



# Criminal Law News

Robert Gee

## *Square Pegs Into Round Holes - R. v. Jackson*

**E**fficiency. We've been hearing it a lot lately concerning the criminal courts. Police, politicians, commentators and some Court of Appeal judges have all been lamenting the fact that criminal trials are not conducted in an efficient manner anymore. Usually the accused and their defence counsel are portrayed as the main culprits behind this lack of efficiency. Efficiency proponents decry what they perceive as frivolous Charter applications that unduly lengthen and complicate what should be a swift and steady march through the system and straight to the jail for the accused. This case illustrates that that presumption, like most presumptions, is often not accurate.

The facts of the case are relatively straightforward. Somewhere in the middle of the bush in Quebec, somebody was growing some pot. I didn't think anyone grew pot outdoors anymore, but in Quebec, apparently they still do. The police found out about it, raided the site and arrested everyone there, which, of course, included Mr. Jackson. When the police conducted their raid, Mr. Jackson was arrested coming out of a tent wearing a pair of

rubber boots. He had apparently been there for two days and arrived wearing running shoes, not rubber boots. In addition to Mr. Jackson, there were four others at the site.

At trial, Mr. Jackson testified and the judge apparently disbelieved every word he said. In convicting him, in addition to expressing his disbelief of Mr. Jackson's testimony, the trial judge emphasized particular features of the marijuana growing operation which primarily focused on its location and Mr. Jackson's presence there. For instance, he pointed out that there was growing equipment in the tent Mr. Jackson emerged from, there was no other legitimate purpose to the site such as camping or cottaging, it was strictly a single use, pot growing operation and Mr. Jackson was an acquaintance of at least two others present.

However, that was about it. There wasn't any direct evidence pointing to Mr. Jackson as a person who was actually participating in the growing of the marijuana. The police did not conduct any observations or surveillance of the site prior to the raid nor was there any other type of forensic evidence found there, such as Mr. Jackson's fingerprints on the growing equipment that would point to his

direct involvement in the particular horticultural activities.

Mr. Jackson appealed his conviction to the Quebec Court of Appeal. The Court of Appeal upheld his conviction but he got a ticket to the Supreme Court because one of the judges dissented, finding that the trial judge's verdict was unreasonable as it was based solely on his mere presence at the scene.

At the Supreme Court, Mr. Jackson's conviction was once again upheld and his appeal dismissed in a 5-2 split decision. Justice Fish authored the majority decision. The dissent was authored by Justice Deschamps.

Justice Fish stated that since this was an appeal as of right, and as the dissenting judge at the Court of Appeal found that the verdict was unreasonable, it was up to Mr. Jackson to convince the court of the unreasonableness of the verdict. To Justice Fish, this was a question of law and required Mr. Jackson to convince the court that no properly instructed jury acting judicially could reasonably have found him guilty. Justice Fish also confirms the longstanding principle that mere presence at the scene of a crime, without more, is not sufficient to form the basis for a conviction.

In his analysis, Justice Fish refers to those parts of the trial judge's reasons where he pointed to Mr. Jackson's presence at the site for two days, his wearing the rubber boots and since his explanation was rejected, the lack of any other exculpatory explanation for his presence. He states these other factors are the cornerstone of the

Crown's case, not Mr. Jackson's mere presence at the scene.

What is not clear from Justice Fish's decision is whether he finds that the trial judge based his decision on these other circumstantial pieces of evidence and therefore did not convict based on Mr. Jackson's mere presence at the scene, or did he convict improperly based on his presence but there was sufficient other evidence on which a jury could have based a conviction.

This distinction is important, mind you, not only to Mr. Jackson I suspect, but to me and perhaps others in the legal profession. In his dissent, Justice Deschamps thinks that the majority was applying the wrong test. In his opinion the test applied by the majority is only to be applied in the case of a jury's verdict. Since a jury does not provide reasons for its verdicts, it is necessary for an appellate court to review the entirety of the evidence to assess whether the verdict arrived at is one a reasonable jury could have arrived at. However, in a judge alone case, there are reasons for the judge's decision and as such the pathway to that decision is clear. As such, the appellate court only needs to look at the reasons the judge gave for arriving at his or her decision to assess whether it is proper.

In this case, Justice Deschamps found that what the judge did here was convict based on Mr. Jackson's presence at the scene. He found that reference to other factors were either non-probative or were only discussed in the context of the location of the marijuana grow. Moreover, he stated that the rejection of Mr. Jackson's explanation cannot be turned into culpable evidence against him.

He summed up his findings as follows:

12 Deschamps J. — The state benefits from broad investigative powers. This is necessary for the prevention and suppression of crime. The police investigation is essential to the work of prosecutors, who must prove beyond a reasonable doubt that alleged crimes have been committed. They cannot do so by means of vague allusions or associations; not even the cumulative effect of many such allusions or associations can turn a lack of evidence into evidence that a properly instructed judge, acting judicially, might rely on to convict the appellant. In my opinion, there is a lack of evidence in the case at bar.

13 It is the majority's view that the appellant was convicted on the basis of his presence on the plantation, the rejection of his explanation, the nature of the offence he is charged with, the context, and other circumstantial evidence. With respect, it can be seen from the judge's reasons that his decision to convict the appellant was based solely on the appellant's presence at the scene. No evidence establishing his participation in the alleged crime was adduced. Moreover, the discredit thrown on his testimony does not turn an unexplained presence into a culpable one.

Justice Deschamps also pointed out that at no point in his reasons did the trial judge even undertake an analysis of the elements of the offence of which Mr. Jackson was charged. Had he done so, according to Justice Deschamps, he would have had to conclude there was insufficient evidence on which to convict.

By this point you are probably wondering how all this ties in with efficiencies in criminal trials that I alluded at the start. Well, let's be honest. Mr. Jackson was probably involved in this particular grow-op. The trial judge recognized that, so did the Court of Appeal judges as did the Supreme Court justices. As such, no one other than maybe Mr. Jackson and those within his circle of friends and family will be too flummoxed by his conviction. But the bottom line is "probably involved" is not supposed to be good enough in the criminal courts and on anyone's take, the case against him was not overwhelming.

Talk about inefficient; look at what this case cost the system. There was a trial for sure and possibly a preliminary hearing before that. There was an appeal to the Quebec Court of Appeal and a further appeal to the Supreme Court of Canada. This case probably cost the system hundreds of thousands of dollars and would have taken at least two to three years to wind its way through from start to finish. And whose fault was that? It certainly wasn't the defence's fault. There didn't even appear to have been one of those pesky Charter applications we hear so much about.

The way I see it, all of this likely could have been avoided very simply and very cheaply up front. Instead of

just barging in and arresting everyone, if the police would have just held back and done a few hours of old-fashioned surveillance it probably would have become very clear, very fast whether Mr. Jackson had any involvement. But no, the police couldn't be bothered sitting in a mosquito and black fly-infested bush doing the dirty work for several hours that would have provided the evidence the court should be able to expect.

No one, judges included, like to see a guilty person get away with a crime, but that desire should not lower the standard of proof, nor should it mean the courts should accept a lower quality investigation or evidentiary foundation. But that seems to be what may be happening these days. With the "get tough on crime" message constantly being bleated by politicians, the constant attack on the Charter by the same politicians and police and even some judges, it seems convictions are being based on less and less. It also seems at times police recognize this trend and are taking advantage of it by not providing the courts with the evidence a more rigorous investigation would have produced. This is a trend courts should in no way condone and could easily discourage, by making it clear that proof beyond a reasonable doubt is not a quaint old notion but a standard that has served us well for a long time and will continue to be strictly adhered to in all cases. ■

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