FILE: 1980/81-8
APPEAL

Trials 1979/80-8

IN THE MATTER OF THE DISCIPLINARY TRIBUNAL

APPEAL DIVISION

THE UNIVERSITY OF TORONTO

Appeal heard June 12, June 25,
September 8, and September 9, 1980

Between: The University of Toronto

Complainant
(Respondent)

- and -

Mr. R.

Accused
(Appellant)

Appearances: For the Appellant, Mr. R.
Joseph Pomerant, Esq., Q.C.

For the Respondent, The University of Toronto
John Laskin, Esq.

DECISION

This is an appeal from a decision of the Senior Branch of the Trial Division of the University Tribunal. The appellant, Mr. R. pleaded not guilty but was found guilty by a jury of the following offences:

(a) that on May 4, 1979, he knowingly obtained unauthorized assistance in the final examination in Computer Science A68S held at Scarborough College in that the examination paper submitted under his name for credit was written by someone other than Stuart Rosenthal, contrary to Section E.1.(a) (i) and Sections G.6 (a) (iv) and G.6(a) (v) of the University of Toronto Code of Behaviour on Academic Matters;

(b) that on May 4, 1979, in the final examination in Computer Science A68S, he knowingly represented as his own work what was in fact the work of another, in that the examination paper submitted under his name for credit was written by someone other than himself contrary to Section E.1(a) (ii) and Sections G.6.(a) (iv) and G.6.(a) (v) of the University of Toronto Code of Behaviour on Academic Matters.

The Jury, composed of three students and two faculty members, voted 4 to 1 in favour of a conviction. In addition, the Jury sanctioned the student by suspending him from attendance at the University of Toronto from June, 1980 until August 31, 1981;

The Jury further recommended:

(i) that the student be given credit for the three courses left pending from his first year;

(ii) that he be given the opportunity to complete the courses he was then enrolled in; and,

(iii) that the suspension order not be recorded on his transcript.

The Jury gave the following reasons for the sanction imposed:

"We want to give Mr. R. time to reflect on the gravity of the offence which he has today been found guilty of. We hope that he will steer away from offences of this nature in the future.

We feel very heavily the responsibility of having to protect the integrity of all the members of the University, especially the vast majority of students who courageously and honestly take upon themselves the challenge of the system."

Mr. R. appealed to the Appellate Division from both the conviction and the sentence. Before dealing with the specific grounds of appeal advanced by Mr. Pomerant on behalf of the appellant, we feel compelled to clarify first the function of this Tribunal as an appellate body reviewing the procedures and results of a Jury trial. Section 22 (1) of the Enactment of the Governing Council Respecting The Disciplinary Tribunal of the University of Toronto (the "Enactment") states:

"22. (1) Any Branch or Division of the Tribunal exercising appellate jurisdiction hereunder shall have power,

(i) to dismiss an appeal summarily if it determines that the appeal is frivolous, vexatious or without foundation;

(ii) in circumstances which the Tribunal hearing the appeal considers to be exceptional, to order a new trial; and

(iii) in any other case, to affirm, reverse, quash, rescind, vary or modify the decision, order, verdict or sanction appealed from and substitute any decision, order, verdict or sanction that could have been made, given or imposed by the Branch of the Division that made the original determination."

This is the only guidance given to the Appeal Division by the applicable 'legislation'. But Rule 2 of the Rules of Procedure (the "Rules") which supplement the Enactment provides:

"2. As to all matters of procedure not provided for in the Rules of Procedure or in Part I of the Act, the practice and procedures of the Tribunal shall be regulated by analogy to the procedure in criminal cases in the Province of Ontario under the Criminal Code of Canada."

Although the duties of an appellate body such as this one are not strictly matters of procedure, Rule 2 makes it clear that it would not be inappropriate to resolve any ambiguities by referring to criminal law.

The Criminal Code of Canada deals with the function of an appellate body in s.613 (1) (a) and (b) as follows:

"613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a) or

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in sub-paragraph (a) (ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred."

We are mindful of the fact that ours is an administrative tribunal and not a court of criminal justice, and that we are governed not only by the Enactment but also, according to section 24 of the Enactment, by The Statutory Powers Procedure Act. In fact, however, it is a hybrid body. We feel that in reviewing the decisions of the Trial Division, we are obliged primarily to ensure that the rights of the accused student to a fair hearing have been scrupulously protected.

In addition, we are obliged to ensure that the accused has received the full benefit of the procedural rights afforded to an accused in criminal proceedings. Our approach will be then to ensure that in the application of these principles, no substantial wrong or miscarriage of justice has occurred.

We turn now to the grounds of appeal put forward by Mr. Pomerant for the appellant.

CERTIFICATION

The appellant argued that the transcript was, in violation of Rules 66, 67, 69 and 74, not properly certified. In addition, it was his submission, by reference to 44 alleged errors or omissions in the transcript, that

the transcript was so grossly inadequate as to justify the quashing of his conviction.

Rules 66, 67, 69 and 74 refer to a certified transcript. The University of Toronto (the "University") sought and obtained an adjournment to have the transcript certified. When the hearing of the appeal resumed, the University submitted a corrected transcript which contained the following preface:

> "In my capacity as Assistant Secretary to the University Tribunal, I attest to the following:
>
> [1] that I was present during the hearings held on the St. George Campus on November 8, 1979 and at Scarborough College on December 6, 1979 and December 15, 1979 and that I recorded those proceedings using a tape recorder, except for the arguments of Messrs. Maloney and Laskin on the preliminary motion heard on November 8, 1979, those arguments not being recorded;
>
> [2] that, to the best of my knowledge and recollection, the tapes form an accurate and complete record of those proceedings except as aforesaid;
>
> [3] that the transcript, prepared under my direction from those tapes, and distributed on February 4, 1980, and with the corrections herewith enclosed, accurately represents, to the best of my ability, the complete content of the tapes." (emphasis added)

The document is signed by Karel Swift, Assistant Secretary, Academic Tribunal and is dated June 19, 1980.

The appellant refused to accept the "attestation" as adequate and insisted that to be properly certified, a transcript must contain the words "I certify". He maintained too that even the corrected transcript was so deficient as to seriously impair his ability to argue the appeal properly.

We cannot agree. On reviewing the transcript, we are not satisfied that there has been any prejudicial error or omission in the transcribing of the proceedings. In the absence of any evidence that the transcript now before the Tribunal substantially interferes with the effective and complete presentation of an appeal, we are not prepared to quash the conviction on the ground that the transcript is fatally deficient.

Nor are we satisfied that there is any magic in the use of the word"certify". Ms. Swift attests to the fact that the transcript is as complete and accurate a record of the proceedings as possible. As the purpose of a certification is to ensure the validity and accuracy of a transcript, and since this is what has been "attested to" by Ms. Swift, we feel that the Rules of the Tribunal have been complied with and that this ground of appeal must fail.

OATH

The Appellant argued that improper oaths were administered to three witnesses for the University since the oaths did not invoke a deity. As a corollary ground, the appellant argued that the jury should have been instructed to give less credence to the evidence of the improperly sworn witnesses.

Section 15 of The Statutory Powers Procedure Act states:

> "15. - (1) Subject to subsections 2 and 3, a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
> (b) any document or other thing,
>
> relevant to the subject matter of the proceedings and may act on such evidence but the tribunal may exclude anything unduly repetitious." (emphasis added).

There is no requirement that any witnesses be sworn at a hearing.

In any event, we are satisfied that the 3 witnesses whose oaths the appellant seeks to impugn, were in fact properly sworn. There is ample authority in criminal case law for the proposition that an oath need not invoke a deity to be adequate and acceptable. It is sufficient if the witness appeared to understand that he was taking an oath which bound him to tell the truth.

Shajoo Ram v. The King (1915) 25 CCC 69. In the case before us, there is no evidence that the witnesses did not consider themselves obliged to tell the truth simply because there was no mention of a deity. These grounds of appeal must therefore fail.

POLYGRAPH

The appellant argued that the results of a polygraph test he had taken should not have been excluded from evidence by the Chairman. Moreover, he argued that the Trial Chairman

erred in refusing to permit Dr. Jerry Cooper, a psychiatrist who had examined the appellant, to refer to the results of the polygraph in giving the bases of his opinions about the appellant. These rulings were made by the Trial Chairman in the absence of the Jury and prior to the commencement of the trial.

The appellant stated that this evidence would have been admissible in a criminal trial and should therefore, on the basis of Rule 2, have been admitted at his Trial. We do not agree that Rule 2 incorporates by reference all evidentiary laws applicable in criminal matters. Rule 2 authorizes the Tribunal to analogize in matters of procedure to the criminal law. Issues of evidence are matters of substantive rather than procedural law and we therefore do not feel that reliance can be placed by the appellant on Rule 2 for any arguments dealing with the admissability of evidence.

Rather, we should look to section 15 of the Statutory Powers Procedure Act. This section states that "...a tribunal may admit as evidence at a hearing, whether or not... admissible as evidence in a court...any...testimony... document or other thing relevant to the subject matter of the proceedings". (emphasis added). In other words,the Trial Chairman has a discretion in deciding what evidence to admit as relevant. Evidence not admissible in a court may, in the discretion of the chairman, be admitted in a proceeding governed by The Statutory Powers Procedure Act.

In exercising his discretion as to what evidence is admissible as relevant, he is not fettered by the laws of evidence applicable in the ordinary courts. But our interpretation of section 15 leads us to conclude that the rules of evidence are at least a minimum standard of admissibility. The accused, should at least have the same benefits as to the admissibility of evidence as does an accused in court. From that starting point, the chairman is then given authority by section 15 to go beyond the parameters of the laws of evidence. To this extent, the laws applicable in the criminal courts are relevant. Not, as the appellant suggests, because of the operation of the principle of stare decisis; but rather because these laws provide guidance to a chairman who must exercise his or her discretion in a manner which is fair, reasonable, and consistent with the principles of natural justice.

There is no case law which indicates that polygraph evidence is admissible per se in criminal proceedings. On the contrary, the authorities, most notably Regina v. Phillion, 34 D.L.R. (3d)99, 53 D.L.R. (3d) 319 (C.A.); 74 D.L.R. (3d) 136 (SCC), are sceptical at best about the validity of this kind of evidence. In addition, it is evidence which purports to give an opinion on the very issue the jury must decide - namely, whether the accused was telling the truth. No case has yet held that this jury function can be delegated. We are therefore satisfied that the Chairman did not

improperly exercise his discretion in excluding the results of the polygraph test.

It is settled law that an expert can state the bases for his opinion. We are persuaded that the following guidelines delineated by Madame Justice Van Camp in Phillion (Supra, 34 D.L.R. (3d) 99, at p. 103) should be considered by a trial chairman in exercising any discretion:

> "From my reading of the cases, I would hold that the criteria of the foundation evidence not otherwise admissible that may be given by the expert would seem to be as follows:
>
> 1) that he considers that test an essential part of the data on which he bases his opinion. In other words, he does not introduce everything that he has used;
>
> 2) that it lends weight to the resulting opinion;
>
> 3) that it is recognized psychiatric procedure;
>
> 4) that he give the fact of any statement not the tenor of it, unless the specific words are necessary to lend weight to the resulting opinion;
>
> 5) that he give the result of any test and not the method, unless again the latter lends weight to the opinion;
>
> 6) that he is introducing his own opinion and not that of another.

There is no evidence that the polygraph evidence complies with these criteria, but neither is there any evidence that it does not. We must therefore look at the circumstances of this case to determine whether the prohibition on Dr. Cooper about making any reference to the polygraph test was so prejudicial an exercise of the Trial Chairman's discretion as to constitute a miscarriage of justice.

Mr. Justice Ritchie, in Phillion (Supra, at pp 139-140) pointed out:

> "Statements made to psychiatrists and psychologists are sometimes admitted in criminal cases and when this is so it is because they have qualified as experts in diagnosing the behavioural symptoms of individuals and have formed an opinion which the trial judge deems to be relevant to the case, but the statements on which such opinion are based are not admissible in proof of their truth but rather as indicating the basis upon which the medical opinion was formed in accordance with recognized professional procedures." (emphasis added).

It may be that one of the bases upon which Dr. Cooper relied was the polygraph test. Was there any prejudice to the accused in refusing to allow Dr. Cooper to refer to this factor? We think not. Dr. Cooper, who was admirably qualified as an expert in psychiatry, was permitted to give his opinion about the appellant, including his opinion about the credibility of the appellant. At page 33 of Volume 2 of the transcript, the following exchange took place between

Mr. Maloney, counsel at trial for the appellant, and Dr. Cooper.

"Mr. Maloney
So you faced up to all the possible alternative explanations for the state of affairs you were aware of and you eliminated such things as you have enumerated. That it was a lark, that it was motivated in some devious way and that sort of thing and the opinion you expressed therefore is that he is an immature youth, has this laisser-faire attitude and does not possess the characteristics of deviousness, deceptiveness, as far as you were able to ascertain?
Dr. Cooper
No.
Mr. Maloney
Thank you, that is all I propose to ask you. My learned friend will ask you some questions".

This conclusion was preceded by a lengthy explanation by Dr. Cooper of Mr. R's character. He emphasized that Mr. R. was extremely "guileless" and "open". He referred to a report by a psychologist, Dr. Lang, which corroborated this opinion of Mr. R. as a person who was open, and who was neither devious nor deceitful.

In addition, Mr. R himself gave evidence at the trial. The jury members had an opportunity to observe the appellant and make their own observations about his credibility. Thus the jury had before it the opinion of an eminent psychiatrist who had examined the accused. His opinion, synoptically put, was that Mr. R was not the type who would lie. In addition, it had the evidence of Mr. R.

himself. Given these factors, as well as the fact that the basis for an expert opinion cannot be admitted to prove the truth of the fact, we are not satisfied that Dr. Cooper's inability to refer to the polygraph testing as one of the bases for his opinion prejudiced the accused. The Trial Chairman did not exercise his discretion in excluding this evidence (or rather this information) so as to cause a substantial wrong or miscarriage of justice.

The Trial Chairman made one other ruling in connection with the polygraph evidence which the appellant seeks to impugn. He ruled that the University's counsel could, on cross-examination, ask Dr. Cooper about the polygraph, with the concomitant right to the accused's counsel to re-examine on the issue if it was raised in this way. Since Mr. Laskin, the University's counsel at trial, did not in fact cross-examine Dr. Cooper on the polygraph, we make no comment on the propriety of the ruling.

REPLY

The appellant objected to reply evidence from Mr. R.'s instructor, Professor Perreault, on the grounds that it was merely corroborative of his previous evidence. The University, appellant argued, had been improperly permitted to split its case.

We do not accept this submission. Professor Perreault was asked in reply to comment on the contents of certain texts referred to by Mr. R. in his defence. The University could not possibly have anticipated what books, if any, Mr. R. would refer to, or even whether

Mr. R would testify. The reply evidence was thus appropriate and reasonable reply evidence.

Professor Perreault's opinion as to what a first year university student was likely to be capable of in computer programming was also considered objectionable as being outside Professor Perreault's expertise. Professor Perreault has been teaching Computer Sciences to undergraduates since 1974. This makes his observations about the abilities of first year students relevant and admissible. The Trial Chairman's discretion was not improperly exercised in permitting this evidence to be given. Moreover, we are not satisfied that any substantial wrong occurred by virtue of the chronology of this evidence.

JURY CHARGE

We have carefully read the charge to the jury and can find no basis for the appellant's assertion that the jury was improperly instructed in any particular. The jury was clearly told that it was ultimately to decide what weight to give the evidence. It was also clearly told that any reasonable doubt was to be resolved in favour of the accused. The evidence was fairly summarized and the defence carefully explained.

The appellant's final submission was that the Trial Chairman improperly failed to tell the jury the consequences of fewer than 4 of their number voting for a conviction. Section 16(3) of the Enactment states:

s.16(3)"The verdict of a Jury need not be unanimous but at least four (4) affirmative votes shall be required for a conviction."

In his charge to the Jury, the Trial Chairman said, at pages 123-4 of Volume 2 of the transcript:

> "Under the rules of the University Tribunal a decision by 4 out of 5 of you is an appropriate decision. As you may know, the burden in a criminal case is a unanimous decision. The University has decided that 4 out of 5 is an appropriate decision and you may not be able to agree on a decision but please try to agree on a decision. I will be polling you at the conclusion if there has been a decision as whether it is unanimous or otherwise".

Whether extrapolated from or considered in the context of the whole charge, this passage must be given its ordinary meaning. The jury was clearly told that 4 out of 5 jurors were required for a conviction. Although the word conviction is not used, this is the thrust of this aspect of the charge, given the reference in the next sentence to criminal juries requiring unanimity. The only reasonalbe inference to be drawn from the passage is that unless 4 out of 5 jurors were satisfied beyond a reasonable doubt as to the guilt of the accused, there could be no guilty verdict. There is no such concept as a "hung jury" under the Enactment nor is there any reason to insinuate such a concept into the Tribunal system. Nor are we persuaded that the jury was confused as to their numerical mandate. In these circumstances, where the Enactment provides only one route to conviction, namely a decision of guilt by 4 jurors, there is no obligation on the Trial Chairman to explain the consequences of less than 4 deciding that the accused was guilty. Although it may arguably have been preferable to explain to the jury that

there could be no conviction unless 4 of them voted for it, by reiterating every other conceivable combination totalling 5, we feel that this would have been superfluous. The obligation to convict by at least 4 jurors was plainly stated. No substantial wrong occurred in the charge to the jury.

SENTENCE

Having dismissed all the grounds of appeal which were advanced by the appellant, we turn to the matter of sentence. Here too we are guided as an appellate tribunal by a reluctance to interfere with the trial process by substituting our discretion for that of the jury, in the absence of any evidence of a miscarriage of justice. On the basis of the facts of this case and on examining the principles of sentencing adopted by this tribunal in the decision of Mr. Sopinka in the case of Mr. C. (1976/77-03) and subsequent cases, we are not prepared to disturb the sanctions and recommendations of the jury. There is no demonstrable error in principle or approach. The appeal as to sentence is therefore dismissed.

S.G. Fisher, Q.C.
Chairman

D.S. Affleck, Q.C.
Co-Chairman

Judge R.S. Abella
Co-Chairman