



# Criminal Law News

Robert Gee

## *R. v. Phillips - Runaway Jury*

When the deadline for this article was fast approaching, and I was again scrambling for a topic, I was inspired by Marge Simpson. You see, there's an episode of the Simpsons where Ned Flanders is coaching the kids' football team. Homer, for those of you who are not aficionados of the Simpsons, is not only Ned's neighbour, he's also his arch enemy. So Homer, of course, sits in the stands and mercilessly heckles Ned to the point where Marge tells Homer to stop and comments "It's easy to criticize" which prompts Homer to reply "And fun too."

So when I was thinking about what to write, I thought all I've been doing is criticizing, so I'll find some case I agree with and write something positive for a change. Then I came across *R. v. Phillips*, released by the Court of Appeal on October 24, 2008, and I find myself back to following Homer's example.

In this case, Alice Phillips, who was 21 when all this occurred, and her friend Julia Grayson, who was 22 at the time, were arrested on November 24, 2002 at Pearson Airport and accused of being drug mules as a result of the finding of 2533 grams of cocaine sewn into the flaps of Ms. Phillips' luggage and 2424 grams of cocaine sewn into the flaps of Ms. Grayson's luggage.

The defence the young women proffered at their Superior Court jury trial was a variation of the standard drug mule defence. They said that an acquaintance of theirs named "Gary" gave them free plane tickets to St. Maarten and in exchange asked if they would do a favour for him by delivering two envelopes stuffed with cash to his friend "Serge" in Curacao. To get from St. Maarten to Curacao, apparently one needs to take a short one hour flight and the young women were advised to purchase the tickets needed for this flight with some of the money from the envelopes. Once in Curacao they should contact "Serge" who would meet them and they then could pass the cash on to him. So they did. They flew to St. Maarten, then to Curacao, met up with "Serge" and delivered the cash. They then stayed for three days in Curacao and on the day of their departure, "Serge" showed up and gave them each a new suitcase. How thoughtful of "Serge". The next day they flew back from St. Maarten to Pearson and, surprise, surprise, the suitcase flaps were stuffed with coke.

The trial commenced November 29, 2004 and the main issue at trial was whether the two accused knew the coke was in their luggage. The women testified that they thought "Gary's" request of them was "kind of strange" but they knew people were always sending money home to

their families in the Caribbean so they didn't "make much of it."

Jury deliberations began the afternoon of December 15, 2004 and at 12:20 p.m. on December 16, 2004 the jury found Ms. Phillips guilty. Deliberation continued over the lunch and into the afternoon regarding Ms. Grayson and even with an exhortation by the judge, the jury was unable to reach a verdict in her case and a mistrial was declared for her at 4:02 p.m. on December 16, 2004.

What happened after the mistrial was declared and the jury discharged is what is really intriguing about this case. As the jury was being escorted from the courthouse, one of the jurors, a Ms. W. advised a court services officer that she lived alone with her son and "she feared for her safety because of possible retaliation from other jurors, who had taunted her during deliberations."

The court services officer advised his supervisor of this who in turn asked a Constable McLaughlin to speak to Ms. W. Constable McLaughlin left the courthouse and found Ms. W. in her vehicle. Ultimately, he related the following of what transpired thereafter:

[15] McLaughlin said that Ms. W. seemed to be upset, was crying, shaking slightly, and that her voice was trembling a little bit. According to McLaughlin, Ms. W. said that other jurors had threatened to have her kicked off the jury. She also said that during the trial she received hang-up telephone calls, possibly from other jury members. At this point, Ms. W. became very upset. McLaughlin spent some time trying to

calm her down. He told her that he had never met someone so upset about being on a jury. In response, Ms. W. said, in a remark that McLaughlin wrote down:

I had a boyfriend 20 years ago. He got caught at the border bringing in drugs. I saw what he went through. I could never put someone else through that. I never could have convicted someone for doing what he did for doing that.

[16] McLaughlin then advised Ms. W. to go home and relax, “just take half a day to sort out her feelings and then to give me a call today.” McLaughlin also told Ms. W. that if there was any investigation into the conduct of a juror, she could contact him. Ms. W. said that was fine and she departed. It is common ground that Ms. W. never contacted Constable McLaughlin after this conversation, nor was a police investigation commenced.

The next day, December 17, 2008, the two court service officers advised the judge they would like to meet with him regarding a matter of a juror from the trial that had just completed the day before. The judge was not comfortable meeting with them in his office so he made arrangement to meet in a courtroom with a court reporter present. Neither Crown nor defence counsel were notified.

The judge heard from the court service officer supervisor and Constable McLaughlin who relayed the above story. The judge had a transcript prepared and sent it to the Crown and

defence counsel. On February 1, 2005 a hearing took place at which time defence counsel requested a date for a hearing to request a mistrial. During the course of this initial February 1, 2005 hearing, the judge commented that it was his opinion that at that point he likely did not have any jurisdiction to do anything about the information received. The mistrial application was set for March 7, 2005 and on that day was ultimately abandoned by defence counsel and the matter proceeded to sentencing, where Ms. Phillips was sentenced to five years and four months in the penitentiary.

Nothing further was ever done about the information provided by the juror nor was any kind of police investigation conducted further.

The matter was obviously appealed or I wouldn't be sitting here writing this. The main two grounds of appeal focused on the initial December 17, 2004 inquiry the judge held when advised of the incident, and the potential criminal conduct of the jurors as relayed by Ms. W.

In relation to the first issue, appeal counsel argued that the accused should have been notified and been present at the December 17, 2004 inquiry as the *Criminal Code* requires the accused to be present for all of his or her trial. The Court of Appeal disposed of this by holding this was not part of the trial and the trial judge acted appropriately in holding the inquiry as he did, since going into the meeting he had no idea what the court service officers wanted to talk about.

In relation to the second ground, the Court of Appeal held that they can't rely on the information provided by Constable McLaughlin or the court services officer about what the juror said because it was hearsay. Appeal

counsel urged the Court to relax the hearsay rules since there was no other way to get the information before the Court. The Court rejected this argument and stated in fact there was a means to get the evidence before the court. Here's what they said:

[47] First, there were avenues, in both trial and appeal contexts, to overcome the hearsay hurdle. The trial defence counsel could have asked the trial judge at the hearing on February 1, 2005 to conduct an inquiry and compel Ms. W., and possibly other jurors, to attend and testify about the matters presented by Ms. W.'s conversations. If this had happened, even if the trial judge could not have interfered with the verdict because he was functus, a record would have been created for this court's consideration on the appeal. Alternatively, appeal counsel could have achieved the same result by invoking s. 683(1)(d) of the *Criminal Code*, which would authorize this court to hear the same testimony.

So what's the bottom line here? The way I see it, a young woman is sitting in the penitentiary having been convicted of a serious offence, there may have been some shenanigans going on during the jury deliberations, no real inquiry or investigation was done into what happened in the jury room and no one is going to get too flummoxed about it because she was probably guilty anyway.

Starting with the last point first, you'd have to be pretty dumb to fall for a scheme as set up by “Gary” and “Serge” and not know something was

up. I'm not that dumb, I'm sure you're not that dumb either, but are there people that dumb out there? I'm sure there are. In fact, I bet most of us, if we think about it enough, probably could think of someone we know who would be dumb enough to fall for such a scheme.

In relation to the other points, this was such a rare set of events that I can't fault trial counsel or appeal counsel for maybe not knowing what to do and not seeking the hearing that the Court of Appeal points to after the fact. If it was so obvious to the Court of Appeal, why didn't they call for such a hearing on their own motion to ensure a miscarriage of justice hadn't

occurred? Are we really that much of a slave to the rules and procedures that we would rather let a person sit in the penitentiary after being convicted by a jury in questionable circumstances, than to dig deep and find out what happened? Unfortunately, it appears so. ■

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