found that the car actually was stolen, and that therefore the information has not been proved. The trial judge did not use the clearest language in giving his decision (transcript, p.123) but it is clear that he found that the car had not been stolen in the way that the defendant described it in his reports. In fact, he rejected the theory of the defence as incredible, and I think it is clear from the whole of the decision that the trial judge was using 'stolen' as the equivalent of 'taken' in his very brief references to what had actually happened.

The appeal is dismissed with the usual order as to costs.

A useful summary of the law touching 'Judicial Misconduct in the Criminal Trial' is contained in an article of that title by Professor Alec Samuels, in [1982] Crim.L.R. 221.

D. T. R. ...
A Judge of the County Court of
District Number One