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[The wrongful conviction of Donald Marshall Jr. is examined]

The Role of the Prosecutor and Defence Counsel

In the Donald Marshall Jr. case, the prosecutor's failure to make full disclosure and the defence counsel's failure to press the case as hard as possible played important roles in the wrongful conviction.

As you read the following material, think about whether the criminal justice system is or should be based on an adversarial system of justice? If all the lawyers in the *Marshall* case had acted as competent and aggressive adversaries, could the miscarriage of justice have been prevented? Are there other problems?

Crown Counsel

The following case is a leading authority on the role of Crown counsel in a criminal trial.

Boucher v. The Queen

Supreme Court of Canada

[1954] S.C.R. 16

RAND J.:<en>There are finally the statements of counsel, which I confine to those dealing with the investigation by the Crown of the circumstances of a crime:

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<BQEX1>(Translation)<en>It is the duty of the Crown, when an affair like that happens, no matter what affair, and still more in a serious affair, to make every possible investigation, and if in the course of these investigations with our experts, the conclusion is come to that the accused is not guilty or that there is a reasonable doubt, it is the duty of the Crown, gentlemen, to say so, or if the conclusion is come to that he is not guilty, not to make an arrest. That is what was done here.

<BQEX2>When the Crown put in that evidence, it is not with the intention of bearing down on the accused, it was with the intention of rendering justice to him.

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<TXEX2>Many, if not the majority of, jurors acting, it may be, for the first time, unacquainted with the language and proceedings of Courts, and with no precise appreciation of the role of the prosecution other than as being associated with

Government, would be extremely susceptible to the implications of such remarks. So to emphasize a neutral attitude on the part of Crown representatives in the investigation of the facts of a crime is to put the matter to unsophisticated minds as if there had already been an impartial determination of guilt by persons in authority. Little more likely to colour the consideration of the evidence by jurors could be suggested. It is the antithesis of the impression that should be given to them: they only are to pass on the issue and to do so only on what has been properly exhibited to them in the course of the proceedings. …

<TXEX2>It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. …

<TXEX2>The conviction, therefore, must be set aside and a new trial directed.

Note on the Professional Responsibility of Prosecutors

The Crown prosecutor in the 1983 Marshall reference agreed that the conviction should be quashed in light of the new evidence. Is this an appropriate stance for a prosecutor to take in an adversarial system? As will be examined below, both jurisprudence and ethical codes stress that the Crown prosecutors is a "minister of justice" that is not a pure adversary only concerned with winning and losing. In some miscarriage of justice cases, including many arising from the flawed testimony of forensic pathologist Dr. Charles Smith about non-accidental causes of baby deaths, the Crown has in the face of new expert evidence revealing flaws in Dr. Smith's analysis agreed that convictions should be quashed in the light of new evidence. See for example R. v. Mullins-Johnson 2007 ONCA 720; R. v. C.M. 2010 ONCA 690; R. v. C.F. 2010 ONCA 691; R. v. Kumar 2012 ONCA 362; R. v. Brant 2012 ONCA 362.

What other ethical duties should be placed on the Crown in relation to the evidence that is relied upon to obtain a conviction? Based on the widely accepted idea in common law jurisdictions that prosecutors should be Ministers of Justice concerned

about truth and justice, Gary Edmond argues:

> The prosecutor should not, as a minister of justice, adduce insufficiently reliable evidence or permit forensic science and medicine evidence to **be** presented in terms stronger than empirical evidence will (or would) allow. The trial and trial safeguards **-** and their *potential* to address evidentiary infirmities **-** do not relieve the prosecutor of these fundamental responsibilities. Where there are serious doubts about opinions, and limited empirical support for techniques, prosecutors should not **-** regardless of historical practices **-** adduce the evidence…. n all cases prosecutors should not wait for the defence to object before drawing the court's attention to issues that bear on the admissibility or evaluation of incriminating expert evidence. In practice, the prosecutor should not simply promote the positive case and leave the defence to contest admissibility and expose limitations. Where the prosecutor has a reasonable belief that the techniques are reliable and there is evidence to support that contention, then they might lead the evidence but only on condition that any presentation is 'warts and all' *and* the defence is able to make submissions or call appropriate witnesses.

Of particular relevance to the Dr. Smith cases where many of original convictions were the result of guilty pleas on less serious offences such as manslaughter and infanticide, Professor Edmond argues:

> Prosecutors should not rely on unreliable, speculative and 'shaky' expert evidence in plea and charge negotiations and should not (mis)use insufficiently reliable opinions to secure admissions and bargains from those accused of criminal acts. On all occasions where incriminating expert evidence is relied upon, limitations with techniques and opinions should **be** disclosed.

Gary Edmond "(Ad)ministering Justice: Expert Evidence and the Professional Responsibilities of Prosecutors" (2013) 37 University of New South Wales Law Journal 921.

Do you agree with Professor Edmond's arguments? Of what significance is the role of defence lawyers and judges in the admissibility of potentially unreliable evidence?

If unreliable evidence is discovered in one case, does the Crown have an obligation to determine if similar frailties occurred in other cases? Bruce MacFarlane Q.C., has

argued that the Crown's "minister of justice" role justified Manitoba's actions when he was its Deputy Attorney General in reviewing all murder cases once it was discovered in one case that hair comparison evidence was not reliable when re-examined in light of DNA analysis. He explained:

> The starting point in this discussion necessarily involves an understanding of the role and responsibilities of prosecuting counsel. At law, Crown counsel in Canada, and more widely throughout the Commonwealth, have two separate and distinct roles. The first, that of "advocate", is well understood and publicly very visible. In respect of this role, the Supreme Court of Canada has observed that it is "both permissible and desirable" that the Crown "vigorously pursue a legitimate result to the best of its ability" Indeed", the Court added, "this is a critical element of this country's criminal law mechanism". As a consequence, prosecuting counsel are expected to be firm and press the evidence to its legitimate strength.
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> The second role, facially at odds with that of advocate, is the role of Crown attorneys as "ministers of justice". The locus classicus concerning this responsibility was first described in 1954 by Rand J on behalf of the Supreme Court of Canada….
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> > It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.
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> In short, the prosecutor does not act in the largely partisan sense usually required of defence counsel by the adversarial system, but as a promoter of the public interest in achieving a just result. Significantly, the Supreme Court has noted that this role as minister of justice is not confined to the courtroom, but extends to all dealings with the accused.
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> This legal framework provided Manitoba Justice with an appropriate basis for conducting a review designed to assess whether murder convictions entered in the Province may be insecure. The very prosecution service that urged conviction during the 1980s and 1990s on the basis of its role as advocate was, therefore, where the circumstances demanded, fully entitled to

> discharge its "minister of justice role" by doing a "double check" in the 21st century to ensure that justice had truly been served during the previous fifteen years.

Bruce MacFarlane Q.C. "Wrongful Convictions: Is it Proper for the Crown to Root Around Looking for Miscarriages of Justice?" (2010) 36 Manitoba Law Journal 1. MacFarlane also notes how the review revealed at least one wrongful conviction, that of Kyle Unger. On that case MacFarlane supra describing resistance by the family of the victim and "Kyle Unger" at http://www.aidwyc.org/cases/historical/kyle-unger/

Disclosure

<TX1>Marshall's defence at his trial and his 1972 appeal were severely prejudiced by the fact that inconsistent statements that the "eyewitnesses" Pratico and Chant had made to the police and MacNeil's original 1971 statement to the police identifying Ebsary as the killer were not disclosed to the defence. If the same events occurred today, would there be disclosure?

<TX2>Chapter 9(9) of the Canadian Bar Association *Code of Professional Conduct* (2009) outlines the ethical duties of the prosecutor:

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<BQ1>When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused. The Federation of Law Societies Model Rules of

Professional Conduct (2012) provide in Article 5.1-3 that "When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect. "

<**H1**>**Plea Bargaining and Guilty Pleas**

<TX1>Because of Donald Marshall Jr.'s insistence on his innocence, plea bargaining was not a factor in the *Marshall* case. Is it possible that Marshall's lawyers might have pled him guilty if they had been offered manslaughter charge even if Marshall maintained his innocence? What should a court do in deciding whether to accept a guilty plea? In *Brosseau v. The Queen* [1969] S.C.R. 181 at 185 the Supreme Court affirmed a guilty plea to non-capital murder even though the accused's own lawyer had to communicate with his client with a Cree interpreter and shockingly told the trial court when pleading his client guilty that "The accused is describable only in terms of an absolute primitive. I don't pretend to have any particular understanding of his mind or of his intent." The accused sought to re-open the guilty plea on the basis that he only plead guilty because he was scared of being hanged, but the Supreme Court ruled that because he was represented by counsel the trial judge was not required by law "to interrogate the accused." at 190. In both that case and *R. v. Adgey* [1975] 2 S.C.R. 426 there were strong dissents that maintained that trial judge should play a more active role in deciding whether to accept a guilty plea that could in some cases inquiry not only whether a plea was voluntary but also factually accurate.

A number of wrongful convictions have been discovered following a guilty plea. For a case where a guilty plea from a mentally disabled accused was accepted by DNA subsequently revealed he was not guilty of the sexual assaults for which he was convicted see *R. v. Marshall* 2005 QCCA 852. In *R. v. Hanemaayer* 2008 ONCA 580 a conviction of breaking and entering and assault was overturned after an accused pled guilty when the homeowner identified him as the perpetrator. The Court of Appeal reversed the conviction on the basis of fresh evidence indicating that another person had committed

the crime. Rosenberg J.A. explained that the accused pled guilty to a crime he did not commit because:

> he lost his nerve. He found the homeowner to be a very convincing witness and he could tell that his lawyer was not making any headway in convincing the judge otherwise. Further, since his wife had left him and wanted nothing more to do with him, he had no one to support his story that he was home at the time of the offence. He says that his lawyer told him he would almost certainly be convicted and would be sentenced to six years imprisonment or more. However, if he changed his plea, his lawyer said he could get less than two years and would not go to the penitentiary. The appellant agreed to accept the deal even though he was innocent and had told his lawyer throughout that he was innocent. …
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> [T]o constitute a valid guilty plea, the plea must be voluntary, unequivocal and informed. There is no suggestion in this case that the appellant's plea almost twenty years ago did not meet these requirements. While the appellant speaks of advice from his lawyer to plead guilty, the fresh evidence makes clear that in the end the appellant came to his own decision. His plea was unequivocal and he understood the nature of the charges he faced as well as the consequences of his plea. On the other hand, the court cannot ignore the terrible dilemma facing the appellant. He had spent eight months in jail awaiting trial and was facing the prospect of a further six years in the penitentiary if he was convicted. The estimate of six years was not unrealistic given the seriousness of the offence. The justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence…. It is profoundly regrettable that errors in the justice system led to this miscarriage of justice and the devastating effect it has had on Mr. Hanemaayer and his family.

Other wrongful convictions that arose from guilty pleas came from the faulty testimony of Dr. Charles Smith as to the cause of death of a number of infants and came in cases where prosecutors and judges accepted pleas to manslaughter or infanticide which unlike murder does not have a mandatory sentence of life imprisonment. See R. v. Brant 2011 ONCA 362; R v. Sheratt-Robinson 2009 ONCA 886; R. v. C.M. 2010 ONCA 690; R. v. C.F. 2010 ONCA 691. In R. v. Kumar 2011 ONCA 120, the Court of Appeal concluded:

> even though an appellant's plea of guilty appears to meet all the traditional tests for a valid guilty plea, the court retains a discretion, to be exercised in the interests of justice, to receive fresh evidence to explain the circumstances that led to the guilty plea and that demonstrate a miscarriage of justice occurred. In our view, this is one of those cases. The circumstances are compelling. At the time he pleaded guilty, the appellant was facing a charge of second degree murder. He was relatively new to Canada and was unfamiliar with the language and the legal system. At the time of the infant's death, his wife had just returned from hospital after major surgery for a brain tumour. He was facing loss of his liberty for at

> least ten years, loss of custody of his remaining child and deportation. Competent counsel had been unable to obtain opinion evidence to refute the opinion of the then leading expert in the province [Dr. Smith] that the appellant had intentionally caused the death of his child. Like in *Hanemaayer*, the appellant faced a terrible dilemma. The justice system now held out a powerful inducement: a reduced charge, a much-reduced sentence (90 days instead of a minimum of ten years), all but the elimination of the possibility of deportation, and access to his surviving child. Given the persuasive value of the fresh expert evidence that shows that the conviction was unreasonable, this is a proper case to set aside the guilty plea to avoid a miscarriage of justice.

For a discussion of the complex scientific and cultural issues that can arise in baby death cases, especially in cases where female care givers are charged see Emma Cunliffe *Murder, Medicine and Motherhood* (Oxford: Hart Publishing, 2011). A number of the Dr. Smith cases are described at Association in Defence of the Wrongly Convicted Historical Cases at http://www.aidwyc.org/cases/historical/. See also Joan Brockman "An Offer You Can't Refuse: Pleading Guilty when Innocent" (2010) 56 C.L.Q. 116. Plea bargaining in general is discussed in a special issue at (2005) 50 C.L.Q. 1-212.

<TX2>Would it have been proper in the face of Marshall's claims of innocence for the prosecutor to have offered him a plea bargain to a charge of manslaughter? Would it have been proper for defence counsel to have recommended that Marshall accept such a plea? An accused can plea guilty to a crime, often in order to avoid a higher penalty, while maintaining innocence in the United States. In *North Carolina v. Alford*, 400 U.S. 25 (1970), the United States Supreme Court held it was constitutionally permissible to accept a guilty plea from an accused who claimed to be innocent if there was a strong factual basis for the plea and it represented a voluntary and intelligent choice among the alternatives open to him or her. Should this sort of plea bargaining be allowed in Canada? In *R. v. Hector* (2000) 146 C.C.C.(3d) 81, the Ontario Court of Appeal refused to allow an accused to withdraw his guilty plea to three counts of first degree murder even though the accused maintained his innocence and the agreement provided that the Crown would not charge the accused's wife with obstruction of justice and allow the accused to have a one hour meeting with his wife. This case was decided before the following provisions were added to the Criminal Code? Given these provisions is/should *Hector* still be considered good law?

The following provisions of the Criminal Code govern the court's acceptance of a guilty plea:

> 606(1.1) A court may accept a plea of guilty only if it is satisfied that the accused
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> (*a*) is making the plea voluntarily; and
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> (*b*) understands
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> (i) that the plea is an admission of the essential elements of the offence,
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> (ii) the nature and consequences of the plea, and
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> (iii) that the court is not bound by any agreement made between the accused and the prosecutor.
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> 606. (1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.

No Contest or Nolo Contendre Pleas?

Given the above, should courts allow an accused essentially to plea no contest? The Ontario Court of Appeal in R. v. G.(D.M.) (2011) 275 C.C.C.(3d) 295 reversed a conviction in a case where a defence lawyer pleaded his hearing-impaired client not guilty, but also invited the court to convict on the basis of the Crown's reading in a summary of the allegations of sexual crimes after which the accused and the Crown made joint submissions about the appropriate sentence. The Court of Appeal concluded:

> [118] A miscarriage of justice occurred in this case. The proceedings were encumbered by procedural unfairness. The practical effect of what occurred was that the appellant, who pleaded not guilty, essentially admitted the full sweep of the prosecutor's allegations that he had consistently denied since arrest. Yet none of the safeguards that we associate with either formal admissions or pleas of guilty were evident in the rush to judgment that occurred here. A hasty, ill-informed volte face from an outright denial to a veiled acceptance of everything alleged in the blink of an eye as trial proceedings were about to begin.
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> [119] What occurred here also raises questions about the reliability of the conclusion of guilt that rests upon allegations untested in the crucible of cross-examination because of inadequate trial preparation by the appellant's former counsel.

In another case, however, the Ontario Court of Appeal distinguished *G. (D.M.)* by stating that the fact that accused "asserted innocence and did not admit guilt to his counsel does not invalidate these proceedings any more than it would vitiate a plea of guilty. Unlike the appellant in *G. (D.M.)*, this appellant does not say he wanted to testify to deny the

allegations, but the procedure followed denied him that opportunity….The flaw in *G. (D.M.)* was in the execution." *R. v. P(R)* (2013) 295 C.C.C.(3d) 28 (Ont.C.A.)

Aside from the legality or advisability of a no contest plea not provided for in the Code, what are the ethical implications of a defence lawyer (or indeed a Crown counsel) pleading an accused who maintains his innocence guilty? Would such a plea breach ethical rules against misleading the court and offering false evidence? Would such a plea breach other ethical rules relating to providing competent and adversarial representation to clients?

The lawyer in *G (D.M.) case* was subsequently disciplined by the Law Society in relation to the no contest matters and other matters involving inadequate preparation. The Disciplinary Tribunal found the lawyer guilty of misleading the court. The Appeal Division of the Disciplinary Tribunal in *Law Society of Upper Canada v. Besant,* 2014 ONLSTA 50 reversed this finding given the Ontario Court of Appeal's apparent acceptance of no contest appeals. Nevertheless it held that the lawyer had breached standards related to providing competent services in accepting the Crown's allegation by holding:

> It was a serious lapse of Mr. Besant's [the defence lawyer] responsibility to give no consideration to what facts would form the basis of the *nolo-contendere* [no contest] procedure, or as the hearing panel stated, to take any steps to see that the allegations read in by the Crown were properly limited, and did not extend to 99 occurrences. It was a serious lapse of Mr. Besant's responsibility not to even discuss with the client what facts would be read into the record by the Crown, which would remain undisputed…. There was no guarantee that the joint submission [by the accused and Crown] would be accepted [by the trial judge]. But even if there was a high probability that the joint submission would be accepted, the allegations read into the record effectively became the facts in the case. The transcript of the proceedings would be available to the provincial parole board and potentially affect post-sentencing issues. The facts might be relevant in any subsequent legal proceedings involving DG. The hearing panel accurately reflected that an accused who is adamant as to his innocence and participates in a *nolo-contendere*-like process requires more, not less, protection than someone pleading guilty…..
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> Notwithstanding the existing jurisprudence, there are compelling reasons why a defence counsel should be extremely reluctant to assist with what is functionally a guilty plea when the client asserts his or her innocence. The potential for a

wrongful conviction of a factually innocent client is obvious. Indeed, there have been a number of identified instances in the jurisprudence of individuals who have pleaded guilty or who did not contest criminal charges for pragmatic reasons, where their innocence was later demonstrated or where the basis for their guilt was subsequently undermined.

Second, although the Court of Appeal cited jurisprudence that countenanced even a guilty plea by an accused who maintains his or her innocence when the plea is voluntary, unequivocal and fully informed, we have doubts whether defence counsel should ever participate in such a plea. A court must be satisfied that the preconditions set out in s. 606 (1.1) of the *Criminal Code*, earlier reproduced, exist. The difficulty in reconciling those preconditions with a guilty plea by someone asserting innocence has been addressed in the jurisprudence already cited. As well, the trial court conventionally asks the accused on a guilty plea whether the facts read in by the prosecutor are "substantially correct." Counsel will often answer affirmatively on the client's behalf or invite the accused to confirm that the facts are substantially correct. In our view, for the purposes of possible Law Society disciplinary proceedings, it is potentially misleading for counsel to participate in advising a court that the facts are substantially correct, knowing that his or her client says that the facts are incorrect. That would arguably be an instance in which counsel is knowingly presenting the client's position to the court in a misleading way.