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R. v. Bero

Between
Her Majesty the Queen, respondent, and
Casey Bero, appellant

[2000] O.J. No. 4199
Docket No. C30048

Ontario Court of Appeal
Toronto, Ontario
Osborne A.C.J.O., Doherty and Charron JJ.A.

Heard: September 1, 2000.
Judgment: November 3, 2000.
(68 paras.)

On appeal from the conviction imposed by Justice George Ferguson, sitting with a jury, dated June 5, 1998.

Counsel:

Edward J. Sapiano, for the appellant.
Erin MacCarthy, for the respondent.

The judgment of the Court was delivered by

DOHERTY J.A.:—

I

¶ 1 The appellant was convicted on June 5, 1998 by a jury of impaired driving causing bodily harm and driving with a blood-alcohol level over the prescribed limit. He received a sentence of 30 months. The appellant appeals his convictions only.

¶ 2 The relevant events occurred on October 25, 1996. The appellant met David Mills in a bar and they left together in Mr. Mills' vehicle. A short time later, the vehicle failed to negotiate a ramp on to an expressway, left the road, rolled over and came to rest on its roof in a grassy area dividing the expressway. Just prior to the accident, the vehicle had passed a police car at an excessive speed. The police officer followed the vehicle and saw it leave the road. He arrived at the scene of the accident seconds after it occurred.

¶ 3 Both Mr. Mills and the appellant were thrown from the vehicle and were seriously injured. Mr. Mills told the police at the scene that the appellant was the driver. The appellant was eventually charged in January 1997 after he was released from the hospital.

¶ 4 The identity of the driver was the only issue at trial. The defence acknowledged that if the jury were satisfied beyond a reasonable doubt that the appellant was the driver, the other elements of the offenses had been proved. The Crown relied on Mr. Mills' evidence that the appellant was the driver to establish its case on the issue of identity. The appellant did not testify.

¶ 5 The appellant was also charged with assaulting Mr. Mills. This allegation arose out of events at the bar prior to the accident. The Crown's case on this charge also depended entirely on Mr. Mills' evidence. The jury acquitted on this charge and there was no appeal from that acquittal.

II

¶ 6 The appellant raised four grounds of appeal. He submitted that:

- * The trial judge erred in not holding that the failure of the prosecution to maintain possession of the vehicle and afford the defence an opportunity to conduct forensic examinations of the interior of the vehicle resulted in a breach of the appellant's rights under s. 7 of the Charter and necessitated a stay of proceedings.

- * In the alternative, if a stay was not warranted, the trial judge erred in refusing to permit the defence to question witnesses to establish the potential significance to the defence of the unavailability of the vehicle for forensic testing.

- * The trial judge erred in admitting evidence of statements made by Mr. Mills at the scene of the accident identifying the appellant as the driver, or alternatively erred in failing to give the jury a limiting instruction as to the evidentiary value of those statements.

- * The trial judge improperly put the onus on the appellant to show that Mr. Mills had a motive to lie.

¶ 7 I would give effect to the second ground of appeal and order a new trial. As the first and second grounds of appeal are related and require a more detailed analysis than the other two grounds of appeal, I will address the third and fourth grounds of appeal before turning to the more substantial grounds of appeal.

III

A: The statements made by Mr. Mills at the scene of the accident

¶ 8 When the police arrived at the accident scene moments after it occurred, the appellant and Mr. Mills were lying on the ground near the vehicle. Constable Morin approached Mr. Mills and asked him some questions. Mr. Mills indicated that he was the owner of the truck and that his "buddy" was driving. Mr. Mills also pointed to the appellant as the driver when another officer at the scene asked him who was driving.

¶ 9 This evidence was admitted without objection. The trial judge instructed the jury that they could use this evidence in determining the identity of the driver. No objection was taken to this instruction.

¶ 10 On appeal, counsel argues that the statements were hearsay and were not admissible for their truth. He further contends that if they were admissible at all, they were admissible only as part of the narrative and the jury should have been so instructed.

¶ 11 The appellant bears the onus of showing that the evidence was inadmissible for its truth. In this case, he cannot meet that onus in the absence of any challenge to the admissibility of the evidence at trial. Had counsel objected to the admissibility of the evidence at trial, it would have been incumbent on the Crown to demonstrate its admissibility. This would no doubt have led to a consideration of whether the evidence fell within a recognized exception to the hearsay rule (eg. spontaneous exclamations) or should be admitted under the principled approach to hearsay evidence developed by the Supreme Court of Canada. The admissibility of the evidence on these grounds is certainly open to argument.

¶ 12 It would be wrong for this court to undertake the analysis required to decide whether the evidence was admissible based on a record in which none of the relevant considerations were explored because the defence chose not to litigate the admissibility of the evidence at trial. Absent any suggestion of ineffective representation at trial, or some other adequate explanation for the absence of any objection to admissibility at trial, I would not give effect to an argument that comes down to the contention that an accused should receive a new trial on the ground that had he chosen to challenge the admissibility of evidence at trial he might have been successful.

¶ 13 In so holding, I do not suggest that the failure to object at trial is fatal to any challenge to the admissibility of evidence at trial. Our law does not require timely objection as a condition precedent to appellate complaint. I do hold, however, that an appellant who can show no more than a possibility that evidence may have been excluded had it been challenged has not established an error in law or a miscarriage of justice.

¶ 14 Although the trial judge did not err in admitting the evidence of Mr. Mills' identification of the appellant as the driver, the admissibility of the evidence can be challenged at the new trial which I would order on other grounds. Should counsel choose to do so, the admissibility of the evidence for its truth will be governed by the recent pronouncement in *R. v. Starr*, [2000] S.C.J. No. 40, 2000 S.C.C. 40.

B: The instruction concerning Mr. Mills' motive to lie

¶ 15 Mr. Mills' credibility was a central issue at trial. The jury's acquittal of the appellant on the assault charge indicates that they had difficulty accepting parts of Mr. Mills' testimony. The trial judge's instructions to the jury clearly identified the importance of Mr. Mills' credibility to their deliberations. He outlined several factors which the jury should consider in assessing Mr. Mills' evidence, including what reason, if any, Mr. Mills would have to falsely identify the appellant as the driver of the vehicle. In doing so, the trial judge did not suggest that the appellant had any onus to demonstrate Mr. Mills' motive or that the absence of any motive was determinative of Mr. Mills' credibility. Nor can this part of the instruction be read as in any way undermining the clear instructions as to the presumption of innocence and the burden of proof. I would reject this submission.

C: The application for a stay of proceedings

¶ 16 At the outset of trial, counsel for the appellant moved for a stay of proceedings. He submitted that the prosecution had allowed the vehicle to be destroyed before the defence had a reasonable opportunity to conduct a forensic examination of the interior of the vehicle. Counsel argued that such an examination may well have produced evidence that was relevant to the identification of the driver. He contended that the prosecution's failure to maintain custody of the vehicle until the defence had an opportunity to examine and conduct forensic testing of it denied the appellant his constitutional right to make full answer and defence and caused sufficient prejudice to warrant a stay of proceedings.

¶ 17 Crown counsel at trial suggested that the appellant's motion should not be determined until at least the end of the Crown's case when the prejudice, if any, flowing to the defence from the failure to preserve the vehicle could be accurately evaluated. Defence counsel argued that the motion should be heard prior to the trial. The trial judge agreed and the motion proceeded. The trial judge dismissed the motion prior to hearing any evidence on the trial proper and gave reasons for doing so at the end of the Crown's case.

¶ 18 The trial judge should not have ruled on the motion at the outset of the trial. This Court has repeatedly indicated that except where the appropriateness of a stay is manifest at the outset of proceedings, a trial judge should reserve on motions such as the motion brought in this case until after the evidence has been heard. The trial judge can more effectively assess issues such as the degree of prejudice caused to an accused by the destruction of evidence at the end of the trial: *R. v. B.(D.J.)* (1993), 16 C.R.R. (2d) 381 at 382 (Ont. C.A.); *R. v. A.(S.)* (1992), 60 O.A.C. 324 at 325 (C.A.). The approach favoured by this Court was approved in *R. v. La* (1997), 116 C.C.C. (3d) 97 at 107-108 (S.C.C.). In keeping with that approach, I will consider the appellant's claim that a stay should have been granted in the light of the evidence which was adduced at the trial.

¶ 19 Constable Sybydlo, an expert in accident reconstruction, examined the vehicle at the scene of the accident. He made a brief visual examination of the interior of the vehicle and also took several photographs. Two of the photographs that were developed

showed parts of the interior of the vehicle. Constable Sybydlo did not examine the interior of the vehicle for fingerprints, blood, tissue or hair fibres. No one asked that he do so. Constable Sybydlo indicated that he did not see any blood or fibre on his visual examination of the vehicle, but agreed that such things could be present and not be detectable on a visual examination. He also testified that forensic tests were performed on the interior of vehicles after some accidents, especially if there was a fatality.

¶ 20 The vehicle was towed to a police garage for mechanical inspection and about three days later, moved to a garage run by a company under contract to the police. That company held the vehicle until December 2, 1996 when it was sent to an auto wrecker in Stouffville, Ontario. The vehicle was eventually sold to a wrecker in Quebec and was destroyed on March 25, 1997. The vehicle was effectively out of the control of the police once it was moved to Stouffville.

¶ 21 The appellant was arrested on January 16, 1997, about two and a half months after the accident. He was not charged earlier because he was in the hospital. The appellant was represented by counsel when charged.

¶ 22 Counsel made a request for disclosure on March 11, 1997 and that disclosure was provided on March 19th. On March 28th, counsel for the appellant requested that the vehicle be retained for examination. He was later told that the vehicle had been destroyed. The investigating officer was not aware that the vehicle had been destroyed until he made inquiries after receiving defence counsel's request that the vehicle be held for examination.

¶ 23 In his examination-in-chief, Mr. Mills described the accident in some detail. He testified that he had struck his face on the dash and hit his head on the windshield. He indicated that he bit and partly severed his tongue when his face hit the dash on the passenger's side of the front seat.

¶ 24 The defence relied on the evidence of Mr. Battiston, an expert accident reconstructionist. He concluded, based on the photographs of the vehicle, the officers' notes and sketches of the accident, and the location of the bodies, that Mr. Mills was the driver. Constable Sybydlo did not agree with that conclusion. In his opinion, the physical evidence did not permit any conclusion as to whether Mr. Mills or the appellant was driving. In the course of commenting on Mr. Battiston's opinion, Constable Sybydlo suggested that the absence of any damage to part of the interior of the driver's side of the vehicle was inconsistent with that opinion. Constable Sybydlo said that he had seen no such damage in his visual examination of the interior at the scene. He also agreed that there could be damage which was not readily as visible to the naked eye.

¶ 25 In his reasons for dismissing the motion, the trial judge did not distinguish between issues relevant to the existence of the alleged breach of s. 7 of the Charter and issues relevant to the appropriateness of a stay of proceedings if a breach was established. He blended his consideration of these two very discrete questions. He also made no reference to the applicable jurisprudence. He concluded:

In this case it has not been shown to me, beyond the realm of pure speculation, that any examination of the vehicle would have resulted in evidence that would have assisted the defence in rebutting the Crown's allegations that the accused was the driver of the vehicle. I was unable to conclude that the accused here, as a result of the disposition of the vehicle, had been deprived of the opportunity to make full answer and defence. In my view there was no abuse of process here. I find there was no Charter violation of any kind in this case. Those are the reasons why I dismissed the application for a stay.

¶ 26 Prior to coming to this conclusion, the trial judge held that:

- * It was pure conjecture that forensic examination of the interior of the vehicle would or might have produced evidence which could assist the Crown or the defence.
- * When the car was disposed of in late March, neither the police nor the Crown had any knowledge or "clue" that the accused or his counsel would allege that he was not the driver of the car.
- * The car was available to the defence for forensic testing until late March.

¶ 27 The first two findings cannot be sustained on this record. While no one can say that evidence helpful to the defence would have been found by forensic testing of the vehicle, the trial judge himself, in the course of argument, recognized that there was a reasonable possibility that forensic examination could produce relevant evidence. He said:

In many cases it [forensic examination of the vehicle] does produce an amount of evidence which is relevant to the reconstruction concepts as to who in fact was the driver of the vehicle. ...

¶ 28 Similarly, while the Crown did not have specific notice from the defence that identity was an issue until after the vehicle was destroyed, the Crown knew full well that it would be required to prove the identity of the driver beyond a reasonable doubt. The trial judge also appreciated this point in argument when he said:

One of the things that worries me in this matter is that from the beginning the police had information that suggested, and on which the Crown heavily relies, that the owner of this vehicle was not the driver. So they had that, if you want to call it, allegation and at that time they must have known or they did know certainly on January 16 [when the charge was laid], they knew of that allegation and they knew as well at that time that they would have to prove if the accused was the driver.

¶ 29 Lastly, the suggestion implicit in the third finding made by the trial judge that the defence did not show due diligence in seeking to preserve the automobile for testing is not in accord with the evidence. The police gave up control of the vehicle two months before the appellant was charged and without notice to the appellant. The defence requested disclosure within about eight weeks of the charge being laid. In that time period, the accused changed counsel. About ten days after receiving extensive disclosure, which showed the extent of the Crown's case on the issue of identity and revealed that no forensic tests of the vehicle had been made, defence advised the Crown that the vehicle should be held for testing. Defence counsel acted with reasonable diligence in making his request for disclosure and in responding to that disclosure with the request that the car be preserved. This is not a case, like *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 at 18-19 (S.C.C.) where the defence failure to pursue disclosure with reasonable diligence weighed against a claim that non-disclosure had resulted in a breach of an accused's Charter rights.

¶ 30 The trial judge also erred in concluding that there had been no breach of the appellant's constitutional rights. The proper approach where any accused claims that the failure to preserve material in the possession of the Crown results in a breach of a Charter right is found in *R. v. La*, supra. That approach is conveniently summarized by Roscoe J.A. in *R. v. F.C.B.* (2000), 142 C.C.C. (3d) 540 at 547-48 (N.S. C.A.):

- (1) The Crown has an obligation to disclose all relevant information in its possession.
- (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
- (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
- (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.
- (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
- (6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 Charter rights.
- (7) In addition to a breach of s. 7 of the Charter, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of the evidence was deliberately for the purpose of defeating the disclosure obligation.
- (8) In either case, a s. 7 breach because of failure to disclose, or an

abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in O'Connor.

- (9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
- (10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.

¶ 31 R. v. Stinchcombe, [1991] 3 S.C.R. 326 recognizes that, subject to limited exceptions, all relevant information must be disclosed to the defence. Relevant information is information that is reasonably capable of affecting an accused's ability to defend himself: R. v. Egger (1993), 82 C.C.C. (3d) 193 at 203 (S.C.C.).

¶ 32 An accused's right to disclosure of relevant information in the possession of the Crown is a component of the right to make full answer and defence which is in turn a principle of fundamental justice. Hence, the failure to preserve information which, if preserved would be disclosable to the defence under R. v. Stinchcombe, supra, will constitute a breach of an accused's constitutional right to disclosure of the Crown's case as protected by s. 7 of the Charter, unless the Crown can advance a satisfactory explanation for the failure to preserve the evidence: R. v. La, supra, at pp. 106-107. If the explanation provided by the Crown establishes that the evidence was not lost or destroyed because of unacceptable Crown negligence, the Crown's duty to disclose will not have been breached by the failure to preserve the evidence.

¶ 33 There is no dispute but that forensic tests of the interior of the vehicle could have provided evidence relevant to the identity of the driver. That evidence could have affected the appellant's ability to defend himself. Depending on the results, the tests could have influenced the appellant's plea, the forum in which he chose to be tried, and the nature of the defence. The failure to maintain possession of the vehicle deprived the appellant of information which was relevant in that it could have affected his ability to defend himself. That conclusion is best demonstrated by considering what would have happened had the Crown maintained possession of the vehicle but refused to produce it to the defence on the basis that it was irrelevant. A trial judge would most certainly have ordered the vehicle produced, pursuant to his or her power to supervise Crown disclosure.

The onus, therefore, falls on the Crown to provide a satisfactory explanation for the failure to preserve the vehicle.

¶ 34 In discussing the approach to be taken in assessing explanations offered by the Crown for the destruction of relevant evidence, Sopinka J., in R. v. La, supra, at p. 107, said:

In order to determine whether the explanation of the Crown is satisfactory, the court should analyze the circumstances the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police. [Emphasis added.]

¶ 35 In this case, neither the police nor the Crown ever addressed the relevance of the vehicle in the context of the Crown's disclosure obligation. Once the vehicle's preservation was seen as unnecessary for Crown purposes, no thought was given to its preservation. The investigating officer had nothing to do with the decision to give up possession of the vehicle. Those in the police responsible for the vehicle had no connection to the investigation. The police lost control of the vehicle because the contract it had with the company holding the vehicle only required the company to keep the vehicle for 30 days. Once the police gave up possession of the vehicle, the timing of its destruction became a matter of happenstance. The officer in charge of the investigation was unaware of its destruction until after the defence requested that it be preserved. He appears to have not regarded preservation of the vehicle as any part of the disclosure obligation.

¶ 36 The vehicle's connection to the incident giving rise to the charge was hardly peripheral. Forensic testing of vehicles for various purposes, including identification of the driver, is not unknown to the police and is used by them on occasion for that purpose.

¶ 37 The destruction of potentially relevant evidence is not satisfactorily explained where that destruction is occasioned by a failure to consider whether preservation of that evidence was necessary to meet the disclosure obligations of the Crown. The destruction of the vehicle amounted to a breach of the Crown's disclosure obligations and resulted in a breach of the appellant's rights under s. 7 of the Charter to full disclosure as an adjunct to his right to make full answer and defence.

¶ 38 Having concluded that the failure to preserve the vehicle resulted in a breach of the appellant's s. 7 rights, *R. v. La*, supra, instructs that one next consider whether that failure amounts to an abuse of process. There is no evidence in this case that the prosecution acted for an improper motive in the sense that it deliberately set out to destroy evidence or compromise the appellant's disclosure rights by giving up possession of the vehicle. An improper motive is not, however, necessary for a finding of an abuse of process. Sopinka J., in *R. v. La*, supra, at 108, said:

... Accordingly, other serious departures from the Crown's duty to preserve

material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In such cases, an unacceptable degree of negligent conduct may suffice.

¶ 39 This is not a situation in which the police considered the potential relevance of the vehicle and made a considered decision that it could not be relevant. Nor is it a case where the destruction was accidental in that it was the product of human error, or some cause beyond the control of the authorities. Nor is it a case where the police perceived the potential relevance of the vehicle but failed to take adequate steps to preserve it. Rather, as set out above, the failure to preserve the vehicle was caused by the failure to look beyond the needs of the prosecution to the wider question of the potential relevance of the vehicle to the defence. Had anyone directed their mind to the disclosure obligations set out in *Stinchcombe*, supra, I think the vehicle would have been preserved. The failure to preserve the vehicle reveals an ignorance of, or at least an indifference to, the duty on the Crown and the police to preserve the fruits of their investigation. This indifference or ignorance is difficult to comprehend so many years after the pronouncement of the Supreme Court of Canada in *R. v. Stinchcombe*, supra, and in my view, is a sufficiently serious departure from the Crown's duty to preserve evidence that it constitutes an abuse of process.

¶ 40 I turn next to the appropriate remedy.

¶ 41 The trial judge refused to grant a stay. That refusal would normally be entitled to considerable deference, however, no deference can be given here in the light of the factual and legal errors made by the trial judge. I also base my assessment of the appropriate remedy on the entirety of the record and not just the motion record.

¶ 42 A stay of proceedings is a remedy of last resort. The prosecution's failure to preserve evidence does not automatically entitle the accused to a stay of proceedings even when that failure amounts to an abuse of process: *R. v. La*, supra, 108. A stay is an appropriate remedy only where the breach of an accused's s. 7 rights has caused harm to the accused's ability to make full answer and defence that cannot be remedied, or where irreparable harm would be caused to the integrity of the justice system if the prosecution were allowed to continue: *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1, per L'Heureux-Dubé, in dissent, approved in *R. v. La*, supra, at p. 108.

¶ 43 The reluctance to stay criminal proceedings reflects the strong preference for a verdict on the merits. A stay of proceedings is sometimes necessary, but it is nonetheless an unsatisfactory result which denies both the accused and the community their legitimate expectation of a true verdict based on the merits.

¶ 44 The integrity of the judicial process will generally be put at risk where the conduct of the state involves a deliberate attempt to compromise an accused's ability to make full answer and defence, otherwise undermines the fairness of the trial process or

deliberately frustrates the court's ability to reach a proper verdict: *R. v. Carosella* (1997), 112 C.C.C. (3d) 289 at 310-312 (S.C.C.).

¶ 45 The prosecution's failure to preserve the vehicle so as to give the defence a reasonable opportunity to examine it is troubling in that it suggests that despite repeated judicial pronouncements, the preservation of evidence, which while not helpful to the prosecution is relevant in the *Stinchcombe* sense, is still not engrained in the prosecution psyche. I cannot, however, conclude on this record that the failure to preserve the vehicle demonstrates a systemic disregard for the prosecution's obligation to preserve relevant evidence. Nor is there any suggestion that the prosecution acted with a malevolent motive. In these circumstances, permitting a trial on the merits would not do irreparable damage to the integrity of the judicial process.

¶ 46 I realize that some will argue that the prosecution will only take its duty to preserve relevant evidence seriously if courts refuse to permit prosecutions to proceed where that duty has been ignored. The force of that argument cannot be denied. Judicial remedies must, however, be responsive to the material placed before the court in a particular case. The case may come when the record supports the conclusion that the destruction of relevant evidence not helpful to the prosecution reflects an institutional disregard for the prosecution's obligation to preserve all relevant information in its possession. In such a case, a stay may well be the appropriate remedy. This is not, however, that case.

¶ 47 The appellant's primary argument in support of his contention that a stay should have been ordered rests on the alleged prejudice caused to his ability to make full answer and defence as a result of the unavailability of the vehicle for further testing.

¶ 48 The degree of prejudice caused to an accused by a failure to preserve relevant evidence and the availability of other means short of a stay to alleviate that prejudice are the primary considerations in deciding whether a stay is warranted by virtue of the prejudice caused to an accused's ability to make full answer and defence: *R. v. La*, *supra*, at pp. 109-110.

¶ 49 An assessment of prejudice is problematic where, as in this case, the relevant information has been irretrievably lost. No one can say with any certainty whether an examination of the vehicle would have produced information helpful to the appellant in his defence. It may have done so, or it may have yielded information that confirmed the Crown's case, or it may have produced information that supported neither the Crown nor the defence.

¶ 50 Counsel for the appellant, in his able submissions, honed in on two aspects of the evidence in support of his contention that the appellant suffered significant prejudice. The first arises out of the evidence of Mr. Mills. He testified that he struck his face on the dash of the car with such force that he bit and severely cut his tongue. Counsel argues that a forensic examination of the interior of the vehicle may have revealed the presence or absence of Mr. Mills' blood in the interior of the car. If Mr.

Mills' blood was not on the dash on the passenger's side of the vehicle, this may have had an adverse effect on the jury's assessment of his credibility. More significantly, if Mr. Mills' blood was found on the dash of the driver's side of the car or on the steering wheel, this would have destroyed Mr. Mills' credibility and the case for the Crown.

¶ 51 The second part of the evidence relied on by counsel for the appellant arises out of the evidence of the two expert accident reconstructionists. Based on their evidence, the presence and extent of damage to certain parts of the interior of the driver's side of the front seat of the vehicle (the steering wheel, the A-frame) could have reinforced the opinion of the defence expert that the appellant was not the driver.

¶ 52 I accept that, depending on the results of forensic tests of the interior of the vehicle, they could have assisted the appellant in the ways outlined by counsel. The fact remains, however, that these possible advantages to the defence were no more than realistic possibilities, and were no more likely than test results that were adverse to or neutral to the defence position.

¶ 53 Counsel for the appellant also submits that there were no remedial steps short of a stay which could erase or even mitigate the prejudice caused to the appellant's ability to make full answer and defence flowing from the failure to preserve the vehicle. He points out that Constable Sybydlo's visual examination of the vehicle, which he contends is no substitute for forensic examination in any event, was admittedly a cursory one. Counsel also submits that the photographs to which the trial judge attached some significance were virtually valueless. Only two of those photographs showed parts of the interior of the vehicle and neither were detailed enough to provide any assistance to the trier of fact.

¶ 54 I accept counsel's observations on Constable Sybydlo's evidence and the photographs. There was, however, another avenue open to the trial judge to minimize the prejudice caused to the appellant. The trial judge should have given the defence the opportunity to place before the jury evidence that the Crown had failed to preserve the vehicle as it was obliged to do, and evidence as to how forensic testing may have assisted in determining the identity of the driver. In my view, had the defence been allowed to make these points and to relate them to its position that the Crown had failed to discharge its burden of proof, the prejudice caused to the appellant would have been substantially reduced. This conclusion is best explored under the next ground of appeal.

¶ 55 The appellant was denied access to evidence which had a realistic possibility of assisting his defence. That evidence could also have destroyed his defence or it could have been of no assistance to him. When that prejudice is considered along with the measures that could have been taken to alleviate the prejudice, I conclude that this is not one of those rare cases where a stay of proceedings was an appropriate remedy.

D: The trial judge's limitation of counsel's cross-examination

¶ 56 Before the constitutionalization of the criminal process, there were, of course, cases where the police had failed to preserve relevant evidence or failed to take

investigative steps which should have been taken. In those situations, defence counsel would turn those failings to the advantage of the accused through cross-examination aimed at bringing out the inadequacies in the investigation and the effect those inadequacies may have had on the information available to the trier of fact.

¶ 57 The absence of evidence can, in some cases, be an important consideration in determining whether the Crown has proved its case beyond a reasonable doubt. As Cory J. said, in *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 at 14 (S.C.C.), a reasonable doubt may be "derived from the evidence or absence of evidence." The absence of evidence may be particularly important to the defence where, as here, no defence evidence is called. Prior to the Charter, many an acquittal could be attributed the police failure to preserve evidence or otherwise to conduct a proper investigation.

¶ 58 The Charter has not diminished defence counsel's forensic arsenal. The defence is still entitled to demonstrate inadequacies or failures in an investigation and to link those failures to the Crown's obligation to prove its case beyond a reasonable doubt. In this case, the trial judge prohibited that line of defence.

¶ 59 In Crown counsel's examination-in-chief of Constable Sybydlo, he elicited evidence that the Constable had visually examined the interior of the car, saw no damage to certain parts of the driver's side, and saw no blood in the interior of the car.

¶ 60 In cross-examination, counsel for the appellant established that no forensic tests had been performed and that forensic tests can yield results that are not apparent on a visual examination. He then asked Constable Sybydlo to examine the photographs of the interior, presumably to show that the photographs provided no assistance. The trial judge interjected at this point and suggested that Constable Sybydlo could look at the photographs at the morning recess. He asked counsel to move to another area. Counsel did so. After the morning recess, on his own initiative without any objection by the Crown and without hearing argument, the trial judge said:

... I think Mr. Moore [defence counsel] it is inappropriate to ask any further questions of this witness with respect to what might have been ascertained with respect to any other examination of the vehicle. I don't think that is appropriate because I have ruled on the question about the stay. I would assume that the defence is not going to rely on the fact of the conjecture with respect to whether other evidence might have been available as part of the defence or as part of any evidence given by any expert witness ...

The fact that there was no other examination made has already been heard. That is fine. But I don't want any questions, nor should there be any questions from this or any other witness, as to what evidence might have been found as a result of any other type of examination of the vehicle. I don't think the expert or anyone else should be asked about that.

¶ 61 Defence counsel observed that the Crown had questioned Constable Sybydlo about the feasibility of testing for fingerprints. The trial judge responded by indicating that there should be no further questions along that line.

¶ 62 The trial judge made no reference to the failure of the prosecution to preserve the vehicle or the absence of forensic testing in his instructions to the jury. He clearly regarded these matters as irrelevant to the jury's deliberations.

¶ 63 Crown counsel, relying on *R. v. Howard* (1989), 48 C.C.C. (3d) 38 at 46 (S.C.C.), suggests that the trial judge correctly limited counsel's cross-examination. In *Howard*, supra, Lamer J. said:

It is not open to the examiner or cross-examiner to put as a fact, or even a hypothetical fact, which is not and will not become part of the case as admissible evidence. ...

¶ 64 Assuming this broad statement has general application to the scope of all cross-examinations, it does not support the trial judge's ruling. Cross-examination as to investigative measures that were not taken, the results which may reasonably have been expected from those investigations, and the significance of those results to the issues at trial do not involve the putting of "facts" to witnesses that were not part of the evidence. If a witness testified that had forensic testing been done, it could have revealed that traces of blood and that the location of that blood could have been important in determining the identity of a driver, those are "facts" which are in evidence. Those facts could support a defence submission that in the absence of such evidence the jury should not be satisfied that the Crown had proved the driver's identity beyond a reasonable doubt.

¶ 65 The trial judge improperly curtailed counsel's cross-examination into matters that could legitimately be considered by the jury in determining whether the Crown had proved its case. In doing so, he exacerbated the prejudice caused to the appellant by the prosecution's failure to preserve the vehicle. Instead of closing that line of inquiry, he should have given counsel considerable leeway so as to alleviate the prejudice caused by the prosecution's failure to preserve the vehicle. The trial judge should have allowed counsel to question witnesses on the following issues:

- * the reasons for the destruction of the vehicle;
- * the tests which could have been conducted but were not; and
- * the possible results of the tests which could have been conducted and, given the other evidence in the case, the likelihood of obtaining probative evidence going to the identity of the driver.

¶ 66 The significance of this line of questioning would depend on the answers given by the witnesses. Depending on those answers, they may have supported the defence position that the Crown has failed to meet its burden.

¶ 67 Where the failure to preserve evidence results in a breach of an accused's s. 7 rights and where the defence has exercised reasonable diligence in attempting to preserve the evidence, I think the trial judge should also instruct the jury that the Crown was under an obligation to preserve the evidence and failed to do so, and that the defence cannot be faulted for not gaining access to the evidence before it was destroyed. These instructions would place the burden for the loss of the evidence on the Crown, where it belongs. These instructions may also help the jury assess the overall reliability of the investigative process which produced the evidence relied on by the Crown, and help the jury decide the significance, if any, of the absence of evidence that may have been available had the prosecution preserved all relevant evidence.

IV

¶ 68 I would allow the appeal, set aside the convictions and order a new trial.

DOHERTY J.A.

OSBORNE A.C.J.O. — I agree.

CHARRON J.A. -- I agree.

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