Her Majesty the Queen (respondent) v. Jahmar Welsh (appellant)
(C49268)

Her Majesty the Queen (respondent) v. Ruben Pinnock (appellant)
(C49887)

Her Majesty the Queen (respondent) v. Evol Robinson (appellant)
(C47667; C49453; 2013 ONCA 190)

Indexed As: R. v. Welsh (J.)

Ontario Court of Appeal
Rosenberg, Sharpe and MacFarland, JJ.A.
April 2, 2013.

Summary:

Oraha was shot multiple times and killed in a parking lot near his car. Forensic evidence indicated that four different firearms were used. No murder weapons were found. It was agreed at trial that the circumstances of Oraha's death were planned and deliberate. The Crown's theory was that eight individuals, four of whom were shooters, were involved in the murder. The Crown alleged that Welsh was one of the four shooters, that Pinnock planned the murder with Welsh and acted as a lookout, and that Robinson delivered a gun to Welsh and acted as a lookout and getaway driver. The other alleged shooters and participants in the murder were not identified. The motive was alleged to be family revenge for a murder a month earlier. Welsh, Pinnock and Robinson were convicted of first degree murder. The accused appealed arguing that: (1) incriminating statements made by Robinson and Pinnock to an undercover police officer who had posed as an Obeah spiritual advisor (the Obeah statements) should not have been admitted because of Charter violations or because the police conduct amounted to a "dirty trick"; (2) the fairness of the trial was tainted by an in camera proceeding conducted by the trial judge, in which the trial judge met privately with Crown counsel to discuss an issue of privilege arising from the Crown's interview of a Crown witness (Brown) on the eve of trial; (3) the trial judge erred by refusing to sever Welsh's trial; and (4) the trial judge erred by allowing the Crown to advance in closing submissions to the jury the speculative proposition that Pinnock had "called out the shooters" and therefore was involved in planning the murder.

The Ontario Court of Appeal dismissed the appeals. As to the first ground, the trial judge did not err in admitting the Obeah statements. The Obeahman operation did not violate the accused's rights to freedom of religion (Charter, s. 2(a)) or equality (s. 15), and even if it did, the evidence would have been admitted under s. 24(2). The Obeah statements were not protected by common law privilege. Further, the Obeahman operation did not constitute a "dirty trick" and did not breach the accused's s. 7 rights. As to the second ground (trial fairness), notwithstanding that the trial judge proceeded with certain matters in the accused's absence contrary to s. 650(1) of the Criminal Code, this was a case where the curative provision in s. 686(1)(b)(iv) could be applied (i.e., the appeal could be dismissed notwithstanding any procedural irregularity at trial where the accused suffered no prejudice). As to grounds three and four, the trial judge made no error.

Editor's Note: Certain names in the following case have been initialized or the case otherwise edited to prevent the disclosure of identities where required by law, publication ban, Maritime Law Book's editorial policy or otherwise.

Civil Rights - Topic 302

Freedom of conscience and religion - What constitutes a religion - [See first **Civil Rights - Topic 382**].

Civil Rights - Topic 303

Freedom of conscience and religion - General - Scope of right - [See both **Civil Rights - Topic 382**].

Civil Rights - Topic 382

Freedom of conscience and religion - Infringement of - What constitutes - The accused were convicted of murder - They appealed, arguing that their right to freedom of religion (Charter, s. 2(a)), was violated when an undercover police officer posed as an Obeah spiritual leader and used various ruses to obtain statements from them - The trial judge admitted the statements, holding that Obeah constituted a religious belief system that attracted Charter protection, but that only one of the accused had demonstrated a genuine or sincere belief - However, the deception respecting that accused did not amount to a violation of s. 2(a) as any interference was trivial or insubstantial - The trial judge held that even if there was a violation of s. 2(a), it was reasonable under s. 1 - The Ontario Court of Appeal dismissed the appeal - The court agreed that to the extent that the invasion of the relationship implicated freedom of religion under s. 2(a), any interference was trivial or insubstantial and dwarfed by the corrupt motives that induced the accused to participate in and fall for the elaborate scheme of deception practiced upon them - Section 1, however, was not applicable as this case did not involve a limit "prescribed by law" - See paragraphs 31 to 42 and 51 to 73.

Civil Rights - Topic 382

Freedom of conscience and religion - Infringement of - What constitutes - The accused, who were convicted of murder, appealed, arguing that their right to freedom of religion (Charter, s. 2(a)), was violated when an undercover police officer posed as an Obeah spiritual leader and used various ruses to obtain statements from them - The Ontario Court of Appeal dismissed the appeals - The court stated that "Finally, we wish to be clear that, contrary to the submissions of the appellants, by holding that there was no violation of s. 2(a) in this case, we do not give the police carte blanche to exploit the religious beliefs and practices of suspects to obtain statements. Each case must be decided on its own facts. This is plainly a very sensitive area where the police must proceed with the utmost caution and with the utmost respect for the fundamental value of freedom of religion. We wish to state clearly that this decision does not stand for the proposition that the police are entitled to pose as religious advisers and expect that statements obtained from religiously-motivated suspects will be admitted. In cases where suspects have sincere religious beliefs and seek counseling from a supposed religious adviser for non-corrupt religious reasons, the result could well be different" - See paragraph 73.

Civil Rights - Topic 1038

Discrimination - Race and national or ethnic origin - Criminal matters - The accused who were of black, Jamaican heritage, were convicted of murder - They appealed, arguing that their s. 15 Charter rights were violated when an undercover officer posed as an Obeah spiritual leader and used various ruses to obtain statements from them - The trial judge had admitted the statements holding that the accused had been targeted on the basis of their suspected involvement in a serious crime, not on the basis of race or religion, and had there been a violation of s. 15, it was justified as a reasonable limit under s. 1 - The accused appealed - The Ontario Court of Appeal dismissed the appeal - The trial judge did not err in finding that the Obeahman undercover operation did not violate the accused's s. 15 rights - The investigative technique used by the police was not based upon an enumerated or analogous ground under s. 15 - Nor did the investigative technique deployed by the police rest on a distinction that created a disadvantage by perpetuating prejudice or stereotyping - Section 1, however, was not applicable as this case did not involve a limit "prescribed by law" - See paragraphs 31 to 37, 43 and 74 to 78.

Civil Rights - Topic 1051

Discrimination - Religion - Criminal matters - [See **Civil Rights - Topic 1038**].

Civil Rights - Topic 3160

Trials - Due process, fundamental justice and fair hearings - Criminal and quasi-criminal proceedings - Right to remain silent and protection against self-incrimination (Charter, s. 7) - While investigating a murder, an undercover police officer posed as an Obeah spiritual leader (Leon) and used various ruses to obtain incriminating statements from the accused - The trial judge rejected the accused's argument that the statements should be excluded under the dirty tricks doctrine or under s. 7 of the Charter, admitted the statements and convicted the accused - The accused appealed - The Ontario Court of Appeal dismissed the appeal - The court was not persuaded that s. 7 of the Charter had any application to this case - Even if it did, at best it might subsume dirty tricks as an aspect of the protection extended by s. 7 and did not add anything substantive to the dirty tricks analysis - The court stated that the reason s. 7 had no application here was that at the time the accused made the Obeah statements, they were not detained or in a situation that was tantamount to detention - See paragraphs 107 to 110.

Civil Rights - Topic 8348

Canadian Charter of Rights and Freedoms - Application - Exceptions - Reasonable limits prescribed by law (Charter, s. 1) - The accused, who were charged with murder, argued that their right to freedom of religion (Charter, s. 2(a)) and equality rights (s. 15) were violated when an undercover police officer posed as an Obeah spiritual leader and used various ruses to obtain incriminating statements from them - The trial judge admitted the statements and convicted the accused - The trial judge found no violation of s. 2(a) or s. 15, and even if those provisions were violated, the violations could be justified as a reasonable limit pursuant to s. 1 - The accused appealed - The Ontario Court of Appeal dismissed the appeal - Sections 2(a) and 15 were not violated - However, the court held that s. 1 had no application on the facts of this case as s. 1 required that the limit be

"prescribed by law" - At issue here was a police investigative technique that rested on nothing more precise than the general legal duty of the police to investigate crime - See paragraphs 79 to 81.

Civil Rights - Topic 8368

Canadian Charter of Rights and Freedoms - Denial of rights - Remedies - Exclusion of evidence - The accused, who were charged with murder, argued that their right to freedom of religion (Charter, s. 2(a)) and equality rights (s. 15) were violated when an undercover police officer posed as an Obeah spiritual leader and used various ruses to obtain incriminating statements from them - The trial judge found no Charter breach, admitted the statements and convicted the accused - The accused appealed - The Ontario Court of Appeal dismissed the appeal - The court opined that even if ss. 2(a) or 15 were violated, the application of the three-part inquiry mandated by R. v. Grant (SCC 2009), for considering the admissibility of evidence under s. 24(2) of the Charter strongly favoured admitting the evidence - See paragraphs 82 to 85.

Courts - Topic 592

Judges - Duties - Duty to conduct fair and impartial proceedings - [See **Criminal Law - Topic 5038**].

Courts - Topic 691

Judges - Disqualification - Bias - Reasonable apprehension of bias - [See **Criminal Law - Topic 5038**].

Criminal Law - Topic 127

Rights of accused - Right to be present at trial - [See **Criminal Law - Topic 5038**].

Criminal Law - Topic 4354

Procedure - Charge or directions - Jury or judge alone - Directions regarding pleas or evidence of witnesses, co-accused and accomplices - Welsh appealed a first degree murder conviction (shooting death), arguing that the trial judge erred in not giving a Vetrovec warning respecting testimony given by the deceased's girlfriend (McLean) - McLean initially told police that she did not see the killers, but later, when she was told that the victim died, identified Welsh as being at the scene - The Ontario Court of Appeal dismissed the appeal - A Vetrovec warning was not required - The judge gave a special warning concerning McLean as an eye-witness - He also reviewed McLean's evidence at length, including matters relied upon by the defence as undermining her credibility - McLean did not fall within the class of witnesses for which a Vetrovec warning was mandatory - There were factors that undermined her credibility but those were apparent on the record - There might have been problems with McLean's credibility but there was no need for special caution in approaching her evidence - See paragraphs 204 to 208.

Criminal Law - Topic 4420.04

Procedure - Opening and closing addresses - Summing up - Counsel - Closing address - Reference to unsupported theory - Welsh, Pinnock and Robinson were convicted of first degree murder - Pinnock appealed, arguing that the trial judge erred by allowing the

Crown to advance in closing submissions to the jury the speculative proposition that Pinnock had "called out the shooters" (i.e., that he called other people on his cell phone to come to the scene and was therefore involved in the planning of the killing) - The Ontario Court of Appeal dismissed the appeal - The defence was not unfairly surprised by the Crown's theory as it was also referred to in the Crown's opening address - There was also a body of evidence from which the jury could infer that Pinnock assisted in planning the killing - See paragraphs 187 to 203.

Criminal Law - Topic 4482

Procedure - Trial - Joint or separate trials of two or more persons - Welsh, Pinnock and Robinson were convicted of first degree murder - Welsh appealed, arguing that the trial judge erred by refusing to sever his trial - Welsh argued that certain incriminating statements made by Robinson to a Crown witness (Brown) and to an undercover police officer posing as an Obeah spiritual advisor would not have been admissible against him at a separate trial - The Ontario Court of Appeal dismissed the appeal - The court was not persuaded that the trial judge acted unjudicially in refusing severance based on the risk of improper use of the Robinson statements - The trial judge resorted to several methods to minimize the prejudice to Welsh (e.g., editing the Robinson statements, simple but emphatic jury instructions about the use of the evidence, etc.) - He also dealt with each accused separately in the jury charge - Thus the evidence that the jury could use against each of the accused was segregated in the jury charge - The judge did not improperly exercise his discretion in refusing to sever Welsh's trial - See paragraphs 152 to 178.

Criminal Law - Topic 4482

Procedure - Trial - Joint or separate trials of two or more persons - Welsh, Pinnock and Robinson were convicted of first degree murder - Welsh appealed, arguing that the trial judge erred by refusing to sever his trial - Welsh argued that certain incriminating statements made by Robinson would not have been admissible against him at a separate trial - Further, Welsh claimed that even the proper use of Robinson's statements would lead to irreparable prejudice because a conviction of Robinson would lead to his conviction, irrespective of the strength of the evidence against him - The Ontario Court of Appeal dismissed the appeal - The court stated that "... Welsh's situation is not unusual in cases of multiple accused where the accused are alleged to have played different roles. The fate of parties and principal offenders are almost inevitably intertwined. Trial judges deal with this problem by instructing the jury to deal with each accused separately and only consider the evidence admissible against the particular accused. In this case, the trial judge went further. As we have pointed out, he did not simply instruct the jury to consider the cases against each accused separately. In his charge to the jury, he dealt with each accused separately and isolated for the jury the evidence they could use to consider the case against the particular accused. We are satisfied that the joint trial of Welsh with his co-appellants did not result in an injustice" - See paragraphs 179 to 186.

Criminal Law - Topic 5038

Appeals - Indictable offences - Dismissal of appeal if error resulted in no miscarriage of justice - Procedural error - A trial judge met privately with Crown counsel in camera to discuss a privilege issue respecting Crown counsel's notes from an interview of a

particular Crown witness conducted on the eve of a murder trial - The judge also rejected a mistrial application and refused to recuse himself - The accused appealed, arguing that the trial was unfair because the trial judge conducted part of trial in the absence of the accused (Criminal Code, s. 650(1)) and the in camera hearing raised a reasonable apprehension of bias - The Ontario Court of Appeal dismissed the appeal - While there was a violation of s. 650(1) when the in camera hearing went beyond the privilege issue, this was a case where the curative provision in s. 686(1)(b)(iv) applied (i.e., the appeal could be dismissed notwithstanding any procedural irregularity at trial where the accused suffered no prejudice) - Also, the accused did not establish that the judge displayed a reasonable apprehension of bias - See paragraphs 116 to 151.

Criminal Law - Topic 5049

Appeals - Indictable offences - Dismissal of appeal if no prejudice, substantial wrong or miscarriage results - Where the accused denied right to be present during whole of trial - [See **Criminal Law - Topic 5038**].

Criminal Law - Topic 5355

Evidence and witnesses - Confessions and voluntary statements - Whether statement was made freely and voluntarily - [See second **Police - Topic 3106**].

Evidence - Topic 4311

Witnesses - Privilege - Priest-penitent communications (incl. communications with other religious and spiritual advisors) - General - While investigating the accused respecting a murder, an undercover police officer posed as an Obeah spiritual leader and used various ruses to obtain incriminating statements from the accused - The trial judge rejected the accused's argument that the statements were protected by common law privilege (R. v. Gruenke (SCC 1991), admitted the statements and convicted the accused - The accused appealed - The Ontario Court of Appeal dismissed the appeal - The trial judge did not err in the application of the four part Gruenke test - The judge's finding that the accused had an expectation of privacy was a generous one - The accused's motivation when participating in the Obeah sessions was not sincere participation in a religious rite or service but rather an attempt to escape detection and prosecution for a serious offence - The harm to the public interest that would result from suppressing the evidence far outweighed any harm to the "Obeahman-adherent" relationship - See paragraphs 31 to 37, 45 and 86 to 90.

Police - Topic 3106

Powers - Investigation - Stratagem and subterfuge (incl. trickery) - While investigating the accused respecting a murder, an undercover officer posed as an Obeah spiritual leader and used various ruses to obtain incriminating statements from the accused - The accused argued that the statements should be excluded under the dirty tricks doctrine or as a violation of s. 7 of the Charter - The trial judge rejected the dirty tricks argument, assuming that the accused's failure to make out a violation of freedom of religion (Charter, s. 2(a)) determined the dirty tricks claim - The accused were convicted - They appealed - The Ontario Court of Appeal disagreed with the trial judge's approach to the dirty tricks claim - While the Charter value of freedom of religion was an important

component of the dirty tricks and s. 7 analysis, those issues had to be specifically considered and were not subsumed by the rejection of the s. 2(a) claim - See paragraphs 91 and 92.

Police - Topic 3106

Powers - Investigation - Stratagem and subterfuge (incl. trickery) - While investigating a murder, an undercover officer posed as an Obeah spiritual leader (Leon) and used various ruses to obtain incriminating statements from the accused - The trial judge rejected the accused's argument that the statements should be excluded under the dirty tricks doctrine, admitted the statements and convicted the accused - The accused appealed - The Ontario Court of Appeal dismissed the appeal - Here, the accused were not in custody when they made the Obeah statements - To the extent that the dirty tricks doctrine was tied to the common law rules relating to voluntary confessions, Leon, as an undercover officer, was not a person in authority - The accused's corrupt purpose significantly undermined any religious element there might have been in their relationship with Leon - This was not a case where admitting the Obeah statements would shock the conscience of the community or bring the administration of justice into disrepute - The trial judge did not err when he found that the Obeah statements should not be excluded under the dirty tricks doctrine - See paragraphs 91 to 106.

Police - Topic 3106

Powers - Investigation - Stratagem and subterfuge (incl. trickery) - [See both **Civil Rights - Topic 382** and **Civil Rights - Topic 3160**].

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R. v. Medina, [1988] O.J. No. 2348, refd to. [para. 46].

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; 58 N.R. 81; 60 A.R. 161, refd to. [para. 52].

R. v. Edwards Books and Art Ltd. - see R. v. Videoflicks et al.

R. v. Videoflicks et al., [1986] 2 S.C.R. 713; 71 N.R. 161; 19 O.A.C. 239, refd to. [para. 52].

Hutterian Brethren of Wilson Colony et al. v. Alberta, [2009] 2 S.C.R. 567; 390 N.R. 202; 460 A.R. 1; 462 W.A.C. 1; 2009 SCC 37, refd to. [para. 53].

Syndicat Northcrest v. Amselem et al., [2004] 2 S.C.R. 551; 323 N.R. 59; 2004 SCC 47, refd to. [para. 55].

Zylberberg et al. v. Board of Education of Sudbury et al. (1988), 29 O.A.C. 23; 65 O.R. (2d) 641 (C.A.), refd to. [para. 60].

Corporation of the Canadian Civil Liberties Association et al. v. Ontario (Minister of Education) and Board of Education of Elgin (County) (1990), 37 O.A.C. 93; 71 O.R.(2d) 341 (C.A.), refd to. [para. 60].

Multani v. Commission scolaire Marguerite-Bourgeoys et al., [2006] 1 S.C.R. 256; 345 N.R. 201; 2006 SCC 6, refd to. [para. 62].

R. v. Jones, [1986] 2 S.C.R. 284; 69 N.R. 241; 73 A.R. 133, refd to. [para. 63].

Attis v. Board of Education of District No. 15 et al., [1996] 1 S.C.R. 825; 195 N.R. 81;

171 N.B.R.(2d) 321; 437 A.P.R. 321, refd to. [para. 66].

Ross v. New Brunswick School District No. 15 - see Attis v. Board of Education of District No. 15 et al.

Bruker v. Marcovitz, [2007] 3 S.C.R. 607; 270 N.R. 1; 2007 SCC 54, refd to. [para. 72].

Little Sisters Book and Art Emporium et al. v. Canada (Minister of Justice) et al., [2000] 2 S.C.R. 1120; 263 N.R. 203; 145 B.C.A.C. 1; 237 W.A.C. 1; 2000 SCC 69, refd to. [para. 80].

R. v. Grant (D.), [2009] 2 S.C.R. 353; 391 N.R. 1; 253 O.A.C. 124; 2009 SCC 32, refd to. [para. 82].

R. v. Rothman, [1981] 1 S.C.R. 640; 35 N.R. 485; 59 C.C.C.(2d) 30, dist. [para. 93].

R. v. Oickle (R.F.), [2000] 2 S.C.R. 3; 259 N.R. 227; 187 N.S.R.(2d) 201; 585 A.P.R. 201; 2000 SCC 38, refd to. [para. 95].

R. v. Miller (1991), 50 O.A.C. 282; 5 O.R.(3d) 678; 68 C.C.C.(3d) 517 (C.A.), refd to. [para. 97].

R. v. Rowe (M.) (2006), 209 O.A.C. 50; 208 C.C.C.(3d) 412 (C.A.), refd to. [para. 98].

R. v. Grandinetti (C.H.), [2005] 1 S.C.R. 27; 329 N.R. 28; 363 A.R. 1; 343 W.A.C. 1; 2005 SCC 5, refd to. [para. 103].

R. v. M.C.H., [1998] 2 S.C.R. 449; 230 N.R. 1; 113 O.A.C. 97, refd to. [para. 103].

R. v. Singh (J.), [2007] 3 S.C.R. 405; 369 N.R. 1; 249 B.C.A.C. 1; 414 W.A.C. 1; 2007 SCC 48, refd to. [para. 103].

R. v. McIntyre (M.), [1994] 2 S.C.R. 480; 168 N.R. 308; 153 N.B.R.(2d) 161; 392 W.A.C. 161, refd to. [para. 105].

R. v. Osmar (T.) (2007), 220 O.A.C. 186; 44 C.R.(6th) 276; 2007 ONCA 50, refd to. [para. 105].

R. v. Hart (N.L.) (2012), 237 Nfld. & P.E.I.R. 178; 1015 A.P.R. 178; 2012 NLCA 61, refd to. [para. 108].

R. v. Hebert, [1990] 2 S.C.R. 151; 110 N.R. 1, refd to. [para. 108].

Committee for Justice and Liberty Foundation et al. v. National Energy Board et al., [1978] 1 S.C.R. 369; 9 N.R. 115, refd to. [para. 130].

R. v. R.D.S., [1997] 3 S.C.R. 484; 218 N.R. 1; 161 N.S.R.(2d) 241; 477 A.P.R. 241; 118 C.C.C.(3d) 353, refd to. [para. 130].

R. v. Hertrich, Stewart and Skinner (1982), 137 D.L.R.(3d) 400; 67 C.C.C.(2d) 510 (Ont. C.A.), refd to. [para. 137].

R. v. Cloutier (1988), 27 O.A.C. 246; 43 C.C.C.(3d) 35 (C.A.), refd to. [para. 139].

R. v. Laws (D.) (1998), 112 O.A.C. 353; 41 O.R.(3d) 499 (C.A.), refd to. [para. 139].

General Accident Assurance Co. et al. v. Chrusz et al. (1999), 124 O.A.C. 356; 45 O.R. (3d) 321 (C.A.), refd to. [para. 146].

Blank v. Canada (Minister of Justice), [2006] 2 S.C.R. 319; 352 N.R. 201; 2006 SCC 39, refd to. [para. 147].

R. v. Olah (S.) and Ruston (J.D.) (1997), 100 O.A.C. 1; 33 O.R.(3d) 385; 115 C.C.C.(3d) 389 (C.A.), refd to. [para. 160].

R. v. Litchfield, [1993] 4 S.C.R. 333; 161 N.R. 161; 145 A.R. 321; 55 W.A.C. 321; 86 C.C.C.(3d) 97, refd to. [para. 168].

R. v. Last (G.E.) (2009), 394 N.R. 78; 255 O.A.C. 334; 69 C.R.(6th) 1; 2009 SCC 45, refd to. [para. 168].

R. v. Guimond, [1979] 1 S.C.R. 960; 26 N.R. 91, refd to. [para. 170].

R. v. K.G.B., [1993] 1 S.C.R. 740; 148 N.R. 241; 61 O.A.C. 1, refd to. [para. 186].
R. v. Rose (J.), [1998] 3 S.C.R. 262; 232 N.R. 83; 115 O.A.C. 201; 166 D.L.R.(4th) 385, refd to. [para. 199].
R. v. Khan (M.A.) (1998), 129 Man.R.(2d) 32; 180 W.A.C. 32; 126 C.C.C.(3d) 353 (C.A.), refd to. [para. 201].
R. v. Vetrovec; R. v. Gaja, [1982] 1 S.C.R. 811; 41 N.R. 606, refd to. [para. 204].
R. v. Bevan and Griffith, [1993] 2 S.C.R. 599; 154 N.R. 245; 64 O.A.C. 165, refd to. [para. 207].
R. v. Bevan - see R. v. Bevan and Griffith.
R. v. Sauvé (J.) et al. (2004), 182 O.A.C. 58; 182 C.C.C.(3d) 321 (C.A.), refd to. [para. 207].

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Counsel:

Dirk Derstine and Ariel Herscovitch, for Ruben Pinnock;
David Bayliss and Anik Morrow, for Evol Robinson;
Philip Campbell, for Jahmar Welsh;
Alex Hrybinsky, Benita Wassenaar and Holly Loubert, for the Crown, respondent;
Virginia Nelder, for the intervener, African Canadian Legal Clinic;
Jason MacLean, for the intervener, Canadian Civil Liberties Association.

These appeals were heard on December 18 to 20, 2012, before Rosenberg, Sharpe and MacFarland, JJ.A., of the Ontario Court of Appeal. The following decision was delivered for the court by Rosenberg and Sharpe, JJ.A., and released on April 2, 2013.

Appeals dismissed.

Editor: Elizabeth M.A. Turgeon

Civil Rights - Topic 302

Freedom of conscience and religion - What constitutes a religion - The accused were convicted of murder - They appealed, arguing that their right to freedom of religion (Charter, s. 2(a)), was violated when an undercover police officer posed as an Obeah

spiritual leader and used various ruses to obtain statements from them - The trial judge admitted the statements, holding that Obeah constituted a religious belief system that attracted Charter protection, but that only one of the accused had demonstrated a genuine or sincere belief - However, the deception respecting that accused did not amount to a violation of s. 2(a) as any interference was trivial or insubstantial - The trial judge held that even if there was a violation of s. 2(a), it was reasonable under s. 1 - The Ontario Court of Appeal dismissed the appeal - The court agreed that to the extent that the invasion of the relationship implicated freedom of religion under s. 2(a), any interference was trivial or insubstantial and dwarfed by the corrupt motives that induced the accused to participate in and fall for the elaborate scheme of deception practiced upon them - Section 1, however, was not applicable as this case did not involve a limit "prescribed by law" - See paragraphs 31 to 42 and 51 to 73.

Civil Rights - Topic 303

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Freedom of conscience and religion - General - Scope of right - The accused, who were convicted of murder, appealed, arguing that their right to freedom of religion (Charter, s. 2(a)), was violated when an undercover police officer posed as an Obeah spiritual leader and used various ruses to obtain statements from them - The Ontario Court of Appeal dismissed the appeals - The court stated that "Finally, we wish to be clear that, contrary to the submissions of the appellants, by holding that there was no violation of s. 2(a) in this case, we do not give the police carte blanche to exploit the religious beliefs and practices of suspects to obtain statements. Each case must be decided on its own facts. This is plainly a very sensitive area where the police must proceed with the utmost caution and with the utmost respect for the fundamental value of freedom of religion. We wish to state clearly that this decision does not stand for the proposition that the police are entitled to pose as religious advisers and expect that statements obtained from religiously-motivated suspects will be admitted. In cases where suspects have sincere religious beliefs and seek counseling from a supposed religious adviser for non-corrupt religious reasons, the result could well be different" - See paragraph 73.

Civil Rights - Topic 1051

Discrimination - Religion - Criminal matters - The accused who were of black, Jamaican heritage, were convicted of murder - They appealed, arguing that their s. 15 Charter rights were violated when an undercover officer posed as an Obeah spiritual leader and used various ruses to obtain statements from them - The trial judge had admitted the statements holding that the accused had been targeted on the basis of their suspected involvement in a serious crime, not on the basis of race or religion, and had there been a violation of s. 15, it was justified as a reasonable limit under s. 1 - The accused appealed - The Ontario Court of Appeal dismissed the appeal - The trial judge did not err in finding that the Obeahman undercover operation did not violate the accused's s. 15 rights - The investigative technique used by the police was not based upon an enumerated or analogous ground under s. 15 - Nor did the investigative technique deployed by the police rest on a distinction that created a disadvantage by perpetuating prejudice or stereotyping - Section 1, however, was not applicable as this case did not involve a limit "prescribed by law" - See paragraphs 31 to 37, 43 and 74 to 78.

Courts - Topic 592

Judges - Duties - Duty to conduct fair and impartial proceedings - A trial judge met privately with Crown counsel in camera to discuss a privilege issue respecting Crown counsel's notes from an interview of a particular Crown witness conducted on the eve of a murder trial - The judge also rejected a mistrial application and refused to recuse himself - The accused appealed, arguing that the trial was unfair because the trial judge conducted part of trial in the absence of the accused (Criminal Code, s. 650(1)) and the in camera hearing raised a reasonable apprehension of bias - The Ontario Court of Appeal dismissed the appeal - While there was a violation of s. 650(1) when the in camera hearing went beyond the privilege issue, this was a case where the curative provision in s. 686(1)(b)(iv) applied (i.e., the appeal could be dismissed notwithstanding any procedural irregularity at trial where the accused suffered no prejudice) - Also, the accused did not establish that the judge displayed a reasonable apprehension of bias - See paragraphs 116 to 151.

Courts - Topic 691

Judges - Disqualification - Bias - Reasonable apprehension of bias - A trial judge met privately with Crown counsel in camera to discuss a privilege issue respecting Crown counsel's notes from an interview of a particular Crown witness conducted on the eve of a murder trial - The judge also rejected a mistrial application and refused to recuse himself - The accused appealed, arguing that the trial was unfair because the trial judge conducted part of trial in the absence of the accused (Criminal Code, s. 650(1)) and the in camera hearing raised a reasonable apprehension of bias - The Ontario Court of Appeal dismissed the appeal - While there was a violation of s. 650(1) when the in camera hearing went beyond the privilege issue, this was a case where the curative provision in s. 686(1)(b)(iv) applied (i.e., the appeal could be dismissed notwithstanding any procedural irregularity at trial where the accused suffered no prejudice) - Also, the accused did not establish that the judge displayed a reasonable apprehension of bias - See paragraphs 116 to 151.

Criminal Law - Topic 127

Rights of accused - Right to be present at trial - A trial judge met privately with Crown counsel in camera to discuss a privilege issue respecting Crown counsel's notes from an interview of a particular Crown witness conducted on the eve of a murder trial - The judge also rejected a mistrial application and refused to recuse himself - The accused appealed, arguing that the trial was unfair because the trial judge conducted part of trial in the absence of the accused (Criminal Code, s. 650(1)) and the in camera hearing raised a reasonable apprehension of bias - The Ontario Court of Appeal dismissed the appeal - While there was a violation of s. 650(1) when the in camera hearing went beyond the privilege issue, this was a case where the curative provision in s. 686(1)(b)(iv) applied (i.e., the appeal could be dismissed notwithstanding any procedural irregularity at trial where the accused suffered no prejudice) - Also, the accused did not establish that the judge displayed a reasonable apprehension of bias - See paragraphs 116 to 151.

Criminal Law - Topic 5049

Appeals - Indictable offences - Dismissal of appeal if no prejudice, substantial wrong or miscarriage results - Where the accused denied right to be present during whole of trial - A trial judge met privately with Crown counsel in camera to discuss a privilege issue respecting Crown counsel's notes from an interview of a particular Crown witness conducted on the eve of a murder trial - The judge also rejected a mistrial application and refused to recuse himself - The accused appealed, arguing that the trial was unfair because the trial judge conducted part of trial in the absence of the accused (Criminal Code, s. 650(1)) and the in camera hearing raised a reasonable apprehension of bias - The Ontario Court of Appeal dismissed the appeal - While there was a violation of s. 650(1) when the in camera hearing went beyond the privilege issue, this was a case where the curative provision in s. 686(1)(b)(iv) applied (i.e., the appeal could be dismissed notwithstanding any procedural irregularity at trial where the accused suffered no prejudice) - Also, the accused did not establish that the judge displayed a reasonable apprehension of bias - See paragraphs 116 to 151.

Criminal Law - Topic 5355

Evidence and witnesses - Confessions and voluntary statements - Whether statement was made freely and voluntarily - While investigating a murder, an undercover officer posed as an Obeah spiritual leader (Leon) and used various ruses to obtain incriminating statements from the accused - The trial judge rejected the accused's argument that the statements should be excluded under the dirty tricks doctrine, admitted the statements and convicted the accused - The accused appealed - The Ontario Court of Appeal dismissed the appeal - Here, the accused were not in custody when they made the Obeah statements - To the extent that the dirty tricks doctrine was tied to the common law rules relating to voluntary confessions, Leon, as an undercover officer, was not a person in authority - The accused's corrupt purpose significantly undermined any religious element there might have been in their relationship with Leon - This was not a case where admitting the Obeah statements would shock the conscience of the community or bring the administration of justice into disrepute - The trial judge did not err when he found that the Obeah statements should not be excluded under the dirty tricks doctrine - See paragraphs 91 to 106.

Police - Topic 3106

Powers - Investigation - Stratagem and subterfuge (incl. trickery) - The accused were convicted of murder - They appealed, arguing that their right to freedom of religion (Charter, s. 2(a)), was violated when an undercover police officer posed as an Obeah spiritual leader and used various ruses to obtain statements from them - The trial judge admitted the statements, holding that Obeah constituted a religious belief system that attracted Charter protection, but that only one of the accused had demonstrated a genuine or sincere belief - However, the deception respecting that accused did not amount to a violation of s. 2(a) as any interference was trivial or insubstantial - The trial judge held that even if there was a violation of s. 2(a), it was reasonable under s. 1 - The Ontario Court of Appeal dismissed the appeal - The court agreed that to the extent that the invasion of the relationship implicated freedom of religion under s. 2(a), any interference was trivial or insubstantial and dwarfed by the corrupt motives that induced the accused to participate in and fall for the elaborate scheme of deception practiced upon them - Section 1, however, was not applicable as this case did not involve a limit "prescribed by law" - See paragraphs 31 to 42 and 51 to 73.

Police - Topic 3106

Powers - Investigation - Stratagem and subterfuge (incl. trickery) - The accused, who were convicted of murder, appealed, arguing that their right to freedom of religion (Charter, s. 2(a)), was violated when an undercover police officer posed as an Obeah spiritual leader and used various ruses to obtain statements from them - The Ontario Court of Appeal dismissed the appeals - The court stated that "Finally, we wish to be clear that, contrary to the submissions of the appellants, by holding that there was no violation of s. 2(a) in this case, we do not give the police carte blanche to exploit the religious beliefs and practices of suspects to obtain statements. Each case must be decided on its own facts. This is plainly a very sensitive area where the police must proceed with the utmost caution and with the utmost respect for the fundamental value of freedom of religion. We wish to state clearly that this decision does not stand for the proposition that the police are entitled to pose as religious advisers and expect that statements obtained from religiously-motivated suspects will be admitted. In cases where suspects have sincere religious beliefs and seek counseling from a supposed religious adviser for non-corrupt religious reasons, the result could well be different" - See paragraph 73.

Police - Topic 3106

Powers - Investigation - Stratagem and subterfuge (incl. trickery) - While investigating a murder, an undercover police officer posed as an Obeah spiritual leader (Leon) and used various ruses to obtain incriminating statements from the accused - The trial judge rejected the accused's argument that the statements should be excluded under the dirty tricks doctrine or under s. 7 of the Charter, admitted the statements and convicted the accused - The accused appealed - The Ontario Court of Appeal dismissed the appeal - The court was not persuaded that s. 7 of the Charter had any application to this case - Even if it did, at best it might subsume dirty tricks as an aspect of the protection extended by s. 7 and did not add anything substantive to the dirty tricks analysis - The court stated that the reason s. 7 had no application here was that at the time the accused made the

Obeah statements, they were not detained or in a situation that was tantamount to detention - See paragraphs 107 to 110.