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# CRIMINAL FOCUS

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## Something or Nothing: “No Evidence” in Criminal Trials

*R. v. Mackinnon*, 2002 BCCA 249

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The central issue in *MacKinnon* was whether the trial judge had inappropriately based a conviction upon inadmissible hearsay evidence. The impugned evidence was a non-verbal response by a purchaser of narcotics when confronted on the street with an allegation that she had just bought from the appellant. The majority dismissed the appeal, Southin J.A. dissenting.

In the course of the hearing another issue arose, one that Southin J.A. described as “technical but interesting”. The question concerned the distinction—if any—between a motion to dismiss for insufficient evidence and a submission that the Crown has failed to prove its case beyond a reasonable doubt. Defence counsel at trial had announced he would not be calling evidence, and would



have submissions on the evidence. The trial judge apparently took this as an “insufficient evidence” motion. Having heard submissions from counsel, though, and without stating whether he was dismissing that motion, the judge simply ruled that he was “satisfied ... on the whole of the evidence that the Crown has proven its case...”.

Citing *R. v. Morabito*, [1949] S.C.R. 172 (“*Morabito*”), and *R. v. Boissoneault* (1986), 29 C.C.C. (3d) 345 (Ont. C.A.), Southin J.A. stated that it was open to defence counsel to make an “insufficient evidence” motion before electing whether or not to call evidence:

Immediately upon the Crown closing its case, the appellant elected to call no evidence. Counsel appearing for him could have made, without being required to make that election, a motion that the Crown had not made out a prima facie case—a motion in effect that there was no case to go to the jury if this were a jury trial.

This might be interesting and a little surprising to defence counsel currently under the impression—like this author—that the making of an “insufficient evidence” motion at the close of the Crown’s case is really not an available option: one either makes a no-

### INSIDE THIS ISSUE

**57** *Something or Nothing: “No Evidence in Criminal Trials*

**62** Cases Cited

**63** Cumulative Index

**64** Focus YOUR Criminal Appeal

*continued on page 58...*

continued from page 57...

evidence motion and/or leads a defence case, or the court simply goes on to hear submissions on the issue of guilt beyond a reasonable doubt. See, for example, *Morabito*, *supra*, as well as *R. v. P.(C.)*, 1992 CarswellINS 571, (C.A.), and *R. v. Mackey*, 1971 CarswellOnt 6, 4 C.C.C. (2d) 192 (C.A.) (“*Mackey*”), a case which, according to Gale C.J.O.,

fell squarely within the scope of the judgment of the Supreme Court of Canada in [*Morabito*], which held that on such a motion in a jury case the trial judge can rule only on whether there is any evidence which can properly be left to the jury and that the question of reasonable doubt and the applicability of the rule in *Hodge's Case* (1838), 2 Lew. C.C. 227, 168 E.R. 1136, does not arise at the close of the Crown's case where the accused has not elected against calling evidence. These principles apply, as it seems to me, not only to cases where there is direct evidence of guilt but also to those instances where the only evidence of guilt is wholly circumstantial.

Is there then a difference between a no evidence motion (“not a scintilla...”) and an insufficient evidence motion? Does it matter? Whether the basis for the motion is said to be “no evidence” or “insufficient evidence”, the real question would seem to be this: under what circumstances can defence counsel realistically (and safely) ask a trial judge to acquit at the close of the Crown's case, while still reserving the right to lead evidence?

The test for an insufficient evidence motion before a judge sitting alone is actually the same as that for a directed verdict of acquittal where there is a jury, and indeed is the same test a preliminary inquiry court is supposed to apply (*R. v. Guay*, 1973 CarswellBC 1, (S.C.)). What, then, is that test? Must there be absolutely no evidence on a given element, or is the judge entitled to weigh what evidence there is, to some extent, to see if it passes a legal threshold?

The conventional view is that a no evidence motion can only succeed if there is absolutely no evidence on an element of the offence—the so-called “scintilla rule”, expressed crisply in *R. v. Waite* (1991), 113 A.R. 318 (C.A.):

The “scintilla” rule is well-settled. Any doubt after *United States of America v. Shepherd* (1976), 9 N.R. 215 (S.C.C.) was resolved in *Skogman*. The

evidence need not be direct evidence, but may be indirect evidence from which the Crown hopes the trier of fact will draw an inference of the fact in issue. The preliminary judge is not required to weigh the evidence beyond asking whether, if believed, such an inference might be drawn.

This extreme rule is not always followed, however. In *R. v. IV*, 1996 CarswellINS 223, (S.C.) (“*IV*”), for example, a sexual assault complainant had given such patently unreliable and internally inconsistent testimony that the jury were directed to acquit. The test in *R. v. Whynot* (1993), 122 N.S.R. (2d) 81 (T.D.), confirmed on appeal (1994), 129 N.S.R. (2d) 347 was applied, as follows:

[T]he matter must go to the jury unless the accused satisfies the Court that there is no evidence upon which a reasonable jury, properly instructed could return a verdict of guilty.

Is the test, then, not simply whether it is possible to draw an inference of guilt, but whether it would be reasonable to do so, beyond a reasonable doubt? In *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193 (S.C.C.) (“*Monteleone*”), following *U.S. v. Shephard*, [1977] 2 S.C.R. 1067, McIntyre J. states that whether the evidence is direct or circumstantial, if there is any evidence that, if believed by a properly charged jury acting reasonably, would justify a conviction, then the trial judge is not justified in directing a verdict of acquittal (my emphasis).

The Supreme Court has also said, on the other hand, that the Judge cannot “weigh” the evidence, and can only grant a directed verdict if he or she determines that there is “no evidence which if believed could form the basis for a conviction” (*R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 at 121 (S.C.C.) (“*Litchfield*”). This ambivalence has been criticized, by Professor R. J. Delisle in a footnote to *Monteleone*, as arising out of a fiction that “no evidence” really means what it says:

In *Monteleone*, McIntyre J. holds that the trial judge erred in “weighing the evidence”. In making this determination, McIntyre J. had regard to the evidence that had been led in the case, considered the same, and concluded that a jury, properly instructed, could reasonably conclude guilt. It appears, then, that McIntyre J. is not really denying an ability in a trial judge to weigh the evidence, but rather is deciding that this trial judge, when weighing the evidence before him against the standard set, was in error in making his assessment. The court is saying one thing and doing another, and this because of the impossibility of doing what they say. Suppose in the case at hand the evidence was less; suppose there had been no evidence of

motive and no evidence of opportunity. There had simply been evidence that the origin of the fire was unexplained and evidence of contradictions between the accused's statement and the cleaning staff's testimony. Would anyone think it appropriate to leave such a case to the jury? Hopefully not. And yet the Crown has led some evidence. The only way for a trial judge to keep such a case from the jury, however, is for him to weigh the evidence and to ask whether a jury, properly instructed, could reasonably conclude guilt. Or would the Supreme Court of Canada simply answer that in such a case there was "no evidence"?

In a companion case handed down on the same day, *R. v. Yebeles*, post, p. 108, the Supreme Court of Canada at p. 120 reviews its role and the role of any appellate court when a jury's verdict is disputed as "unreasonable or cannot be supported by the evidence" pursuant to s. 613(1)(a)(i) of the Criminal Code, R.S.C. 1970, c. C-34:

The court must determine on the whole of the evidence whether the verdict is one that a properly-instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence.

Why is it that an appellate court can look back and re-weigh the evidence, and so determine whether the verdict was reasonable, but a trial judge cannot look forward and weigh the evidence to determine whether a verdict based thereon could be reasonable? Are appellate judges more able? Surely the test and its implementation should be the same, and both trial judge and appellate judge should do all they can to ensure that the jury is confined within the parameters of rationality. When Glanville Williams in "The Application for a Directed Verdict -- I", [1965] *Crim. L. Rev.* 343, described the role of the trial judge on an application for a directed verdict, he wrote at p. 346:

This test is whether there is sufficient evidence for a conviction to be upheld. The trial judge, in ruling on the submission, must put himself in the position of an appellate court hearing an appeal against conviction.

Clearly then, this is not strictly a test of no evidence, but a test of "no reasonable possibility of conviction". In *IV*, for example, there actually was some evidence of lack of consent, since the complainant testified that, while she had consented to the accused being on a bed with her, she had commenced sexual intercourse after she had fallen asleep.

If all this means there is legal space for a "directed verdict" or "insufficient evidence motion" in the narrow gap between a strict no evidence motion and final submissions on the whole of the evidence, it appears to

accommodate only those cases where the evidence is uncontroverted, but purely circumstantial, and where that evidence is not—in some sense—legally sufficient.

Indeed, on a reading of the case law in this regard, it would appear that *IV* may well have been wrongly decided, since it was a case based on direct evidence, at least some of which, while apparently deserving of little weight, did suggest an absence of consent. What was left for the trier of fact was an evaluation of credibility. The law on that is clear: the trial judge considering such a motion is not to weigh credibility (*Mezzo v. R.*, 1986 *CarswellMan* 327, [1986] 1 S.C.R. 802, 27 C.C.C. (3d) 97; *Litchfield, supra*; *Monteleone, supra*).

While the distinction between cases based on direct and circumstantial evidence is fairly unambiguous, it is not quite so clear whether the rule in *Hodge's Case* applies to motions for directed acquittals in the circumstantial cases, despite clear statements in cases like *Mackey, supra*, and *R. v. Vallieres* (1973), 15 C.C.C. (2d) 241 (Que. C.A.) that it does not. *R. v. Collins*, 1993 *CarswellOnt* 726, 79 C.C.C. (3d) 204, (C.A.), for example, was a case in which a trial judge had directed the jury to acquit after hearing a Crown case comprising weak circumstantial evidence and apparently unreliable evidence of confessions. The court ruled that it was solely for the jury to decide what weight to assign to the confession evidence, and that the issue should have been left with the jury even if the Crown had led no more than that evidence alone. The credibility and the weight of a confession, of course, are matters for the jury (*R. v. Mulligan* (1955), 11 C.C.C. 173 (Ont. C.A.)). Arbour J.A. (as she then was) wrote:

Mr. Rosenberg argued that, in a case of circumstantial evidence, the *Sheppard* test must be articulated in relation to the rule in *Hodges'* case which paraphrases the standard of proof beyond a reasonable doubt as applicable to circumstantial evidence. Mr. Rosenberg submitted that on a motion for directed verdict of acquittal, when the evidence is circumstantial, there is no evidence within the meaning of *Sheppard, supra*, and *Monteleone, supra*, if the evidence is equally consistent with innocence as it is with guilt. If this submission is right, presumably this determination would be made after giving the Crown the benefit of all helpful inferences that are reasonably open to it on the evidence.

...

It is, in my opinion, unnecessary to decide whether

Mr. Rosenberg's submission is an appropriate articulation of the *Sheppard* test since, in this case, the evidence is not entirely circumstantial. Even assuming that the case was too weak to go to the jury on the strength of the circumstantial evidence alone, that, in combination with the confessions, which could be believed in whole or in part by the jury, left a sufficient evidentiary basis for the jury to consider.

A clear application of the *Hodge*'s rule at the trial level is found in *R. v. Gaudet*, 1961 CarswellPEI 2, 40 C.R. 193 (S.C.). The trial judge was faced with direct evidence of an apparent attempt at breaking and entering, but only circumstantial evidence of an intent to commit a particular indictable offence within. The court acceded to a motion for a directed verdict on the basis that the circumstantial evidence was reasonably capable of supporting an inference other than guilt as charged:

I am fully convinced that, on the Crown evidence, it would be unsafe and improper for a jury to convict the accused. Although the evidence is sufficient to warrant a suspicion, or even an inference, that the accused intended to commit the offence charged, it is at least equally consistent with the conclusion that, in a state of partial intoxication, he merely intended to commit some entirely different offence, such as mischief or damage to property...

...

The Crown's present case, as to the issue of the attempt to commit the offence charged, rests on purely circumstantial evidence, and it must therefore be established that the evidence is inconsistent with any other rational conclusion than that the accused attempted the alleged offence.

As I have already intimated, the Crown evidence is not only consistent with, but is at least equally consistent with, an alternative conclusion.

I therefore consider that, on the evidence submitted by the prosecution, it would be unsafe for a jury to find the prisoner guilty.

Of course, if a jury (or judge alone) is acting properly, reasonable doubt is necessarily playing a part in deliberations, so that one would think it would be difficult to escape the conventional rule where other plausible inferences necessarily raise reasonable doubt. Rae J. put it this way to the jury in *R. v. Harry*, 1974 CarswellBC 301, 21 C.C.C. (2d) 93 (S.C.):

Now, the defence submits to me that the evidence adduced, that is, brought forward, by the Crown is not capable, and I accent those words as I do with my voice, not capable, of meeting that test as I have stated it, and that there is no case for the defence to

meet. Whether the evidence is so capable is a matter of law and, as I said to you at the outset of the case, the law is my responsibility.

Now, let me be clear, this is not to say that it is for the trial Judge sitting with a jury, assuming the evidence is so capable, to say whether the evidence does or does not satisfy that so-called rule as to circumstantial evidence. To do that, if I were to do that, I would be usurping your function as a jury and I have no right to do that, but I have said to you that the law is for me and whether the evidence is so capable is a question of law. I have concluded, after careful consideration, that the nature of the evidence in this case is such that it cannot form a basis for you, as a jury, properly instructed as to the law, including the law as to reasonable doubt and circumstantial evidence, properly to reach a verdict of guilt and, to allow the case to go to you would be to invite you to act on conjecture and suspicion, and that is not proper. In that case, the law as to what I should do is clear, that is, what I should do as the Judge of this Court.

The Supreme Court has written again fairly recently on the issue, in *R. v. Charemski*, 1998 CarswellOnt 1199 ("*Charemski*"), and portions of that judgment were applied last year by a provincial court judge facing a curious set of circumstances. In *R. v. Breen*, 2001 CarswellNS 334, 45 C.R. (5th) 68 (Prov. Ct.), the Crown case consisted of a single witness who testified to having observed apparent assaults on two individuals. Even though her evidence was direct, and uncontradicted, it was effectively circumstantial evidence on the issue of consent. Given that the evidence was of rough and apparently abusive handling by a hospital orderly of helpless elderly patients, one could certainly see that there was some evidence from which an inference of lack of consent could be drawn. The court, however, acceded to a motion for non-suit without calling on the defence to lead evidence.

The learned trial judge acknowledged the test in *Sheppard*, noted that the test had been "in a state of flux" over the years, and cited Bastarache J., writing for the three-judge majority in *Charemski*, as follows:

For there to be "evidence upon which a reasonable jury properly instructed could return a verdict of guilty" in accordance with the *Sheppard* test (at p. 1080), the Crown must adduce some evidence of culpability for every essential definitional element of the crime for which the Crown has the evidential burden. See Sopinka et al., *The Law of Evidence in Canada* (1992), at p. 136.

On the topic of what a "reasonable jury properly

instructed” actually is, though, the trial judge resorted to the words of McLachlin J. (as she then was) in dissent:

A properly instructed jury acting reasonably is a jury that will convict only if it finds that the evidence establishes guilt beyond a reasonable doubt. To determine whether this could occur, the judge on the motion for a directed verdict must ask whether some or all of the admissible evidence is legally sufficient to permit the jury to find guilt beyond a reasonable doubt. In so doing, the trial judge is determining the sufficiency of the evidence. The question is whether the evidence is capable of supporting a verdict of guilt beyond a reasonable doubt. If it is not, the judge must direct an acquittal, since it would be impossible for a reasonable jury to convict legally on the evidence. To permit the trial to continue would be to impinge on the accused's right to silence and right to be presumed innocent until proved guilty, and to risk a verdict that would necessarily be unreasonable. ...

If the evidence is all direct evidence, the trial judge's task on a motion for a directed verdict is quite simple. An absence of evidence on an essential element will result in a directed acquittal. The existence of evidence on every essential element will result in a dismissal of the motion.

On a motion for a directed verdict, whether the evidence is direct or circumstantial, the judge, in assessing the sufficiency of the evidence must, by definition, weigh it. There is no way the judge can avoid this task of limited weighing, since the judge cannot answer the question of whether a properly instructed jury could reasonably convict without determining whether it is rationally possible to find that the fact in issue has been proved.....The difference between the judge's function on a motion for a directed verdict and the jury's function at the end of the trial is simply this: the judge assesses whether, hypothetically, a guilty verdict is possible; the jury determines whether guilt has actually been proved beyond a reasonable doubt.

This limited judicial weighing at the stage of a motion for a directed acquittal does not infringe the jury's role of determining as a matter of fact whether that guilt has been established. ...

sufficient evidence must mean sufficient evidence to sustain a verdict of guilt beyond a reasonable doubt; merely to refer to sufficient evidence is incomplete since sufficient always relates to the goal or threshold of proof beyond a reasonable doubt. This must constantly be borne in mind when evaluating whether the evidence is capable of supporting the inferences necessary to establish the essential elements of the case.

Not only do reasonable triers of fact acknowledge reasonable doubt where it clearly exists, of course, but they also refrain from indulging in speculation. The case of *R. v. Huynh*, 1996 CarswellAlta 572, 188 A.R. 136 (Q.B.) is a curious case illustrating the proposition that the test of sufficiency is not met where proof of the given element requires a speculative inference to be drawn from the evidence on hand. It was a case where an undercover officer had engaged in a drug purchase transaction with two individuals, one of whom had apparently, during the process of dealing with the officer, bought the drugs from a third person. That third person, the court held, could not be said to have been shown to have intended to aid or abet the trafficking of the second (and of course, while clearly guilty of trafficking to the second person, could not be convicted on that basis because that was not the transaction charged).

Of course, it could be said that *Huynh* was wrongly decided, according to the law that keeps coming down from the nation's highest court. There certainly was some evidence of the third party's intention to be a party to the drug transaction—in fact, ordinary common sense would tell any reasonable person that this was a joint venture. There were, however, other reasonable inferences to draw, and so no legitimate way for a trier of fact to reach a conclusion of guilt beyond a reasonable doubt. It was in that way that the evidence did not, in the trial judge's view, meet the threshold of legal sufficiency.

One would hope that trial courts will continue “wrongly deciding” these issues. The repeated attempts by the Supreme Court of Canada to limit the directed verdict test to an impracticable extreme carry a curious incense-like aroma of dogma. The extreme test is productive of nothing positive, and risks unjust convictions by irrational juries. Defence counsel should perhaps continue to push the boundary in appropriate cases, in the hope that, the next time the issue “goes all the way”, the more enlightened view might prevail.

Postscript 1: in a jury trial where an accused is facing multiple counts, he may move for a directed verdict on a count at the close of the Crown's case, and before electing whether to lead evidence, but if the motion is successful, the trial judge is not to direct the acquittal on that count until the end of the defence case, if any, in relation to the other counts (*R. v. Jagodic*, 1985

CarswellNS 291 (S.C.)).

Postscript 2: if one is successful in persuading a trial judge to accede to a motion, however one characterizes it, at the close of the Crown’s case, the Crown will have a hard time appealing that decision. After all, even if the judge is found to have erred, it will be a tough slog for the Crown to convince the appeal court that the result would not inevitably have been the same following further (presumably exculpatory) evidence from the defence (see, for example, *R. v. Jensen*, 1994 CarswellAlta 668, (Q.B.), but be aware of the contrary authority in *R. v. Melo*, 1986 CarswellOnt 1141, 29 C.C.C. (3d) 173 (C.A.)).

Postscript 3: still on the topic of appeals, don’t forget that if a trial judge denies a motion to dismiss and then immediately convicts, the accused has a “tap-in” appeal (see *R. v. Seamans*, 1978 CarswellNB 26, 41 C.C.C. (2d) 446 (C.A.)).



CASES CITED

*Hodge's Case* (1838), 2 Lew. C.C. 227, 168 E.R. 1136 .....58

*Mezzo v. R.*, 1986 CarswellMan 327, [1986] 1 S.C.R. 802, 27 C.C.C. (3d) 97.....59

*R. v. Boissoneault* (1986), 29 C.C.C. (3d) 345 (Ont. C.A.).....57

*R. v. Breen*, 2001 CarswellNS 334, 45 C.R. (5th) 68 (Prov. Ct.)... ..60

*R. v. Charemski*, 1998 CarswellOnt 1199 (S.C.C.).....60

*R. v. Collins*,1993 CarswellOnt 726, 79 C.C.C. (3d) 204, (C.A.) . ..59

*R. v. Gaudet*, 1961 CarswellPEI 2, 40 C.R. 193 (S.C.) .....60

*R. v. Guay*, 1973 CarswellBC 1, (S.C.) .....58

*R. v. Harry*, 1974 CarswellBC 301, 21 C.C.C. (2d) 93 (S.C.) ..60

*R. v. Huynh*, 1996 CarswellAlta 572, 188 A.R. 136 (Q.B.).....61

*R. v. IV*, 1996 CarswellNS 223, (S.C.) .....58

*R. v. Jagodic*, 1985 CarswellNS 291 (S.C.).....61

*R. v. Jensen*, 1994 CarswellAlta 668, (Q.B.) .....62

*R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 (S.C.C.).....58

*R. v. Mackey*, 1971 CarswellOnt 6, 4 C.C.C. (2d) 192 (C.A.) ..58

*R. v. Melo*, 1986 CarswellOnt 1141, 29 C.C.C. (3d) 173 (C.A.)... ..62

*R. v. Monteleone* (1987), 35 C.C.C. (3d) 193 (S.C.C.).....58

*R. v. Morabito*, [1949] S.C.R. 172.....57

*R. v. Mulligan* (1955), 11 C.C.C. 173 (Ont. C.A.).....59

*R. v. P.(C.)*, 1992 CarswellNS 571, (C.A.).....58

*R. v. Seamans*, 1978 CarswellNB 26, 41 C.C.C. (2d) 446 (C.A.) . ..62

*R. v. Vallieres* (1973), 15 C.C.C. (2d) 241 (Que. C.A.).....59

*R. v. Waite* (1991), 113 A.R. 318 (C.A.) .....58

*R. v. Whynot* (1993), 122 N.S.R. (2d) 81 (T.D.) .....58

*U.S. v. Shephard*, [1977] 2 S.C.R. 1067 .....58

## Cumulative Index

	page
Abetting.....	25
Break and enter .....	33
Directed Acquittal.....	57
<i>Festing v. Canada (Attorney General)</i> , 2001 BCCA 612, 159 C.C.C. (3d) 97, 2001 CarswellBC 2457 .....	49
Firearms, imitation.....	1
Marijuana, criminalization .....	9
No Evidence Motion.....	57
Party liability.....	25
Privilege, Solicitor-Client.....	49
Probation, stale.....	17
<i>R. v. Barnhardt</i> , 2001 BCCA 191 .....	25
<i>R. v. Ivan</i> (2000), 148 C.C.C. (3d) 295, 2000 BCCA 452 .....	17
<i>R. v. Malmo-Levine; R. v. Caine</i> (2000), 145 C.C.C. (3d) 225, 2000 BCCA 225.....	9
<i>R. v. Mackinnon</i> , 2002 BCCA 249.....	57
<i>R. v. Scott</i> , (2000), 145 C.C.C. (3d) 52, 2000 BCCA 220 .....	1
<i>R. v. Schizgal</i> , 2001 BCCA 238 .....	33
Solicitor-Client Privilege.....	49

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