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COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

No: **500 10 000287 936**
(500 01 017372 928)

On March 27, 1995.

CORAM: THE HONOURABLE BEAUREGARD
BAUDOUIN

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PROULX, JJ.A.

VALERY I. FABRIKANT,

APPELLANT - accused

v.

HER MAJESTY THE QUEEN,

RESPONDENT - prosecutrix

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JUDGMENT

THE COURT, on an appeal against the verdict rendered by a jury in Superior Court, (Montreal, August 11, 1993, Fraser Martin J.) finding the appellant guilty of four counts of murder in the first degree, one of attempted murder and two of hostage taking;

Having studied the file, heard the parties and deliberated;

For the reasons given by Proulx, J.A., with which Beauregard J.A. concurs, and for the concurring reasons given by Baudouin, J.A.

DOTH DISMISS the appeal.

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MARC BEAUREGARD, J.A.

JEAN-LOUIS BAUDOUIN, J.A.

MICHEL PROULX, J.A.

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The Appellant: In person

Me Michel F. Denis, for the respondent
Crown counsel

Date of hearing: February 13, 1995.

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BAUDOUIN
PROULX, JJ.A.

VALERY I. FABRIKANT,

APPELLANT - accused

v.

HER MAJESTY THE QUEEN,

RESPONDENT - prosecutrix

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OPINION OF PROULX J.A.

Introduction

On August 24, 1992, the appellant, a professor in the department

of mechanical engineering at Concordia University in Montreal, spoke to 9-1-1 and made known that he had just committed several murders on the site of the university and that he wanted «to explain the reason why». The evidence reveals that on that day, the appellant, in possession of several weapons, had first killed Dr. Hogben, then Dr. Saber, thirdly, Dr. Ziogas and finally, Dr. Douglas: each of these homicides were committed in a different location. In addition, the appellant fired two shots at Mrs. Horwood, who survived, bleeding severely from the gunshot wound. The appellant then took as hostages two individuals while he was speaking to the 9-

1-1 operator. (9-1-1 had initially been contacted by Mrs. Horwood).

The appellant's involvement in each of these incidents was reiterated in his opening statement at the trial, and nowhere in the record is there any doubt on that issue.

Sometime later in the afternoon of August 24th, the appellant was arrested and eventually charged with seven counts: four counts of first degree

murder, one of attempted murder, and two of hostage taking (forcible confinement).

The trial commenced in Montreal on March 8, 1993, before a jury presided over by Fraser Martin J. of the Superior Court. Between March 8th and 25th, the Crown called evidence. The presentation of the evidence was then suspended for a trial on the issue of the appellant's fitness to stand trial. Following the verdict of the jury that the appellant was fit to stand trial, the Crown resumed its

case on May 11th and continued until May 17th. On May 20th, the appellant, who had decided at the outset of the trial to act on his own behalf, started his defence. He examined seventy-seven witnesses until July 30th when, after a long series of incidents which will be narrated below in further detail, the trial judge terminated the defence, with the consequence that the appellant did not testify in his own defence. However, the appellant made his summation to the jury, which lasted a few days, followed by the Crown's summation on August 9th. The trial judge's address followed, and, on the 11th of August, the jury returned with a verdict of guilty on

each of the seven counts: four verdicts of first degree murder, one of attempted murder and two of hostage taking.

The appeal

The only ground of appeal raised by the appellant in his factum relates to the trial judge's decision to end his defence and to refuse him the right to testify in his defence.

In his factum, which he prepared himself, still being unrepresented by counsel, the appellant sets out the questions in dispute as follows:

- Does a judge err in law when he, in response to several insults made by a Defendant, decides not to allow Defendant to testify but at the same time allow Defendant to do the summation to the jury?

- Is it possible to imagine a situation where judge's decision not to allow Defendant to testify would be justified in law, taking into consideration

that the Defendant was found fit to stand trial by jury? If yes, what is it?

- Is it possible to imagine any situation where judge's decision not to allow Defendant to testify would be justified in law? If yes, what is it?

- Is judge's decision not to allow Defendant to testify such a fatal error which could be qualified as shocking judicial conscience, provided of course that such thing does exist in this country?

- Appellant uses just one ground of appeal: breach by the trial judge of the main principle of natural justice: audi alteram partem. Appellant reserves the right, in the case of dismissal of this appeal, to envoke all other other grounds of appeal in the future action in the Supreme Court of Canada.

The hearing of the appeal

Prior to the hearing of this appeal, at the appellant's request, the respondent's factum which was originally written in the French language was translated into English and arrangements were made for the services of an interpreter at the hearing so that the oral presentation of counsel for respondent in

French could be translated into English for the appellant's benefit.

On the morning of the hearing, before the actual pleadings on the merit of this appeal, this Court had to dispose of six motions by the appellant: (1) in foreclosure against the respondent, (2) to strike the factum of the respondent, (3) to declare respondent's factum frivolous, (4) to recuse Justice Marc Beauregard, (5) to recuse Justice Jean-Louis Baudouin, the two other members of the panel, and (6) for

appointment of a lawyer and a court order to pay legal expenses.

The first three motions were dismissed as totally unfounded. The appellant withdrew his two motions in recusation. As to the sixth motion, that motion was dismissed since this Court had already disposed of previous motions related to the appointment of a lawyer and, moreover, this Court had no jurisdiction, as requested in the motion, to «order legal aid to provide a lawyer for the appellant». In fact, on October 12, 1994, the Court dismissed the

appellant's motion «for appointment of a lawyer», by reason of one of appellant's conditions «that his lawyer must only «assist» him, not «act on behalf of» him.

Furthermore, at the appellant's request, this Court provided him with the tapes of the hearing of August 10, 1993 at his trial, though the appellant was in possession of the full transcript of his trial. A few days after the hearing, the appellant returned those tapes to the Court, indicating that, after hearing the tapes, he was not in a position to make the point he believed relevant at the time of his

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request.

Finally, the appellant was given permission to add to his factum, already filed since last June 1994, a memorandum of 45 pages in which he develops his argument on the sole ground of appeal raised in his factum. Indeed, right on the first page of this new document, the appellant writes: «Is it always a fatal error,where a trial judge does not allow accused to testify?»

However, in this memorandum, the appellant makes reference, in passing, to what this Court considered to be, at the hearing, a second ground of appeal. It concerns the trial judge's decision to discharge a juror under sec. 644 of the Criminal code, a few days after the trial had started. The trial judge ordered the discharge after having examined the juror in the absence of the other jurors but in the presence of the appellant and Crown counsel, and after having heard arguments on the issue. The appellant complains that he was denied the right to cross-examine

the juror in the course of this inquiry held by the trial judge, and, in support of this point, he refers to **R.** v. **Barrow**, [1987] 2 S.C.R. 694. I see no merit in this ground of appeal. As it has been decided many times in the jurisprudence,[1] the course to be followed in the application of this section of the Criminal Code lies in the discretion of the trial judge and nothing in the record shows that the trial judge erred in that regard. Having disposed of that ground of appeal, I propose now to deal with the sole ground of appeal indicated above, which was argued at length at the hearing.

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1 **R.** v. **Mackay** (1980), 53 C.C.C. (3d) 366 (C.A. B.C.); **R.** v. **Lessard** (1992), 74 C.C.C. (3d) 552 (C.A.Qué.).

The principles in issue and the issue in the case at bar

Before I discuss the trial judge's decision in the context of the events which led to it, I feel it is appropriate to set out the relevant sections of the law and the principles in issue.

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Section 650 of the Criminal Code provides as follows:

650. (1) **[Accused to be present]** Subject to subsection (2), an accused other than a corporation shall be present in court during the whole of his trial.

(2) **[Exceptions]** The court may
(a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;

(b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or

(c) cause the accused to be removed and to be kept out of court

during the trial of an issue as to whether the accused is unfit to stand trial, where it is satisfied that failure to do so might have an adverse effect on the mental condition of the accused.

(3) [**To make defence]** An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.

This section should be read in conjunction with sub-sec. (1) and (2) of sec. 651 of the Code which grant the rights (1) to an opening statement that can be made by the accused himself, (2) to examine the witnesses «as he thinks fit» and

(3) to sum up the evidence. Sub-sec. 651(1) and (2) read as follows:

> **651.** (1) **[Summing up by prosecutor]** Where an accused, or any one of several accused being tried together, is defended by counsel, the counsel shall, at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused for whom he appears and if he does not announce his intention to adduce evidence, the prosecutor may address the jury by way of summing up.
>
> (2) **[Summing up by accused]** Counsel for the accused or the accused, where he is not defended by counsel, is entitled, if he thinks fit, to open the case for the defence, and after the conclusion of that

opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence.

It is useful here to relate these rights to the constitutional rights enunciated in sub-sec. 11 d) of the **Canadian Charter of Rights and Freedoms** in the following terms:

11. Any person charged with an offence has the right

[...]

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

as well as sec. 7 of the **Charter**, which reads:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Thus, the right which the appellant claims was violated when the trial judge put an end to his defence derives from sub-sec. 650 (3), which gives the accused the right to personally make full answer and defence and from sub-sec. 651 (2) which expressly provides that the unrepresented accused may, at the end of the case for the prosecution, examine the witnesses he wishes to be heard in his defence, including, obviously, himself.

Although, when we read Sections 650 and 651 together, power is specifically given to the court to order the expulsion of the accused from the courtroom in the case of misconduct, neither of those sections contemplate the possibility that the court may, in the case of misconduct or for any other reason, except for reasons which would justify the expulsion of the accused, put an end to his defence or not allow him to do the summing up. Does that mean, however, that the right is infinite and that the court cannot, in appropriate cases, restrict this right or even terminate it? In other words, can an accused, by his conduct, lose such

fundamental rights? That is the issue in the case at bar.

In Canada, apart from authorities which discuss the **rationale** behind sec. 650 and the situations in which an order of expulsion can be justified, very few are of much assistance to the present case, mainly because in those cases the accused expelled was represented by counsel at each stage of the trial and, therefore, the issue was restricted to the merit of the order of expulsion. As will

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be discussed below, the fact that an accused is not assisted by counsel creates an additional difficulty for the trial judge who is confronted with an accused who disrupts the course of the trial.

In **R.** v. **Paul Rose** (1973), 12 C.C.C. (2d) 273 (C.A.Qué.), reference is made to the fact that the accused, who was unrepresented at the trial, was expelled from the courtroom on account of «the misconduct, the annoyance, the open defiance of authority and the insults of the accused». The trial continued

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in his absence but no other details are given as to the manner in which the trial was conducted, nor how the trial proceeded at the stage of the defence and of the summing up.

In **R.** v. **Pawlin** (1985), 23 C.C.C. (3d) 14, Murray J. of the British Columbia Supreme Court had to deal with an accused who was unrepresented at his jury trial on a charge of trafficking in heroin. The judge removed the accused from

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the courtroom for one day because of his conduct, and then ordered his removal, this time for the duration of the Crown's case, after having concluded «that the accused deliberately embarked on a course of conduct calculated to delay and to obstruct the course of this trial indefinitely», and after having told the accused that «he was in effect by his conduct holding the members of the jury as hostages» (p. 17). Following that decision, the accused wrote to Murray J. stating that he did not wish him to cross-examine Crown witnesses but despite that, Murray J. undertook to cross-examine the majority of the Crown witnesses. In his reasons,

Murray J. described as follows the incidents which prompted his decision to remove the accused during the rest of the Crown's case:

1. He continually made long statements to the jury about matters which are absolutely irrelevant to the case. An example of this type of statement was his constant reference to his conviction for first degree murder and the fact that he was in bed asleep when the murder was committed.

2. He continually asked repetitious questions of witnesses. On some occasions he would ask the same witness the same question four or five times despite repeated warnings.

3. He persisted in asking witness after witness improper questions. One

example of this type of question was his persistence in asking nearly all police officers if he was suspected of having committed 30 murders.

4. Time after time he asked witnesses to testify to hearsay after I had explained to him in simple terms the nature of hearsay evidence. On many of these occasions instead of abiding by my ruling he would immediately ask the same question again.

5. He would deliberately pause for very long intervals between questions. The delays often amounted to four or five minutes.

6. On occasions too numerous to mention he displayed a calculated refusal to abide by any directions I gave as to the admissibility of evidence or otherwise.

7. He made spurious motions at every available opportunity. These were usually motions to quash the indictment on frivolous grounds.

8. He refused to abide by my rulings on other motions and requests made by him. One example of this was his request for the issue of a subpoena directed to one Judy Rusu??, a witness who had testified against him as a Crown witness at his murder trial and who has now been given a new identity and is out of Canada. When I ruled that I would not compel her attendance he refused to recognize the ruling and renewed his request on an almost daily basis interspersed with complaints to the jury. He similarly requested that subpoenas be issued for Dennis Van Dooren and Conrad Gunn. Van Dooren is the husband of Diana Van Dooren for whose murder the accused was convicted and Gunn is a convicted drug trafficker who, the evidence adduced by the accused showed, had a contract out to kill the accused and **vice versa**. I was convinced that these requests were not made genuinely but were made for obviously ulterior purposes. The accused again refused to accept my ruling on these latter matters.

9. Finally, the accused commenced to verbally abuse witnesses. An example of this occurred on October 16th when he addressed a police officer who was giving evidence by using words to the following effect: «Officer, I used to think you were a gentleman -now I think you are a jerk.»

This decision was upheld by the Court of Appeal.[2]

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[2] June 23, 1989, B.C.C.A., 8 W.C.B. (2d) 9.

It is in a decision rendered in England in 1987 by the Court of Appeal[3] that I was able to find the most helpful statement of the principles applicable in a case such as ours.

Morley was charged with burglary. At his trial, he had appeared in person, having dispensed with the aid of counsel. The case for the prosecution was not very complicated and it was estimated that the evidence-in-chief given by the

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3 **Morley** (1988), 87 Cr.App.R. 218.

witnesses lasted little more than an hour. However, the trial extended over 38 days, during which the trial judge, in order to impose some limitation on the length of the trial, felt compelled **to refuse** the accused's request for certain witness summonses, and **to order** him to be removed from the court from time to time, which included the accused's removal just prior to the commencement of the summing up. This deprived the accused of the opportunity to address the jury. The accused was convicted, and he appealed on the ground of improper denial of witness summonses in respect of defence witnesses, wrongful determination of the defence case, and

refusal by the judge to permit a closing speech.

When this case came before the Court of Appeal, the court noted «a surprising absence of any previous guidance by the Courts».

As in Canada, an accused in England is entitled under some statutory provisions to call witnesses and address the jury: See sec. 2 of the Criminal Procedure Act 1865, 28 and 29 Vict., c. 18. Lord Justice Woolf, who wrote the

opinion of the court, stated first that these rights must be construed «**in the context of the obligation upon the judge to ensure the proper conduct of the trial as a whole**», the judge having a duty «**to avoid the prolongation of a trial and to avoid the incurring of unnecessary expense**».

In that perspective Woolf L.J. then defined the limits on the rights in question, in an extract which I consider very persuasive for the present appeal (pp. 221, 222):

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Section 2 of the 1865 Act cannot be regarded as giving a licence to a defendant to behave as he likes and to say what he wishes, irrespective of the effect of that upon the proper conduct of the trial. The right cannot be used in **order to frustrate the trial and is conditional upon the defendant using that right for the purpose for which it was given, which is to advance and not to defeat the course of justice and for the proper conduct of the trial.**

The position is the same in relation to witnesses. A defendant is entitled to call any witness who can give relevant and admissible evidence which the defendant considers can reasonably assist his defence. In relation to such witnesses it is not for the court but for the defendant to decide which witnesses should be called. However, section 2 cannot be interpreted as giving the defendant an unlimited

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> licence to call witnesses irrespective of whether or not they would assist his defence.
>
> (my emphasis)

As to the remedy which is vested in the court's jurisdiction and which can go as far as deprive an accused of some of his rights, Lord Woolf took the precaution to state:

> While, therefore, the court has a reserved power to avoid its process

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> being abused by a defendant, it is to be emphasized that this power, particularly in relation to the closing address, **is to be exercised exceedingly sparingly and only in an obvious case and so far as a closing address is concerned, where there is really no alternative.**

(my emphasis)

In applying these principles, the Court of Appeal examined the circumstances up to the crucial time when the order was made to remove the accused from the court, and held that the trial judge had had no alternative

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but to act as he had done. The Court noted that the trial judge had «exercised considerable patience and whenever possible resisted being provoked by the appellant», and concluded that this was «one of the exceptional cases» which justified the order.

The soundness of the principles above enunciated in the **Morley** case can hardly be disputed; they are in harmony with our tradition and values as reflected in the Criminal Code as well as in the Canadian Charter of Rights. Lamer

J. (as he then was), writing in **Korponay** v. **Attorney General of Canada**, [1982] 1 S.C.R. 41, p. 48, in the context of a discussion on the right to waive a procedural requirement, described the Canadian approach in the following words:

> Paramount to such a right is that of the trial judge to require compliance notwithstanding a desire to waive, he being the ultimate judge of what procedural safeguards need nevertheless be respected in order to protect the certainty and the integrity of the judicial process.

By analogy it is of some interest to examine the course of prudence which our courts in Canada have adopted in dealing with situations where the misconduct of the accused results in his expulsion from the courtroom.

Our former colleague Nichols J., in **Marceau** v. **R.**, [1990] R.J.Q. 33, with the approval of his two other colleagues, stated that the discretion given to the court by sec. 650 to expel the accused must be exercised «à l'enseigne de la retenue et de la stricte nécessité» (with reserve and out of strict necessity). Discussing the

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difficult predicament of the judge who has, on the one hand, the obligation to assure the accused's presence at his trial, and, on the other hand, that of preserving the dignity of the court to the point of having to remove a person who acts irresponsibly, Nichols J. concluded that the decision to remove the accused was wrong in that instance; as he said, the decision required on the part of the trial judge that he avoid acting out of «agacement ou impulsion» (irritation or impulsion) or «en fonction de son propre tempérament» (as a function of his own temperament). In summarizing, he said:

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L'ensemble du dossier ne permet pas de présumer que l'accusé aurait eu, pendant les plaidoiries et l'adresse du juge, un comportement incorrect au point de faire craindre que tout le procès puisse devenir une moquerie ou une parodie de la justice.

The appeal was allowed and the conviction was quashed.

Similarly in **R.** v. **Grimba** (1981), 56 C.C.C. (2d) 570, the Ontario

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Court of Appeal ruled that it would take more than a single offensive and disruptive act to justify the exclusion of an accused from the courtroom (p. 573):

> In my respectful view, neither does the second exclusion find a foundation in s. 577(a). Conceding that the action of the appellant was offensive and disruptive, it was a single act which could have been dealt with by an admonition or by causing the appellant to take a position further from the Bench. There is nothing in the transcript nor in the report of the trial Judge which suggests that the continuation of the proceedings in the presence of the appellant was not feasible.

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I intend now to proceed to a review of the American jurisprudence discussing these issues. The United States Supreme Court affirmed in **Illinois** v. **Allen** (1969), 397 U.S. 337 that the right given to an accused to attend his trial in virtue of the Sixth Amendment of the Constitution is not absolute and that an accused can lose this right. The Court set out the rule, which is almost identical to sec. 650 (2)a) of our Code, as follows:

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> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, **Johnson v. Zerbst**, 304, U.S. 458, 464 (1938), we explicitly hold today that a defendant **can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behaviour**, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.
> (p. 343)

(my emphasis)

As to the discretion given to trial judges confronted with such situations and the permissible solutions to deal with them, the Court added the following:

> We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present: (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.
> (p. 344)

The governing principle which underlies the legitimacy of an order of exclusion was enunciated by the United States Supreme Court in 1899, in **Falk** v. **United States**,15 App. D.C. 446 (1899), as quoted by Justice Brennan in **Illinois** c. **Allen**, supra:

> The question is one of broad public policy, whether an accused

person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of the law, paralyse the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for his own safety, to restrict the operation of the principle of personal liberty. **Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong.**
(pages 349, 350)

(my emphasis)

In my study of the issue in the American jurisprudence, I found

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particularly interesting, for the purposes of the case at bar, the decisions dealing with the situation of the disruptive or contumacious accused who is not represented by counsel.

In **Faretta** v. **California** 422 U.S. 806 (1975), the United States Supreme Court affirmed that a defendant in a state criminal trial has a constitutional right to proceed without counsel in his trial when he voluntarily and intelligently elects to do so, but that this right is not «a licence to abuse the dignity of the

courtroom», although «he may conduct his own defence ultimately to his own detriment...».

I pause here to recall that, in Canada, an accused, as previously noted under sec. 651 of the Criminal Code, has the right to represent himself.

In **United States** v. **Dujanovic**, 486 F. (2d) 182 (1973), a decision of the Court of Appeals, Ninth Circuit, the court observed that «one of the penalties

of the appellant's self-representation is that he is **bound by his own acts and conduct and held to his record**».

The same objectionable conduct by an accused who is unrepresented can result in the loss of such fundamental rights, namely, his right to be present and to represent himself: «both rights may be curtailed on behalf of the same institutional interest and, as a factual matter, both rights are usually lost by the same or succeeding acts». (**Badger v. Cardwell**, 587 F.2d 968 (1978), (Ninth

Circuit).

Needless to say, in the examination of the decision to remove an accused from the court or to put an end to one of his fundamental rights, as in the present instance, a Court of Appeal, as properly stated the U.S. Court of Appeals, Ninth Circuit, in **Badger** v. **Cardwell**, has to be mindful that it is engaged, to some extent, in «second-guessing» the trial judge's decision: «deference would be owed in any event to the decision of the judge in whose hands the actual responsibility for

courtroom conduct is placed» (p. 973).

As in Canada, the American courts have taken the position that any limitation on such fundamental rights as the right to be present, to present his case and to be heard can happen only after a trial court has looked «for corrective measures that do least injury to these rights consistent with the preservation of an orderly court atmosphere» (**Badger** v. **Cardwell**, supra).

To conclude on this study of the principles in issue, I find that where, in exceptional cases, despite efforts by a trial judge to avoid the inevitable, an accused still persists in his disruptive conduct and therefore, abuses his rights, he can lose these rights. In such a case the trial judge in the exercise of his discretion, can take the appropriate measures to ensure the proper march of the trial, which can include the continuing of the trial in absence of the accused, or the premature termination of the latter's defence, which may mean, as in the present case, that the accused

would not testify in his own case. Such an exceptional decision has to be examined in its context; therefore, I shall now consider the saga of events which resulted in the judge's decision in this case.

The trial judge's decision and its contextual background

It is important to note that, at the outset of the trial, the appellant had made it clear that he did not wish to be represented by counsel, despite many

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attempts by the trial judge to provide him with every reasonable assistance to obtain counsel. Considering the importance of the case, the trial judge appointed Me Louis Belleau as «amicus curiae» before the trial started and Me Belleau acted in this capacity all through the trial up to July 30, 1993, almost the end, when he was granted permission to be substituted by his associate.

The trial started on March 8, 1993, and the Crown ended its case on

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May 17th. On May 20th, the appellant started his defence and examined seventy-seven witnesses up to July 29th, during which time many incidents, which I will examine below, culminated in the following last warning by the trial judge, mixed with insults on the part of the appellant, in the course of the examination by the appellant of Dr. Swamy (R.Factum, pages 526, 527, 528, 529):

> BY THE COURT:
>
> We are not going to go through any more of that. This is marginally pertinent, if pertinent at all.. Continue.

BY THE ACCUSED:

This is the most important meeting. They were...

BY THE COURT:

You have until this afternoon to finish with this witness. I suggest you get on with it.

BY THE ACCUSED:

Well, about...

BY THE COURT:

You have been four days...

BY THE ACCUSED:

About the afternoon, I have another jurisprudence here which says... if I can read it to you. If you... and it says:

> There is no way a judge can put a limit as long as there are pertinent questions to interrogation.»

BY THE COURT:

As long as there are pertinent questions.

BY THE ACCUSED:

All right.

BY THE COURT:

And I'm not certain there are pertinent questions.

BY THE ACCUSED:

Well, as soon as they are not pertinent, then you do it.

BY THE COURT:

And I am satisfied that you are not moving with the dispatch with which you can move, and that is that, and it's been the same with every witness. You have till this afternoon. You have known that Mr. Swamy is leaving. You have known that Mr. Swamy is not available tomorrow, and you have known that for two weeks.

BY THE ACCUSED:

I advised you on several occasions that he responds much longer than necessary, and he doesn't respond to questions. I would have finished a long time ago...

BY THE COURT:

If you are... if you have questions to put to him, I'd suggest you get on with it.

BY THE ACCUSED:

I have questions, but I suggest that you stop abusing the law. You ignore all the jurisprudence which I quote to you. You are above the law, and this is no good.

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BY THE COURT:

Sit down. **This interrogation is ended.**

BY THE ACCUSED:

No.

BY THE COURT:

Mr. Lecours, you have any questions to put to Mr. Swamy?

BY THE ACCUSED:

I have questions.

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BY THE CROWN:

I have no questions. My Lord.

BY THE COURT:

Fine. You're excused, Dr. Swamy.

BY THE ACCUSED:

Well...

AND FURTHER DEPONENT SAITH NOT

BY THE COURT:

Call your next witness.

BY THE ACCUSED:

Whatever I do, you cannot excuse the witness.

BY THE COURT:

Call your next witness. You were warned yesterday and you've been warned today, and you continue arguing, and you refuse to put your questions. That's it.

BY THE ACCUSED:

You behave like a little low crook.

BY THE COURT:

Call your next witness... Pardon?

BY THE ACCUSED:

Little low crook.

BY THE COURT:

Take him out.
We'll adjourn for fifteen (15) minutes.

(THE JUDGE LEAVES THE BENCH)
(MEMBERS OF THE JURY LEAVE THE BENCH)

SHORT RECESS

OUT OF THE PRESENCE OF THE JURY

(THE JUDGE TAKES THE BENCH)
(THE CROWN, Me BELLEAU AND THE ACCUSED ARE PRESENT):

BY THE COURT:

Might I hear, please, the tape of the last few minutes before we adjourned.

BY THE ACCUSED:

Well, I can repeat it myself, if you want it.

(THE TAPE IS PLAYED IN THE COURTROOM)

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Can you show any reason why you should not be held in contempt for that last statement?

BY THE ACCUSED:

Contempt of who?

BY THE COURT:

Contempt of Court.

BY THE ACCUSED:

You are not Court.

BY THE COURT:

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Thank you. Sit down.

BY THE ACCUSED:

May I finish my explanation?

(my emphasis)

During this same sequence of events, the trial judge expressed openly the predicament with which he had been confronted since the beginning, namely, the

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difficulty of dealing with an accused whose conduct justifies his exclusion from the courtroom but who represents himself (R. Factum, pages 531, 532, 533):

> BY THE COURT:
>
> Sit down.
>
> Throughout this trial you have elected to defend yourself. That, of course, is your right. That makes it incumbent upon me, unfortunately, to have a number of exchanges with you, which I would not ordinarily have. Human nature being what it is, a number of these exchanges have, of course, been heated, and that in itself is probably to be expected. I, however, in dealing with you, have always respected the limits of basic politeness. I have thrown no

insults at you. When you call me a little low crook, you express contempt not only for me, but for the whole system which, whether you like it or not, in this country we happen to be proud of.

BY THE ACCUSED:

(Laughter) I'm sorry.

BY THE COURT:

It may be that you sit there, or stand there and thumb your nose at contempt citations. And when you do, of course, the weakness of the system is that you're able to do it with impunity. The strength of the system is that it progresses. Your trial goes on, and at the end, whatever it is, you will be tried and the jury will decide what the jury has to decide.

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So along with the weakness of the system is its strength itself, because its strength is rooted in the fact that most of us in this country have some faith in it. It may not be perfect, but by and large it works pretty well.

That is why when you call me a little low crook, not only am I not personally obliged to accept that sort of behaviour on your part. I'm obliged to use the authority which I have to punish that. Whether you feel that the punishment affects you one way, or the other, or not is, in a sense, besides the point. The point is that nobody is obliged to put up with that sort of thing in a Court of law, and the message has to be made very clear that this sort of thing will not be tolerated.

You may laugh at sentences of imprisonment for contempt, but when a situation commands that they be imposed, they will be imposed.

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And if it makes the system look wear and impotent, then that is a misconception of the system in this country, which is rooted in basic freedoms, one of which you have been exercising since the beginning of this trial, and that is to defend yourself.

Your behaviour this morning since the beginning has basically merited that you be removed from the courtroom. But then, of course, as I've said before, the problem which arises is how do you defend yourself if you're removed from the courtroom. The answer is obvious.

So we'll go on. We will go on. If necessary time limits will be imposed depending on the situation and this case will move ahead. As things stand at the moment, I find you guilty of contempt of Court. I told you that in the ten years that I've been here, I never had occasion to pronounce one judgment in contempt of Court against anyone until this trial began. Thus far I don't know whether

> I'm at four or five with another series waiting in the wings. That disappoints me, but it is unfortunate.
>
> I find you guilty of contempt of Court and for that last contempt I sentence you to six months imprisonment to be served consecutively to the sentences which you already served. I can tell you that if an incident such as this morning repeats itself, the same approach will be adopted, and your trial will continue. And we will get to the end, whether you like it or not, with you, or in spite of you.

The trial resumed and witnesses were heard. On the same day, July 29th, during the examination of Eleanor Morris by the appellant, the latter

proferred further insults to the trial judge. Other witnesses were heard; a discussion then ensued regarding a potential witness. The appellant was finally refused an adjournment to call that witness. The appellant moved to call the Crown Attorney as a witness but, in the absence of any ground to support that request, the trial judge dismissed it. The jury was asked to leave the courtroom, and the trial judge felt at this point that the matter had to come to an end and intimated to the appellant that if he wished to testify he should do so then (R.F. pages 557, 558, 559):

(MEMBERS OF THE JURY LEAVE THE COURTROOM)
(OUT OF THE PRESENCE OF THE JURY)

BY THE COURT:

Well, you would appear to have one option. You have said before, and I don't wish to say it in front of the jury, that you propose to testify. I suppose you could start. That would take you from now until four-thirty (16:30).

BY THE ACCUSED:

You must be kidding?

BY THE COURT:

Not at all. I'm deadly serious, Mr. Fabrikant.

BY THE ACCUSED:

I am more than not prepared to testify yet. I have still many, many witnesses to be heard. So there is no way I'm going to testify. I would like Mr. Lecours to testify or... frankly speaking, I don't want him to be removed because I think he is...

BY THE COURT:

Mr. Lecours is not going to testify unless you convince me that you require Mr. Lecours to testify...

BY THE ACCUSED:

All right.

BY THE COURT:

... and that will take some convincing.

BY THE ACCUSED:

I do not want him to be removed. I didn't think that his testifying would remove him. You see, I am still ignorant at law. So I think he is one of the best I could possibly have. I hope you understand what I mean. So definitely I don't want him to be removed.

BY THE COURT:

All right, I'll cut you short.

BY THE ACCUSED:

Well, I haven't finished yet. Let me explain why I need him.

BY THE COURT:

I have finished listening to you. I will tell you this. You will be prepared as of tomorrow morning to proceed.

BY THE ACCUSED:

Yes.

BY THE COURT:

If you are not prepared to proceed tomorrow morning for whatever reason... for whatever reason, **you risk your defence being declared closed**. We will go on tomorrow, and then we will go on the following week, and we will go on witness after witness until we are finished.

BY THE ACCUSED:

That's a good idea.

BY THE COURT:

This is the last adjournment that you will get at your particular request.

BY THE ACCUSED:

It is not at my particular request. It is at your lawlessness.

BY THE COURT:

And that is it. Take him out. Tomorrow morning, nine-thirty (9:30).

ADJOURNMENT

(my emphasis)

The next day, after having disposed of Me Belleau's request to cease to act as «amicus curiae» and to be replaced by Me Boutros, the trial judge recalled the jury. The appellant's first words were: «Well, ladies and gentlemen, welcome to the Muppett show», followed by more insults.

After a long confrontation between the accused and the trial judge, the appellant was found guilty once again of contempt of court. The trial judge then gave the following explanation to the jury (R.F. pages 569, 570, 571, 572):

BY THE COURT:

What provoked all of this, ladies and gentlemen, was the fact that in view of the length of the trial which from March is now stretching to five months, with some time to go, perhaps, that Mr. Belleau has found it impossible to continue in his capacity as the Friend of the Court.

When he accepted that position it was on the belief that, or on the thought the trial would take three to four months, as the outset. His reasons, from my point-of-view, I deem serious, because a lawyer's practice, and in this instance his practice has effectively been put on hold during the time of the trial, and you all know the feeling of this because your lives have been put on hold, too.

The consequences for him will be relatively far reaching unless he's able to re-establish his practice when the term opens in September. And he asked me whether it would be possible in these circumstances for me to consider his replacement as a Friend of the Court. And I said I would certainly be prepared to give some consideration to it, on the understanding that the task could be taken over by a member of the Bar, who had some experience in criminal matters and who would have the time available to see the thing through to the end. He suggested to me the attorney who is at his left, Me Gabriel Boutros, who has the advantage of being Mr. Belleau's partner, or one of Mr. Belleau's partners, and who because of that relationship is familiar to some degree with, not just what's transpired here, but with the manner in which Mr. Belleau has been exercising the functions of amicus curiae, so that that continuity which I feel is important, would that way be preserved. He will, of course, have access to Mr. Belleau if he has any questions with regard to what has transpired so far. So in these circumstances

I agreed to permit Mr. Belleau to withdraw. I agreed with some considerable hesitation because he's been of great assistance to me throughout this matter, and...

BY THE ACCUSED:

And to the Crown.

BY THE COURT:

... I expressed thanks to him before you came in, and I do so again. And he'll be with Mr. Boutros throughout the day and then as of Monday Mr. Boutros will assume the functions of Friend of the Court. And to this end he has discussed at length with Mr. Belleau how the task has evolved in the context of this trial. So that is what I gather prompted the comment when you came in this morning.

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Call your next witness.

BY THE ACCUSED:

Well, it's not exactly this that prompted... it was just...

BY THE COURT:

Would you call your next witness.

BY THE ACCUSED:

Otherwise what, you will release the witness?

BY THE COURT:

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Otherwise I will release the witness.

BY THE ACCUSED:

You have no right to do that. The witness is here.

(my emphasis)

The appellant then proceeded to examine the witness Nicholson who was followed by the witness Karpman. After a long examination of the latter, a debate arose as to the relevance of some of the questions and resulted in the

following incident which becomes crucial in the present case (R.F. pages 615, 616):

> BY THE COURT:
>
> I'm not going to argue with you any more. I've ruled. That line of questioning is out of order.
>
> BY THE ACCUSED:
>
> Well, you know very well this is not my witness. And if I disclose what I am aiming at, the witness would know and definitely he will adjust his answer.
>
> BY THE COURT:

That question and line of questioning is out of order. It's not pertinent. Last time. Now, if you persist in arguing, I'll end the interrogation of this witness.

BY THE ACCUSED:

Well, to this point I would like to tell you, do not scare me. I couldn't care less. If you want to do another illegal thing, do it. All right. And never again try to scare me.

BY THE COURT:

Mr. Karpman, thank you very much. If the Crown has no questions you're excused.

BY THE CROWN:

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I have no questions, My Lord.

AND FURTHER DEPONENT SAITH NOT

BY THE COURT:

Next witness.

BY THE ACCUSED:

Well, I think It's about time to repeat again, **you are little low crook**.

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BY THE COURT:

Okay. That's it. You are out of order. Remove him from the courtroom. I will decide between now and twelve o'clock (12:00) what my next step is going to be. But it is obviously impossible to proceed with this trial in the manner in which you're behaving yourself. Your behaviour has become totally disruptive. Out, now. We'll adjourn till twelve o'clock (12:00), ladies and gentlemen.

(THE JUDGE LEAVES THE BENCH)

(MEMBERS OF THE JURY LEAVE THE COURTROOM)

SHORT RECESS

(my emphasis)

In the absence of the jury but in the presence of the appellant, the trial judge, who had just ruled that the whole trial had to come to an end, invited the Crown attorney to make representations. The latter's answer was the following (R.F. pages 616, 617):

> (OUT OF THE PRESENCE OF THE JURY)
> (THE JUDGE TAKES THE BENCH)
> (THE ATTORNEYS AND ACCUSED ARE PRESENT)

BY THE COURT:

Mr. Lecours, before I take the decision that I have to take, I wonder whether the Crown has anything to say, and the decision obviously **that I'm contemplating is the closing of the Defence**. I wonder what the Crown's position on that is.

BY THE CROWN:

I agree with that, My Lord. I think the situation has become intolerable.

BY THE COURT:

Thank you. The jury, please.

(my emphasis)

Immediately after, the trial judge recalled the jury and informed them that he had decided that «**the time has come to terminate the defence...»** and to ask the Crown attorney if he wished to call rebuttal evidence (R.F. pages 617, 618, 619):

BY THE COURT:

Ladies and gentlemen, in view of the situation in which we find ourselves I have decided that the time has come to terminate the Defense which... or the evidence in Defense which is being called by Mr. Fabrikant. I think that I owe you an explanation as to why I've come to that decision, and the explanation will be brief.

We hear in this country over and over again the word «rights». In particular, in relation to the Criminal Law, we hear the right to a full answer in defense. And in the context of the word «rights», we hear invoked again and again the question of the Charter of Rights, whether it be the Federal Charter or whether it be the Quebec Charter.

The concept of a full answer in defense wasn't created by the Charter and isn't new. It's something which has been part of our criminal

law for a long, long time. I say a right to a full answer in defense. Yes, it's a right, but it carries with it a concomitant duty, and that is a duty to exercise that right within the rules which apply to the running of criminal case.

And as I explained to you in the beginning in the running of a criminal case, the judge has, among other things, the power to decide both as to the admissibility of evidence, as to the pertinence of evidence, and as to the manner in which that evidence is to be adduced.

The parties have the duty to respect the judge's rulings because, as I said to you before, if the judge errs along the way, that is why there is an appeal procedure which is in place in order to undo any injustice which might result.

Systematically it has become more and more difficult to see these

basic rules respected. The right to a full answer in defense is not unlimited. One cannot simply throw oneself before the high alter of the Charter of Rights and expect by invoking it to be able to behave as one wishes, casting aside all of the rules which apply to the orderly running of a Canadian court. And unless proceedings can devolve in a calm atmosphere, then obviously the rules are being abused somewhere.

This morning is but the culminating point, and in the light of what transpired this morning, virtually all of which transpired with you present, I've decided that this trial cannot usefully proceed any further, and that the time has come simply to put an end to the Defense evidence.

There isn't such precedent for this in our Criminal Law, but then there's not much precedent for a lot of what we have met along the

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way in connection with this trial.

And the bottom line is that it stands now to be decided on the basis of the record as it exists now. What I propose to do is move to the next stage, which is to ask the Crown Prosecutor if he has any rebuttal evidence to present. I don't know what the answer is.

BY THE CROWN:

I have no rebuttal evidence.

The last extract constitutes the basis of the trial judge's decision.

The defence being declared closed and no rebuttal being called by the Crown, the appellant agreed to proceed with his summation to the jury, which lasted a few days, followed by the Crown attorney and the trial judge who gave his address on August 9th and 10th. The jury returned with a verdict of guilty on August 11th.

After this review of the incidents which led to the decision impeached

in this case which terminated the appellant's defence, I shall now point out some previous incidents which occurred during the appellant's presentation of his defence, in order to show the appellant's conduct in a broader perspective, to better illustrate the nature of the trial judge's predicament and to seek to show how things came to that culminating point.

Just before the appellant started with his witnesses the trial judge, who realized that the appellant could need some assistance in order to facilitate

his task in the presentation of the evidence, told the appellant that Me Belleau, the «amicus curiae», «will be available to counsel you if you require his counsel», adding that «he is not your lawyer, he is there to furnish you with any information which you might want». Incidentally, the record shows that the appellant used the services of the «amicus curiae»; but, in his case as well, the appellant did not spare him his insults.

In the early stages of his defense, in the course of the examination of

his witnesses, the appellant directed various insults to the trial judge. For example, on May 25th, during the examination of John Relton, when the appellant persisted in asking irrelevant questions and was warned that he should not do so, he then replied in speaking of a «comedy play», of the «biased judge» and made insulting comments. The next day, after the examination of Marie-Andrée Robitaille, the appellant questioned the «honesty» of the trial judge who had to put an end to the examination of this witness on account of the appellant's irrelevant questions.

It is not exaggerated to say that, for each witness called by the appellant, the trial judge had to intervene many times to disallow an abundant number of irrelevant questions and to put an end to the examination. As early as June 3rd the trial judge admonished the appellant with a clear warning as to the consequences of his misconduct, stating that it could mean the foreclosure of his defence (R.F. pages 222, 223, 224):

You have asked them, you're not a lawyer, I have extended to you

as such latitude as I can, but what you have no right to do and what you persist in doing and why I intervened is because you insist on cross-examining your own witness, which you may not do. Save and except if that witness has been shown to my satisfaction to be hostile.

Now, you argue consistently after I have ruled. One of the rules of the game, one of the rules of Court is that I am the person who has the right to decide whether a question is legal, whether the evidence that it proposes to put in the record is pertinent, and whether the question should be permitted. You're not required to like my rulings, you are... you may even hold the view that they are wrong, but you are required to respect them, you are required to respect them. What do you? Every time you argue with me, since the beginning of this trial **I have been insulted on a daily basis, you have committed contempt of Court on a regular and ongoing basis.** And in the teeth of the fact that the Judge has

the right to control and direct the trial, **what options do I have?** Argument is inadmissible, you persist in arguing. For the first time in almost ten years here, you are the first person that I have ever had to cite for contempt. Now, I do not care if that tells you something, but it certainly tells me something. First time in ten years, never done it before, never had to.

I have on a daily basis had to record incidents which ran from contemptuous, to insolent, directed against me, and directed against the Court in which I am sitting, directed against other witnesses, directed at the process in general. I will not live with this sort of thing. **I will not put up with it from you any longer. You are conducting your own defense, that is the situation you are in. You merited being removed from the courtroom yesterday afternoon, yet I am left with a practical problem, how I do I run your trial with you removed from the courtroom**

particularly at the stage of your defense, so there is no solace for me there. There is no solace for me in gagging you, there is no solace for me in finding you in contempt because you thumb your nose at all rulings that I make. You joke about times and notes in the procès-verbal, you make it virtually impossible.

Quite frankly, **the only remedy**, if you are not going to live by the rules, and I thank you very much for the lecture about my interrupting you, but it is out of place, if you are not going to live by the rules **is foreclosure.**

I am conscious of the fact that you say that you are entitled to a full and complete defense, but I say that is conditional upon your respecting the rules of Court and conforming to them. And if you do not it is the way it is going from now on.

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(my emphasis)

This warning of «foreclosure» pronounced by the judge as early as June 3rd shows clearly that, though the trial judge felt the situation was already intolerable at that time, he could not easily resign himself to carry out his warning, and decided to use his power of foreclosure only as a last resort.

Despite the previous warning of foreclosure, on June 17th, the

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trial judge gave another warning to the appellant that his trial, on account of his disruptive and contumacious conduct, could be put to an end (R.F. pages 332, 333):

> **Since the beginning of this trial, I've had nothing but argument, disrespect and rudeness from you. It's coming to an end. If there is one more incident, one more incident, this trial will end. You will go straight out through that door. This trial will end. The jury will begin their instructions and that is that.**
>
> **You will follow the directions of this court, word for word closely. If you don't like what they are, you can go and complain to the Court of Appeal but I'm not putting up with the kind of treatment I've been subjected to by you for any**

longer.

Now you go through that door now and go and think about this for fifteen minutes and when that fifteen minutes is up, we will resume.

BY THE ACCUSED:

There is nothing to think. You have...

SUSPENSION OF THE HEARING

(my emphasis)

On June 22nd, the appellant acknowledged very clearly the warning which he received from the trial judge (R.F. page 353):

> VALERY FABRIKANT:
>
> Well there was nothing wrong in my question except that you didn't allow it.
>
> LA COUR:
>
> Well that's fine, that's ... that's enough.
>
> VALERY FABRIKANT:

That's enough for you. This is why all lawyers want to handle my appeal. Alright.

LA COUR:

Well if they all want to handle your appeal perhaps you should call them and have them come and give you a hand with your case.

VALERY FABRIKANT:

Well frankly speaking I'm seriously thinking about finishing this stuff and go to appeal from tomorrow because I think I have more than enough.

LA COUR:

Wonderful then. Go right ahead.

VALERY FABRIKANT:

I'm trying to speak I think a good idea.

LA COUR:

Go right ahead.

VALERY FRABRIKANT:

Yes well you threatened to shut up my defense why don't you do that and this is exactly where are going to ...

(my emphasis)

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On a few occasions, for example on July 19th, after the appellant insisted on putting some questions to his witnesses despite the ruling that those questions were «a waste of time», the judge ordered the appellant to be removed from the courtroom, adjourned the trial for a short period, and recalled the appellant for the continuation of the trial.

The trial judge warned the appellant each time he intended to

terminate the examination of one of appellant's witness on account of the irrelevance of the questions.

It follows from this study of the record that the last warning, on July 29th, was preceded by previous warnings in the previous two months, all of which confirm the view that the appellant could not have been taken by surprise when he was given that last warning.

As to the defence which was advanced by the appellant, let us see on what it was based. From his opening statement on May 20th, I extract the following elements which the appellant submitted to the jury (R.F. p. 508):

> VALERY FABRIKANT:
>
> Ladies and gentlemen, members of jury, many of you think that since I have publicly admitted, on several occasions, and you have heard it on the tape, that yes, indeed, I was the one who killed four people, so probably you think that what then to talk about, he's guilty and that's it. How many of you think so, would you raise your

hands?

P. 509 -

[...] So it is not question of justification but it is question of giving you all the facts which led to what happened, and it will be up to you to determine the degree of criminal responsibility of mine to those actions. This is the main purpose of this defense. We can say thousand times that we need stricter gun laws, that we need this, we need that, it will not change anything because the main reason for violence is injustice or perception of injustice. In some cases this perception might be wrong, in some cases this perception is right, but in all cases, or almost all cases, violence is result of perception of injustice, and if we really want to curb violence, we have to address question of injustice.

Pages 513, 514 -

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[...] And you will see that what triggered shooting was neither of those, those facts were steps which were leading to it, but I would never shoot anyone because I was not promoted, or because my article has appeared with somebody else's name there. Ever.

[...]

And again, you will get **the evidence that I didn't want to kill anyone, the only thing I wanted was to scare them to leave me alone**, this attempt was done terribly wrong, and you will hear what happened there, and you will decide by yourselves about the facts.

(my emphasis)

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At an early stage of his defence, on May 26th, the appellant had said that his «only intent» was to «threaten Hogben», Dr. Hogben being the first victim, who had been shot three times, no evidence having shown firing at close range (R.F. p. 183):

> Mr. FABRIKANT:
>
> No, no, no, you didn't understand what I said. I said that I didn't

plan to kill anyone, what I'm saying, to take justice in my own hands, the only intent of mine was to threaten Hogben sufficiently that he will convey to all other bandits that they would let me alone. That's all. And, I want to show to the jury that there was no other way of doing this.

THE COURT:

I am not going to permit you to embark on any of this.

Mr. FABRIKANT:

Well, you want to protect Concordia, what can I do.

THE COURT:

I have no desire to protect anybody. If what you say is true ...

Mr. FABRIKANT:

I think that my explanation is so clear and logical.

All through the presentation of his evidence, the appellant argued that his questions were relevant to show provocation on the part of the authorities

which could explain why one «would become violent». On May 26th, he tried to convince the Court of the relevancy of his questions in order to show «**that he was dealing with criminals and when you are dealing with criminals, you have no choice but to take justice in your own hands**», his only intent being «to threaten Hogben sufficiently that he will convey to all other bandits that they would let me alone».

In those instances where the appellant, in his defence, focused

exclusively on a theory that he was provoked to act as he did, that he wanted to threaten Dr. Hogben or to scare the authorities so that they leave him alone, the trial judge did not allow him to pursue that line of defence. The trial judge summarized as follows the theory of the defence in his address to the jury (R.F. pages 716, 717, 718):

> **The theory of the defense** generally is that the Crown has failed to prove the essential elements of the offences, that the Crown evidence is unreliable, and that the scene was tampered with. As to the tampering of the scene, the Defense particularly refers to the movement of Hogben's body, and underlines that it is palpably

impossible, that given the movement of the body, the letter which he purportedly was touching could possibly have remained in his hand.

The accused further takes the view that particularly in relation to Dr. Douglass, the scene was tampered with inasmuch as blood was added to the doors in order to make the scene look more gory. He takes the position that the police and Concordia officials conspired in order to paint him in the worst possible light, and points to Sangollo's news conference the following day as being evidence of the fact that the police, with full knowledge of what had transpired, nevertheless put it about that the whole affair had commenced in Ziogas' office, rather than in that of the accused.

The accused's position is that he had no motive to plan to murder anyone. Having before him an offer of three years termination, which was a rather handsome golden handshake by any standards. He maintains that he could not have planned and deliberated the

whole affair, having initially intended to be at a conference in Israel, and that he only returned the one thousand dollars ($1,000) because his plans changed at the last minute.

He takes the position that, no, the proof does not demonstrate the planning of any deliberate murder. He takes the position that the Crown has not explained the presence of the guns and ammunition in his office on August twenty-fourth (24th), nor for that matter the presence of Hogben as part of a plan. There is, he says, no evidence that he brought the guns.

He puts in question Hébert's testimony with regard to the recovery of the ammunition on the twenty-fourth (24th) of August, relying on Bujold who gave access to Hébert on September the twenty-second (22nd).

He indicates that his behaviour does not indicate an intention to kill. Why, he suggests, would he leave a stock of ammunition in his office as he went on a shooting spree, rather than carry it with him?

Relying on Morris' testimony, with regard to the two minutes which elapsed between the shooting of Hogben and Saber, he raises the question of why take two minutes to cross the hall if he was embarking upon a planned shooting rampage.

He underlines that the evidence showed that he walked slowly, calmly, as Chouri said, and that had he been putting into operation a plan he would have walked quickly. It is not, he says, the ordinary behaviour for someone who is going after pre-selected targets.

He maintains that he could not have attempted to hit Horwood,

particularly having regard for the location of the various bullets which struck various doors and walls in the hall in question. He puts in question, again, the police interference with the scene, having regard, in particular, for the bullet that penetrated half-way up one of the door frames. «Lin's», I think. It might be someone else's, but which the police dug out from underneath by removing a portion of the floor of the skirting.

He says that in the face of the falsification of evidence by the police it would be extremely dangerous to base oneself on any of the evidence which he contends the police invented in order to come to any conclusion about planning and deliberation.

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At the hearing, the appellant qualified his defence as the «psychologically battered person syndrome».

Earlier in his address the trial judge had specifically directed the jury that the defence of provocation was not open to the appellant in this case (R.F. p. 691):

> Now, I would simply make allusion to two other things. You have sat

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here for weeks and weeks and listened to a plethora of evidence that was admitted on the basis of the facts that one day it might have become pertinent to a defense called provocation.

I told you yesterday and I repeat, that evidence cannot support a defense of provocation because essential additional evidence was not made relating to provocation and therefore it is not open either for me to instruct you on the question of provocation or therefore for you even to get into it.

In the absence of proof sufficient to justify provocation, or in the absence of proof of insanity, let me tell you that loss of control or loss of one's temper is not and never can be a valid excuse for murder.

Having set out the context in which the decision attacked was taken and the principles applicable in the examination of this decision, I shall now come to a discussion of the issue.

Discussion

Throughout the presentation of the appellant's defence, the trial judge,

to paraphrase Mr. Justice Black in **Illinois** v. **Allen**, supra, was confronted with a disruptive, contumacious and stubbornly defiant accused who had adopted a strategy of defiance and disruption of the trial, if not self-destruction, for reasons of his own. Had the appellant acted that way but been assisted by counsel, the matter could have been more easily resolved by removing him from the courtroom. But, as the trial judge indicated more than once, he felt, in his wisdom, that he had to endure, to the extent possible, the contemptuous conduct of the appellant since he did not want to order the expulsion of an unrepresented accused. As shown above,

the trial judge first gave several sharp warnings to the appellant that his defence would be terminated or his rights foreclosed, and ordered him to be removed from the courtroom while adjourning the trial for a few minutes in order to admonish the appellant. On six occasions, the trial judge had to use the contempt of court proceedings in view of the most abusive language of the appellant. In my study of this case, I very often asked myself: what else could the trial judge have done to maintain the integrity of the process and to try to dissuade the appellant from pursuing his line of conduct which could lead to a chaos?

Though the trial judge had shown commendable patience since his first severe warning on June 3rd, it was only on July 29th that he had to finally inform the appellant that it was the end and that if ever he wished to testify in his own defence, he should do so then. To say the least, as I said before, the appellant had to expect that to happen: his reaction, namely, that he was not ready to testify, still remains inexplicable since he had been clearly advised. Be that as it may, it was only the

next day, on July 30th, after the appellant chose to call another witness and not to testify himself yet, that he pursued his disruptive behavior and that his defence was declared closed by the trial judge. I fail to see how the appellant can argue seriously that he was taken by surprise, after the numerous warnings of foreclosure, the temporary expulsions and the convictions for contempt of court. In these circumstances, how can the appellant claim he was denied a right when he refused to exercise that right in anything approaching a reasonable manner and when he used every opportunity during his trial to discredit the court and the trial process.

Moreover it seems to me essential to remember that what culminated in the decision to end the defence did not result only from the appellant's conduct but also from the obvious waste of time to which the judge and the jurors were obliged to submit, from the first to the last of the seventy-seven witnesses called by the appellant in his defence. In the case of almost every witness the trial judge had to terminate the examination on the ground of irrelevancy. Without suggesting that

the trial judge should have curtailed the defence sooner, with the benefit of hindsight in perusing the evidence called in defence, I feel it would not have been wrong to do so, given the irrelevancy of the evidence. This reinforces my opinion that, when the trial judge gave his final warning to the appellant on July 29th and invited him to put an end to his defence and come forward as a witness if he so wished, the appellant was not caught off guard and knew very well what this meant. For over two months, the appellant conducted the examination of all witnesses, was told every day that many of his questions were irrelevant and, more particularly, that his defence of

threats or fear or provocation against the four murder charges did not constitute a valid defence. He was also warned many times what his abuse of the time of the Court could not be accepted. I should add, at this point, that I am satisfied that this defence of threats or fear or provocation, or the one of «psychologically battered person syndrome», not tantamount to insanity, which was advanced by the appellant at the hearing, were not valid defences to the charges of murder and attempted murder.

Examined in that context, the decision to terminate the appellant's defence was, in my opinion, inevitable. As in **Morley**, supra, where the English Court of Appeal ruled that the refusal by the trial judge of the accused's request for certain witness summonses and also to permit the accused a closing speech before the jury, were justified because of the conduct of the accused, I have come to the conclusion that this was an «exceptional case» where the trial judge had no other choice: he took all reasonable steps to assure that the trial was conducted fairly and properly. The Court, as stated in the **Morley** case, supra, has the inherent

power to avoid its process being abused by an accused and to prevent an accused perversely trying to examine witnesses whose evidence is manifestly unnecessary and irrelevant.

The appellant's case bears no resemblance to the situation described in **United States** v. **Bentvena et al** (1963), 319 F. (2d), 916, a decision of the United States Court of Appeals, Second Circuit, referred to us by the appellant in his

memorandum. In that case, though the Court stated that the right to testify «may be waived by conduct» of the one who holds that right, to which I fully agree, it ruled that the facts of the case did not warrant that conclusion. The Court concluded that the trial judge could not invoke serious misconduct at an earlier stage of the trial on the part of an accused to refuse him the right to testify in his own behalf.

The right of an accused to make full answer and defence entitles the accused to adduce relevant evidence, to advance legal argument and to address

the Court. It carries with it no license to paralyse the trial process by subjecting an endless stream of witnesses to interminable examination on irrelevant matters.

In this regard, an unrepresented accused enjoys no particular privilege. On purely formal matters, he, untrained in legal science, will generally be permitted reasonable latitude in putting questions, in formulating objections, and in arguing points of law. By renouncing to the assistance of counsel, however, an accused gains no right to proceed by different fundamental rules.

In this case, the appellant called seventy-seven witnesses and was permitted to question each of them at length. He was invited repeatedly to testify in his own defence if he wished to do so. Notwithstanding his offensive comments and his systematically obstructive conduct, he was permitted to make and argue submissions in law, and to address the jury at great length.

Appellant, in short, was hardly deprived of his right to make full answer and defence. He simply declined as I mentioned earlier, to exercise it in a reasonable manner, let alone in the manner provided by law. To a certain extent I see it as a waiver by the appellant of his right to call further witnesses or to testify himself, after having been warned that his behaviour could lead to the foreclosure or loss of his rights. In conducting himself as he did, the appellant has no one to blame but himself for the foreclosure ordered by the trial judge. To permit the appellant to continue would have made a mockery of the trial process.

When I think of how scrupulous courts are in their efforts to maintain the integrity of the process and to assure fairness at trial, it is difficult to understand why one would deprive himself of the fundamental guaranties which are protected by our Constitution and choose instead to seek to disrupt, abuse and discredit the very process that is there to protect his rights. That is what the appellant did and, in so doing, he himself was the sole cause of the trial judge's decision to terminate his right to call further witnesses in defence.

For all those reasons, I would dismiss the appeal.

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MICHEL PROULX, J.A.

COURT OF APPEAL

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CORAM: THE HONOURABLE BEAUREGARD
BAUDOUIN
PROULX, JJ.A.

VALERY I. FABRIKANT,

APPELLANT - (accused)

v.

HER MAJESTY THE QUEEN,

RESPONDENT - (prosecutrix)

OPINION OF BAUDOUIN, J.A.

I agree entirely with the reasons given and the conclusion reached by my brother Proulx, and wish only to add a brief comment of my own.

A criminal trial must, under any and all circumstances, not

only be, but also **appear to be**, fair and equitable. The evidentiary and procedural mechanisms, safeguards and rules that have been developed by our legal tradition over the years to attain this goal must be respected and strictly enforced.

As Justice Frankfurter observed more than 50 years ago in McNabb v. United States, 318 U.S. 332 (1943), at p. 347:

> The history of liberty has largely been the history of

observance of procedural safeguards.

Indeed, no safeguard is more important to the integrity of a criminal trial than the right of an accused to make full answer and defence. Trial courts are therefore bound to exercise great restraint in making any order that could have an impact on the right of defendants to remain present throughout their trials, to call witnesses, to testify themselves, and, if they are unrepresented, to address the court.

For the same reasons, appellate courts must scrutinize with care every alleged violation of the right of an accused to make full answer and defence.

Finally, as appears from the paucity of decided cases dealing with the circumstances that concern us here, trial courts have fortunately been

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required only on rare occasions to contend with a systematic abuse of the rights I have mentioned. Nonetheless, when that does occur, a measured but firm response is essential to safeguard our system of justice against any attempt to subvert the rules that ensure its integrity.

The present case is a good example of how the rules devised to protect the accused against arbitrariness and unfairness are abused and turned against the system itself. In such cases, the presiding judge who is not only the

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guardian of equity and justice, but also the protector and keeper of the integrity of the criminal justice system as a whole has both the unquestionable right and the clear duty to intervene to preclude a travesty or a parody of justice.

The complete trust and confidence of the public in its system of justice is a fundamental value of our democracy. If the very tools and weapons that are given to the accused to ensure his full protection against despotism and arbitrariness are manipulated and used against the system itself, there is, because

of the very frailty of the system, a clear danger that the whole structure of criminal justice would become subject to ridicule and that public confidence in it might thereby be eroded.

In my respectful view, the careful analysis of the record by Justice Proulx demonstrates that the trial judge, despite appellant's persistent provocation, conducted the proceedings with

remarkable dignity and serenity. The appellant is alone responsible for his failure to testify. He was not deprived by the judge of that fundamental right -- or any other.

Accordingly, I too would dismiss the appeal.

JEAN-LOUIS BAUDOUIN, J.A.