


R. v. Béland, [1987] 2 S.C.R. 398

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R. v. Béland, [1987] 2 S.C.R. 398

Her Majesty The Queen

Appellant

v.

Alain Béland and Bruce Phillips

Respondents

INDEXED AS: R. v. BÉLAND

File No.: 18856.

1987: March 31; 1987: October 15.

Present: Dickson C.J. and Beetz, McIntyre, Lamer, Wilson, Le Dain and La Forest JJ.

on appeal from the court of appeal for quebec

Evidence -- Polygraph evidence -- Exclusionary rules -- Accused denying participation in conspiracy to commit robbery -- Motion by accused to take a polygraph examination and submit results in evidence refused -- Whether such evidence admissible.

Criminal law -- Powers of the Court of Appeal -- Court of Appeal ordering the reopening of the trial -- Whether the Court of Appeal had jurisdiction to make such an order under s. 613(2) of the Criminal Code.

The respondents were charged with conspiracy to commit a robbery. At trial, one of their accomplices gave evidence for the Crown which directly implicated the respondents. In their testimony, the respondents asserted that the evidence of the Crown's witness was false and denied any participation in the alleged conspiracy. After completion of the evidence at trial, the respondents made an application to reopen their defence in order to permit each of them to take a polygraph examination and submit the results in evidence. The trial judge denied the motion, holding that the results of such an examination were inadmissible, and respondents were convicted. A majority of the Court of Appeal allowed their appeal from conviction, granted an order reopening the trial and directing that the results of the polygraph examination be submitted to the trial judge for a ruling as to their admissibility. This appeal is to determine whether

evidence of the results of a polygraph examination is admissible in light of the particular facts of this case.

Held (Lamer and Wilson JJ. dissenting on the merits): The appeal should be allowed.

Per Dickson C.J. and Beetz, McIntyre and Le Dain JJ.: The results of a polygraph examination are not admissible as evidence. The polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses. The admission of such evidence would offend well established rules of evidence, in particular, the rule against oath-helping, which prohibits a party from presenting evidence solely for the purpose of bolstering a witness' credibility, the rule against the admission of past or out-of-court statements by a witness and the character evidence rule. The polygraph evidence is also inadmissible as expert evidence. The issue of credibility is an issue well within the experience of judges and juries and one in which no expert evidence is required.

Further, the admission of polygraph evidence will serve no purpose which is not already served. Such admission will disrupt proceedings, will open the trial process to the time-consuming and confusing consideration of collateral issues and will deflect the focus of the proceedings from the fundamental issue of guilt or innocence. It will also lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists. The results recorded by the polygraph instrument, their nature and significance will reach the trier of fact through the mouth of the operator. Human fallibility will thus still be present, but now fortified with the mystique of science.

Per La Forest J.: There are two compelling factors for the exclusion of polygraph evidence in judiciary proceedings: human fallibility in assessing the proper weight to be given to the evidence cloaked under the mystique of science, and the inadvisability of expending time on collateral issues.

Per Lamer and Wilson JJ. (dissenting on the merits): Polygraph evidence goes directly to the issue of an accused's credibility and should have been admitted in this case. The Crown attacked the respondents' credibility by alleging that they were lying under oath while the informer was telling the truth. The central issue was whom to believe: the informer or the respondents. There was no other evidence implicating the respondents in the alleged conspiracy. It would be unjust, in these circumstances, to prevent the respondents from calling any evidence of probative value indicating that they were telling the truth. This was their defence to the charge and they should have been allowed to make it under s. 577(3) of the *Code*.

The rule that the Crown will not be allowed to adduce evidence solely to bolster the credibility of its witnesses should not be extended to an accused where the Crown's whole case is based on the accused's lack of credibility.

The polygraph evidence was clearly relevant and did not fall within any of the other exclusionary rules advanced by the Crown. The case of *Phillion v. The Queen*, 1977 CanLII 23 (S.C.C.), [1978] 1 S.C.R. 18, was clearly distinguishable.

The appeal should be allowed, however, and a new trial ordered. The Court of Appeal had no jurisdiction under s. 613(2) of the *Criminal Code* to order that the original trial be reopened.

Cases Cited

By McIntyre J.

Followed: *Phillion v. The Queen*, [1978] 1 S.C.R. 18; **considered:** *R. v. Kyselka* (1962), 133 C.C.C. 103; *R. v. Clarke* **reflex**, (1981), 63 C.C.C. (2d) 224; **referred to:** *R. v. Burkart*; *R. v. Sawatsky*, [1965] 3 C.C.C. 210; *R. v. Martin* **reflex**, (1980), 53 C.C.C. (2d) 425; *R. v. Turner*, [1975] 1 All E.R. 70; *Jones v. South-Eastern and Chatham Railway* (1917), 87 L.J.K.B. 775; *R. v. Campbell* (1977), 38 C.C.C. (2d) 6; *R. v. Hardy* (1794), 24 St. Tr. 199; *R. v. Barbour*, [1938] S.C.R. 465; *R. v. Close* **reflex**, (1982), 68 C.C.C. (2d) 105; *R. v. McFadden*

1981 CanLII 494 (BC C.A.), (1981), 65 C.C.C. (2d) 9; *R. v. McNamara (No. 1)* [reflex](#), (1981), 56 C.C.C. (2d) 193; *R. v. Abbey*, 1982 CanLII 25 (S.C.C.), [1982] 2 S.C.R. 24; *Davie v. Magistrates of Edinburgh*, [1953] S.C. 34.

By Wilson J. (dissenting on the merits)

Phillion v. The Queen, 1977 CanLII 23 (S.C.C.), [1978] 1 S.C.R. 18, aff'g (1974), 20 C.C.C. (2d) 191, aff'g (1972), 10 C.C.C. (2d) 562; *Lowery v. The Queen*, [1974] A.C. 85; *R. v. Miller* (1952), 36 Cr. App. R. 169; *R. v. Wickham* (1971), 55 Cr. App. R. 199; *R. v. Cook* (1960), 127 C.C.C. 287; *R. v. Martin* [reflex](#), (1980), 53 C.C.C. (2d) 425; *R. v. Wong (No. 2)* (1976), 33 C.C.C. (2d) 511, rev'd (1978), 41 C.C.C. (2d) 196; *R. v. Kyselka* (1962), 133 C.C.C. 103; *R. v. Burkart*; *R. v. Sawatsky*, [1965] 3 C.C.C. 210; *R. v. Clarke* [reflex](#), (1981), 63 C.C.C. (2d) 224; *R. v. Turner*, [1975] 1 All E.R. 70; *R. v. Nelson*, [1982] Qd. R. 636; *City of Saint John v. Irving Oil Co.*, 1966 CanLII 64 (S.C.C.), [1966] S.C.R. 581; *R. v. Lupien*, 1969 CanLII 55 (S.C.C.), [1970] S.C.R. 263; *Frye v. United States*, 293 F. 1013 (1923).

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 577(3), 613(2), 621(1)(a).

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APPEAL from a judgment of the Quebec Court of Appeal, [reflex](#), [1984] C.A. 443, 15 D.L.R. (4th) 89, 16 C.C.C. (3d) 462, 40 C.R. (3d) 193, allowing the appeal of the accused from their conviction for conspiracy to

commit robbery contrary to s. 423 of the *Criminal Code*. Appeal allowed, Lamer and Wilson JJ. dissenting on the merits.

Jean-François Dionne and François Landry, for the appellant.

Vincent Rose and Joseph Elfassy, for the respondent Béland.

The judgment of Dickson C.J. and Beetz, McIntyre and Le Dain JJ. was delivered by

1. MCINTYRE J.--This appeal involves the question of the admissibility in evidence in a criminal trial of the results of a polygraph examination of an accused person.
2. The respondents, Béland and Phillips, were charged with conspiracy to commit a robbery. The Crown led evidence to the effect that the respondents had conspired with one Grenier and one Filippone to rob an armoured truck. No robbery took place because Grenier disclosed the conspiracy to the police. He later gave evidence for the Crown and his testimony was the only evidence which directly implicated the respondents in the conspiracy. The respondents gave evidence on their own behalf, denying any participation in the conspiracy and saying that the evidence of Grenier was false. Each respondent during his testimony said that he was prepared to undergo a polygraph examination. After completion of the evidence at trial the respondents made an application to the trial judge to reopen their defence, in order to permit each of them to take a polygraph examination and submit the results in evidence. This motion was refused by the trial judge who held that the results of such an examination were inadmissible in evidence, in accordance with *Phillion v. The Queen*, [1978] 1 S.C.R. 18. The respondents were convicted. An appeal to the Court of Appeal by the respondents succeeded. By a majority, the Court of Appeal granted an order reopening the trial and directing that the results of the polygraph examination be submitted to the trial judge, for a ruling as to their admissibility in light of all the circumstances revealed in the evidence: [reflex](#), [1984] C.A. 443, 15 D.L.R. (4th) 89, 16 C.C.C. (3d) 462, 40 C.R. (3d) 193. The Crown appeals to this Court as of right under s. 621(1)(a) of the *Criminal Code*. The parties agree that the sole issue in this appeal is whether evidence of the results of a polygraph examination is admissible in light of the particular facts of this case.
3. In the Court of Appeal (Bisson, Jacques and Malouf JJ.A.) the majority (Bisson and Jacques JJ.A.) distinguished the case at bar from *Phillion v. The Queen*, *supra*, on the basis that here the parties had each given evidence and their credibility was clearly in issue, whereas Phillion on his trial had not testified and any question as to his credibility did not arise. They were also of the view that the trial judge, in considering the possible inaccuracies of the polygraph and the uncertainty which could arise from its use, had confused the issue of admissibility with that of weight.
4. Malouf J.A., in dissent, relied on *R. v. Kyselka* (1962), 133 C.C.C. 103 (Ont. C.A.), in expressing the view that the evidence of the polygraph test was inadmissible. He based his dissent on the proposition that a person may not call witnesses to testify to the veracity of his own witnesses. He was, in effect, relying on the rule against oath-helping.
5. The leading case in this Court concerning the admissibility of polygraph evidence is *Phillion v. The Queen*, *supra*, in which it was held that such evidence should be rejected. Speaking for the majority, Ritchie J. expressed the view that such evidence offended the hearsay rule. He said, at p. 24:

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 opinions 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.

Entirely different considerations, however, apply to the evidence of Mr. Reid who was neither a psychiatrist nor a psychologist and does not appear to have had any other medical training. The evidence indicates that he only saw the accused on the occasion when he administered the polygraph test which was the day before he gave his evidence.

He continued, at p. 25:

In my view, Mr. Reid had neither the qualifications nor the opportunity to form a mature opinion of the propensity of the man he was subjecting to the test either as to truthfulness or otherwise. His opinion, however, was not based on the statements made by the appellant, but on his own expertise in interpreting the recordings of the machine. If the statements had been made to Mr. Reid alone, there is in my opinion no doubt that they would have been inadmissible as self-serving, second hand evidence tendered in proof of its truth on behalf of an accused who did not see fit to testify and I am not prepared to hold on the evidence of this case that the presence of the polygraph machine or the expertise of its operator made them admissible. The admission of such evidence would mean that any accused person who had made a confession could elect not to deny its truth under oath and substitute for his own evidence the results produced by a mechanical device in the hands of a skilled operator relying exclusively on its efficacy as a test of veracity.

Spence J., with whom Laskin C.J. concurred, wrote separate reasons in which he agreed that the evidence should be rejected, but he left open the question of whether in other circumstances the polygraph evidence might be admissible.

6. It was the suggestion of the possibility of a different result in other circumstances which was relied upon by the majority of the Court of Appeal to distinguish the *Phillion* case. As has been noted, Phillion did not give evidence himself but sought to rely on the evidence of the polygraph operator to place his story before the jury and lend it credibility. In the case at bar the two respondents each gave evidence at trial and now seek to invoke that of the polygraph operator to support their credibility.

General Rule Against Oath-helping

7. The Crown appellant argues that the admission of polygraph evidence offends the rule which prohibits a party from presenting evidence which has, as its sole purpose, the bolstering of the credibility of that party's own witnesses. This is sometimes referred to in the earlier cases as oath-helping. There does not appear to be any decision of this Court which has dealt specifically with the rule, but there is other substantial authority supporting it. The leading decision on this point in Canada is *R. v. Kyselka, supra*. In that case, the three accused were charged with the rape of a mentally retarded 16-year-old girl. The trial judge permitted the Crown to call a psychiatrist, who gave evidence that because of her low mental age the complainant lacked sufficient imagination to concoct a story. It was therefore likely that she would tell the truth in court. The accused were convicted. On appeal, Porter C.J.O., speaking for the court (Porter C.J.O., Kelly and McLennan J.J.A.), held that the evidence of the psychiatrist should not have been admitted as its sole purpose was to suggest that the complainant, because of her mental classification, was likely to be a truthful witness. He said, at pp. 107-8:

While the credit of any witness may be *impeached* by the *opposite party*, *R. v. Gunewardene*, [1951] 2 All E.R. 290 at p. 294, there is no warrant or authority for such oath-helping as occurred in the circumstances of this case, reminiscent as it is of the method before the Norman Conquest by which a defendant in a civil suit or an accused person proved his case by calling witnesses to swear that the oath of the party was true. If this sort of evidence were admissible in the case of either party no limit could be placed on the number of witnesses who could be called to testify about the credibility of witnesses as to facts. It would tend to produce, regardless of the number of such character witnesses who were called, undue confusion in the minds of the jury by directing their attention away from the real issues and the controversy would become so intricate that truth would be more likely to remain hidden than be discovered. For these reasons this

evidence was not admissible.

In *R. v. Burkart; R. v. Sawatsky*, [1965] 3 C.C.C. 210, the Saskatchewan Court of Appeal, *per* Culliton C.J.S., on virtually the same facts followed *Kyselka* in rejecting similar evidence. The rule has, as well, been supported in other decisions, such as *R. v. Clarke reflex*, (1981), 63 C.C.C. (2d) 224 (Alta. C.A.), a case in which both *Kyselka* and *Burkart* were cited and followed. In *Clarke*, a murder case which was based largely on circumstantial evidence, the Crown called as a witness a fellow prison inmate of the accused, who gave evidence of an inculpatory statement made by the accused to the witness in prison. In introducing the witness, Crown counsel asked a series of questions which firstly revealed a lengthy criminal record and then dealt with the witness's conversion or rehabilitation. This involved testimony by the witness to the effect that he was now attending bible classes, that he was in regular attendance at Alcoholics Anonymous classes, that he had made restitution for certain offences in respect of which he had not actually been prosecuted, that he had changed his attitude to the police and society, generally, and that he had come to realize that his social problems were of his own making, and that he now despised and rejected violence. The impropriety of this evidence was attacked on appeal from conviction. McClung J.A., writing for the court (Clement, McClung J.J.A. and Crossley J. (*ad hoc*)), held that, while counsel must be permitted to present witnesses in the best allowable light, the examination carried out in that case exceeded the permitted limit because its overriding and dominant objective was the bolstering of the witness's character and, therefore, his credibility. He supported his view by reference to *Wigmore on Evidence* (Chadbourn rev., 1972), vol. 4, at pp. 233-34:

§1104(A) *Proving good character in support; in general, inadmissible until impeached.* Good character for veracity is as relevant to indicate the probability of truth-telling as bad character for veracity is to indicate the probability of the contrary. But there is no reason why time should be spent in proving that which may be assumed to exist. Every witness may be assumed to be of normal moral character for veracity, just as he is assumed to be of normal sanity. Good character, therefore, in his support is excluded *until his character is brought in question* and it thus becomes worthwhile to deny that his character is bad.

He referred as well to the words of Lacourcière J.A., speaking for the Ontario Court of Appeal, in *R. v. Martin reflex*, (1980), 53 C.C.C. (2d) 425--a case where evidence was admitted that a Crown witness had earlier been tried and acquitted of the murder with which the accused was charged--who said, at p. 433:

It is difficult, however, to justify the introduction of this evidence during examination-in-chief. It was wrong if it was an attempt to bolster and support the credibility of the prosecution's own witness which was not yet under attack notwithstanding the obvious direction of the defence theory.

A similar view has been expressed in England where Lawton L.J. in *R. v. Turner*, [1975] 1 All E.R. 70, speaking for the Court of Appeal, referred, at p. 75, to the rule "relating to the calling of evidence on the issue of credibility, ie that in general evidence can be called to impugn the credibility of witnesses but not led in chief to bolster it up".

8. Writers on evidence have frequently commented on the rule. McWilliams in *Canadian Criminal Evidence* (2nd ed. 1984), says, at p. 1078:

Evidence may not be given as to witnesses generally to bolster their credit, though evidence of bad character may be given to impeach their credit, in which case evidence of good character may be given in rebuttal on that issue. Evidence of good character of witnesses other than the accused may not be given to prove that they were not likely to commit the offence for the obvious reason that it would be irrelevant.

Similarly, Schiff in *Evidence in the Litigation Process* (2nd ed. 1983), vol. 1, states, at p. 585:

As a general principle, before the opponent has attacked the credibility of a witness, the party-litigant who called him may not support his credibility.

Schiff, as well, adopts Wigmore's view that until credibility is attacked the witness is presumed to be credible. In England, Sir Rupert Cross has dealt with the subject in the fifth edition of his work on *Evidence* (1979), at pp. 269-72. He points out, at p. 271, that there is Commonwealth authority for an accused to adduce psychiatric evidence of a mental condition which would render doubtful the truth of a confession, but he goes on to say, at pp. 271-72:

The requirement that the evidence should be about an aberrant mental condition by an expert in such matters and not merely about registrations on a machine by a witness capable of handling it is illustrated by the preponderance of judicial reaction to evidence of the performance of a polygraph. The fear that the admissibility of such evidence to cast doubt on the veracity of a confession could lead to trial by machine rather than trial by jury lay at the root of the decision of the Supreme Court of Canada in *R. v. Phillion* to exclude it. Of course a time may come when polygraphs are considered infallible, but, in that event, the law of evidence, like much else, would differ greatly from what it is at present.

As yet there does not appear to have been a case in which evidence has been admitted for the sole purpose of supporting the credibility of a witness called or to be called by the party adducing it, nor does there appear to have been a case in which evidence has been adduced for the purpose of rebutting the testimony of a witness called to impugn the credibility of a witness on the opposite side. So far as the first possibility is concerned it is to be hoped that it will be avoided on the ground that witnesses are presumed to be credible.

And see *Phipson on Evidence* (13th ed. 1982), para. 13-63.

9. From the foregoing comments, it will be seen that the rule against oath-helping, that is, adducing evidence solely for the purpose of bolstering a witness's credibility, is well grounded in authority. It is apparent that since the evidence of the polygraph examination has no other purpose, its admission would offend the well-established rule.

Rule Against Past Consistent Statements

10. The rule against oath-helping is also consistent in principle with other rules of evidence which in some degree may be said to overlap it and which are based on similar principles. An example is the rule against the admission of previous consistent statements of a witness. McWilliams, *supra*, discusses this rule, at p. 353, and refers to the frequently quoted words of Neville J. in *Jones v. South-Eastern and Chatham Railway* (1917), 87 L.J.K.B. 775 (C.A.), at p. 779, that:

... statements may be used against a witness as admissions, but ... you are not entitled to give evidence of statements on other occasions by the witness in confirmation of her testimony.

This was said in the context of a case where an injury was alleged to have been suffered by the plaintiff while at her work, and it was sought to adduce evidence of a statement she had made after the accident to a third party. McWilliams also cites *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.), where Martin J.A., speaking for the court (Arnup, Martin and Lacourcière JJ.A.), said, at p. 18:

The refusal of the trial Judge to admit the evidence of other witnesses, whether in cross-examination or otherwise, of previous statements made by the appellant, involves two separate rules of evidence:

- | | | |
|-----|---|---|
| I. | The rule which precludes an accused from statements which he has previously made. | eliciting from witnesses self-serving |
| II. | The rule which provides that a witness, own previous statements concerning the persons out of Court, and may not call | whether a party or not, may not repeat his matter before the Court, made to other other persons to testify to those |

statements.

Statements made by an accused which infringe rule I are excluded as hearsay. The narration by a witness of earlier statements made to other persons out of Court appears to be excluded under rule II, because of the general lack of probative value of such evidence, save in certain circumstances, in support of the credibility of the witness.

Wigmore, *supra*, at p. 255, para. 1124, describes the rule in these terms:

When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it. Such evidence would ordinarily be cumbersome to the trial and is ordinarily rejected.

While Martin J.A. in *Campbell*, and Wigmore, suggest that the statements are excluded on the basis of hearsay and lack of probative value, another rationale for the rule has been noted, namely, that such statements could be too readily manufactured for use in later proceedings. In *R. v. Hardy* (1794), 24 St. Tr. 199, Eyre C.J. said, at pp. 1093-94:

...the presumption ... is that no man would declare anything against himself, unless it were true; but that every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself.

11. The rule is generally expressed in relation to past consistent statements. In the case at bar, evidence would be given of statements made subsequent to the evidence given by the respondents at trial. In my view, however, this leads to no difference in principle. The concern is with consistent statements made out of court. The fact that they may be made after evidence has been given at trial would not change their probative value or reliability. In my view, the rule against admission of consistent out-of-court statements is soundly based and particularly apposite to questions raised in connection with the use of the polygraph. Polygraph evidence when tendered would be entirely self-serving and would shed no light on the real issues before the court. Assuming, as in the case at bar, that the evidence sought to be adduced would not fall within any of the well recognized exceptions to the operation of the rule--where it is permitted to rebut the allegation of a recent fabrication or to show physical, mental or emotional condition--it should be rejected. To do otherwise is to open the trial process to the time-consuming and confusing consideration of collateral issues and to deflect the focus of the proceedings from their fundamental issue of guilt or innocence. This view is summarized by D. W. Elliott in "Lie-Detector Evidence: Lessons from the American Experience" in *Well and Truly Tried* (1982), at pp. 129-30:

A defendant who attempts to put in the results of a test showing this truthfulness on the matters in issue is bound to fall foul of the rule against self-serving statements or, as it is sometimes called, the rule that a party cannot manufacture evidence for himself, and the falling foul will not be in any mere technical sense. The rule is sometimes applied in a mechanical unintelligent way to exclude evidence about which no realistic objection could be raised, as the leading case, *Gillie v. Posho* shows; but striking down defence polygraph evidence on this ground would be no mere technical reflex action of legal obscurantists. The policy behind the doctrine is a fundamental one, and defence polygraph evidence usually offends it fundamentally. As some judges have pointed out, only those defendants who successfully take examinations are likely to want the results admitted. There is no compulsion to put in the first test results obtained. A defendant can take the test many times, if necessary "examiner-shopping", until he gets a result which suits him. Even stipulated tests are not free of this taint, because of course his lawyers will advise him to have several secret trial runs before the prosecution is approached. If nothing else, the dry runs will habituate him to the process and to the expected relevant questions.

12. It is therefore my opinion that evidence of the results of a polygraph examination would clearly offend the rule against the admission of past or out-of-court statements by a witness. All of the considerations upon which

the rule is based are as applicable to polygraph evidence as to other statements. The repetition of statements by another witness adds nothing to their weight and reliability. The ultimate decision as to the truth or falsity of the evidence of a witness must rest upon the exercise of the judgment of the trier of fact. This is as true of evidence of polygraph tests as of any other evidence. In the last analysis, the trier of fact must reach its conclusion on the basis of the evidence given by a human being in court. The evidence of the polygraph operator if heard by the trier of fact adds nothing to the earlier statement of the witness which is sought to be supported.

Rule Relating to Character Evidence

13. A further rule which is related to the rule against oath-helping, and consistent with it in general application, is that concerning the use of character evidence. *McWilliams*, *supra*, at p. 275, expresses the rule as it relates to the Crown's position in these terms:

It is a fundamental principle of the English common law that the prosecution is not allowed to prove that an accused had committed the offence with which he is charged by evidence that he is a person of bad character and one who is in the habit of committing crimes. Proof of guilt of the accused is limited to the transaction which forms the charge upon which he is being tried.

This proposition is subject, however, to the qualification that where an accused person puts his good character in issue in the case the Crown may then bring evidence of bad character. There has been controversy as to how an accused could put his character into issue. According to the early view, in giving character evidence he was limited to evidence of general reputation, rather than of specific incidents of good conduct. This position was somewhat at odds with the view expressed by Duff C.J. in *R. v. Barbour*, [1938] S.C.R. 465, where he said, at p. 469:

Of course, a much wider latitude is allowed the accused, who may adduce any evidence, of good character for example, tending to show, not only that it was not likely that he committed the crime charged but that he was not the kind of person likely to do so.

More recent decisions have developed a compromise between the two extremes expressed above. Brooke J.A. in *R. v. Close* [reflex](#), (1982), 68 C.C.C. (2d) 105 (Ont. C.A.), at p. 113, observed that "It is difficult to see how an accused could give evidence of his own reputation" and the courts have thus accorded a wider scope to an accused. In *R. v. McFadden* [1981 CanLII 494 \(BC C.A.\)](#), (1981), 65 C.C.C. (2d) 9 (B.C.C.A.), Craig J.A. said, at p. 13:

The purpose of evidence of good character is to show the accused is a person who is not likely to have committed the act with which he is charged and, also, to enhance his credibility. An accused may adduce evidence of good character (1) by calling witnesses; (2) by cross-examining Crown witnesses on the subject; (3) by giving testimony. Normally, he may lead evidence of good character by adducing evidence only of his general reputation, not by adducing evidence of specific acts which might tend to establish his character. The Crown may call evidence of bad character in rebuttal, but such evidence, also, must relate only to general reputation: *R. v. Rowton* (1865), Le. & Ca. 520, 169 E.R. 1497. An accused may put his character in issue in the course of giving his testimony, not by giving evidence of his general reputation, but by making assertions which tend to show that he is a person of good character, particularly with regard to the aspect of his character which is in issue.

See, as well, *R. v. McNamara (No. 1)* [reflex](#), (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at p. 348:

Mr. Robinette also argued that character means general reputation and that the accused can only put his character in issue by adducing evidence of general reputation. With respect, we do not agree. The common law rule was that evidence of good character could only be given by evidence of reputation, and could only be rebutted by evidence of reputation and not by specific acts of bad conduct: *R. v. Rowton* (1865), Le & Ca. 520, 169 E.R. 1497. That rule was, however, established at a time when the accused could not himself give evidence. A long series of cases in England (two of which were cited with approval in *Morris v. The*

Queen, supra) have held that an accused may put his character in issue by testifying as to his good character. The word "character" in the *Criminal Evidence Act, 1898* has uniformly been held to mean not only reputation, but actual moral disposition: *Cross on Evidence*, 4th ed. (1974), p. 426; *Phipson on Evidence*, 12th ed. (1976), p. 218. It is true that when the accused wishes to adduce extrinsic evidence of good character by calling witnesses, such evidence is confined to evidence of general reputation, but that has no application where the accused himself gives the evidence.

The position is summarized by McWilliams, *supra*, at p. 282, in these terms:

When the defence seeks to put the character of the accused in issue by cross-examination of prosecution witnesses, or by calling defence witnesses other than the accused it is submitted that the rule should be strictly enforced, that is, it is confined to evidence of general reputation. However, when the accused himself puts his character in issue he is not so confined.

14. An example of the attempted use of character evidence to support the credibility of a witness has already been cited in *R. v. Clarke, supra*. What is the consequence of this rule in relation to polygraph evidence? Where such evidence is sought to be introduced it is the operator who would be called as the witness and it is clear, of course, that the purpose of his evidence would be to bolster the credibility of the accused and, in effect, to show him to be of good character by inviting the inference that he did not lie during the test. In other words, it is evidence not of general reputation but of a specific incident and its admission would be precluded under the rule. It would follow, then, that the introduction of evidence of the polygraph test would violate the character evidence rule.

Expert Evidence

15. It was also argued that the polygraph evidence was receivable as expert evidence. The polygraph operator, as an expert, was trained and qualified to give his opinion as to the veracity of the witness, based solely on his interpretation of the significance of the responses made by the witness to the questions put on the examination.
16. The role of the expert witness was defined in this Court in *R. v. Abbey*, [1982 CanLII 25 \(S.C.C.\)](#), [1982] 2 S.C.R. 24. Speaking for the Court, Dickson J. (as he then was) said, at p. 42:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, *per* Lawton L.J.)

It was said in *Davie v. Magistrates of Edinburgh*, [1953] S.C. 34, at p. 40, by Lord Cooper:

Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.

The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inference which may be drawn from proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact. The expert witness is permitted to give such opinions for the assistance of the jury. Where the question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received.

17. Here, the sole issue upon which the polygraph evidence is adduced is the credibility of the accused, an issue well within the experience of judges and juries and one in which no expert evidence is required. It is a basic tenet of our legal system that judges and juries are capable of assessing credibility and reliability of evidence. This question has been the subject of a comment by Michael Abbell in "Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials" (1977), 15 *Am. Crim. L. Rev.* 29, who said, at p. 55:

Witness or defendant veracity has seldom been viewed a technical issue on which 'untrained' laymen are unqualified to reach intelligent determinations after being exposed to all of the evidence in a case. Indeed, it has been the traditional function of jurors in our system to apply their own daily experiences to the testimony and the other evidence presented to them to determine which witnesses are truthful. It is the jurors' own "expertise" in conducting their personal and business affairs which our judicial system has long regarded as making them specially qualified to make this determination.

I adopt these words, and I am therefore of the view that polygraph evidence aimed at supporting the credibility of the accused is not receivable as evidence in Canada.

18. In conclusion, it is my opinion, based upon a consideration of rules of evidence long established and applied in our courts, that the polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses. It is frequently argued that the polygraph represents an application of modern scientific knowledge and experience to the task of determining the veracity of human utterances. It is said that the courts should welcome this device and not cling to the imperfect methods of the past in such an important task. This argument has a superficial appeal but, in my view, it cannot prevail in the face of the realities of court procedures.

19. I would say at once that this view is not based on a fear of the inaccuracies of the polygraph. On that question we were not supplied with sufficient evidence to reach a conclusion. However, it may be said that even the finding of a significant percentage of errors in its results would not, by itself, be sufficient ground to exclude it as an instrument for use in the courts. Error is inherent in human affairs, scientific or unscientific. It exists within our established court procedures and must always be guarded against. The compelling reason, in my view, for the exclusion of the evidence of polygraph results in judicial proceedings is two-fold. First, the admission of polygraph evidence would run counter to the well established rules of evidence which have been referred to. Second, while there is no reason why the rules of evidence should not be modified where improvement will result, it is my view that the admission of polygraph evidence will serve no purpose which is not already served. It will disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists.

20. Since litigation replaced trial by combat, the determination of fact, including the veracity of parties and their witnesses, has been the duty of judges or juries upon an evaluation of the statements of witnesses. This approach has led to the development of a body of rules relating to the giving and reception of evidence and we have developed methods which have served well and have gained a wide measure of approval. They have facilitated the orderly conduct of judicial proceedings and are designed to keep the focus of the proceedings on the principal issue, in a criminal case, the guilt or innocence of the accused. What would be served by the introduction of evidence of polygraph readings into the judicial process? To begin with, it must be remembered that however scientific it may be, its use in court depends on the human intervention of the operator. Whatever results are recorded by the polygraph instrument, their nature and significance reach the trier of fact through the mouth of the operator. Human fallibility is therefore present as before, but now it may be said to be fortified with the mystique of science. Then, it may be asked, what does it do? It provides evidence on the issue of the credibility of a witness. This has always been a collateral issue and one to be decided by the trier of fact. Is the trier of fact assisted by hearing, firstly from witness "A" that he was not present at the scene of the crime, and then from witness "B", a polygraph operator, that "A" was probably truthful? What would the result be, one may ask, if the polygraph operator concluded from his test that witness "A" was lying? Would such evidence be admissible, could it be excluded by witness "A", could it be introduced by the Crown? These are serious

questions and they lead to others. Would it be open to the opponent of the person relying upon the polygraph to have a second polygraph examination taken for *his* purposes? If the results differed, which would prevail, and what right would there be for compelling the production of polygraph evidence in the possession of a reluctant party? It is this fear of turmoil in the courts which leads me to reject the polygraph. Like Porter C.J.O. in *Kyselka*, I would not wish to see a return to the method of pre-Norman trials where parties relied heavily upon oath-helpers who swore to their veracity. For a description of the role of the oath-helper in early times, see W. S. Holdsworth, *A History of English Law* (7th ed. 1956), vol. 1, at pp. 305-8, and W. F. Walsh, *Outlines of the History of English and American Law* (1926), at pp. 99-100 (footnote II). I would seek to preserve the principle that in the resolution of disputes in litigation, issues of credibility will be decided by human triers of fact, using their experience of human affairs and basing judgment upon their assessment of the witness and on consideration of how an individual's evidence fits into the general picture revealed on a consideration of the whole of the case.

21. For the above reasons, and following *Phillion, supra*, I would allow the Crown's appeal. I would set aside the order of the Court of Appeal and confirm the conviction recorded at trial.

The reasons of Lamer and Wilson JJ. were delivered by

22. WILSON J. (dissenting on the merits)--I have had the benefit of the reasons of my colleague, Justice McIntyre, on this appeal. He has set out the facts and the history of the case in the courts below and it is unnecessary for me to repeat them here.

23. My colleague gives four basic reasons for excluding the polygraph evidence in this case. They are:

- (1) the rule against oath-helping;
- (2) the rule against past consistent statements;
- (3) the rule relating to character evidence; and
- (4) the expert evidence rule.

I must respectfully disagree with him that these rules present a basis for excluding the polygraph evidence and I will comment briefly on each.

24. (1) *The Rule Against Oath-helping*

25. Oath-helping or compurgation was, as I understand it, a method used to prove one's case in pre-Norman England. The accused in a criminal case or the defendant in a civil case could prove his innocence by providing a certain number of compurgators who would swear to the truth of his oath. The compurgators swore a set oath. If they departed from it in the slightest, the "oath burst" and the opposing party won. The practice fell into desuetude in the 13th Century.

26. The connection between oath-helping and the admissibility of polygraph evidence seems to me to be very tenuous. Oath-helpers were not required to have any knowledge material to the innocence or guilt of the accused. They merely recited a particular oath and their oaths were not subject to rebuttal. The polygraph operator, on the other hand, has subjected the accused to a number of tests. He reports on the results of these tests and gives his expert opinion as to whether the physiological reactions of the accused are similar to those of someone telling the truth. He is open to cross-examination on his technique, his assumptions, his interpretation of the data and the accuracy of the device. His evidence is only one of the many factors the jury will consider when assessing the credibility of the accused.

27. In what sense then can polygraph evidence be said to be similar to the medieval device by which the accused was guaranteed an acquittal if he could muster a sufficient number of compurgators? Any suggestion of similarity would, it seems to me, have to be based on the assumption that, despite the cross-examination of the polygraph operator, the calling of other operators to challenge erroneous statements by the original operator, and the delivery of a proper charge to the jury, the jury would automatically base its decision on the polygraph operator's testimony. I think this is an unwarranted assumption. I do not think we can make it even if my colleague's concern about the heightened weight that might be given to polygraph evidence because of the "mystique of science" has some validity. For reasons which will be given later I doubt that this concern is a valid one.

28. My own view would be that the rule against oath-helping is a curious point of legal history that has little bearing on the issue of polygraph admissibility. Oath-helping was a method of proving one's case that ante-dated the modern concept of trial by evidence. Polygraph evidence, on the other hand, fits squarely within the modern trial theory whereby witnesses are examined to ascertain the truth.

29. It is suggested, however, that oath-helping is the antecedent of a "well-established rule" against the admissibility of evidence adduced solely for the purpose of bolstering the credibility of one's own witness. A number of authorities are cited in support of the proposition that evidence may not be given in chief to bolster the credit of one's own witnesses but, if evidence is given to impeach their credit, rebuttal evidence may be given on that issue. It is noted, however, that the Canadian cases relied on in support of the rule are all cases in which the Crown was attempting to lead evidence-in-chief to bolster the credibility of a Crown witness. No Canadian case was cited where an accused was denied permission to do this. I have some concern, therefore, as to the scope of the "well-established rule" in Canada. I believe it would require an extension of the rule in this case to apply it to the respondents. Perhaps it should be applied to Crown and defence alike but this is not self-evident. Analogies certainly can be drawn from other areas of criminal evidence law to support a more permissive approach to evidence led by an accused. For example, in *R. v. Miller* (1952), 36 Cr. App. R. 169, an accused was permitted to call evidence against a co-accused which would have been inadmissible if called by the Crown. Also, the English Court of Appeal held in *R. v. Wickham* (1971), 55 Cr. App. R. 199, that an accused may comment upon the failure of a co-accused to testify although the prosecution could not. The rationale of these cases is summed up by Lord Morris in *Lowery v. The Queen*, [1974] A.C. 85 (P.C.), where he said at p. 102:

It is ... one thing to say that such evidence [commentary upon failure to testify] is excluded when tendered by the Crown in proof of guilt, but quite another to say that it is excluded when tendered by the accused in disproof of his own guilt.

30. I am very mindful of the fact that the respondents in this case took the stand in order to deny their involvement in the conspiracy and that the only direct evidence implicating them was that of Grenier, a self-confessed conspirator. The Crown, through Grenier, was impugning the credibility of the respondents by saying that they were lying under oath. It was his word against theirs. The respondents were, in effect, responding to an attack on their credibility by the Crown by offering to take a lie detector test. Indeed, the Crown's whole case was that the respondents were lying and that the informer Grenier was telling the truth.

31. Section 577(3) of the *Criminal Code* provides that an accused is entitled, after the close of the prosecution's case, to make full answer and defence. It might be said that this is precisely what the respondents were attempting to do through the introduction of the polygraph evidence. Indeed, it has been held that this section of the *Code* gives an accused the right to call such witnesses and evidence as he may consider necessary: see *R. v. Cook* (1960), 127 C.C.C. 287 (Alta. S.C., App. Div.)

32. It was held in *R. v. Martin* [reflex](#), (1980), 53 C.C.C. (2d) 425 (Ont. C.A.), that the attack on the Crown

witness's credibility has to be more explicit than "the obvious direction of the defence theory" in order to justify the leading of credibility evidence. Again, however, in that case it was the Crown that was seeking to bolster the credibility of its own witness. This Court has not yet had occasion to discuss whether the rule should be applied against an accused in a case such as this where the Crown's whole case is based on the accused's lack of credibility. I do not believe, therefore, that there is a "well-established rule" in Canada operating against the respondents. Indeed, I note with interest that the passage quoted from Cross's 5th edition (1979) by my colleague was omitted from the 6th edition (1985) and that there are other authors who do not recognize the existence of such a rule. In my view, therefore, we would be making law in this area if we were to hold such a rule applicable in the circumstances of this case. This is not to say that we should not do so but merely that, if we do so, we should do so advisedly. I will return to this point later when discussing the majority decision in *Phillion v. The Queen*, 1977 CanLII 23 (S.C.C.), [1978] 1 S.C.R. 18.

33. (2) *The Rule Against Past Consistent Statements*

34. The second ground for exclusion of the polygraph evidence is that it infringes the rule against the admission of past consistent statements. The cases and authorities make it clear that these statements are excluded because they are at best irrelevant and at worst fabricated and self-serving. The irrelevance rationale has, it seems to me, little applicability to polygraph evidence. The argument that the mere repetition of a story has no bearing on the truth of the story is, of course, a convincing one. Polygraph evidence, however, is not merely evidence that the accused has said the same thing twice. It is expert evidence on how closely his physiological responses during the test correspond to those of someone telling the truth. It is, in my opinion, clearly relevant.

35. Nor am I persuaded that the evidence should be excluded on the ground that by "examiner shopping" and by engaging in practice tests the accused may be able to increase the likelihood of a "successful" test. Unless it can be established that polygraph tests are *per se* without probative value (and I do not think this has been or could be established), it would seem to me that the possibility of abuse should be a factor going to weight rather than to admissibility.

36. (3) *The Rule Relating to Character Evidence*

37. It is suggested that the admission of polygraph evidence is precluded by certain rules relating to character evidence. Specifically, reliance is placed on the authorities which preclude the accused from leading evidence of specific incidents in order to establish his good character except through his own testimony.

38. I have grave doubts that polygraph evidence is character evidence. McWilliams in *Canadian Criminal Evidence* (2nd ed. 1984) distinguishes between character and credit at p. 279:

In *R. v. Hardy* (1794), 24 St. Tr. 199, the great Erskine said: "Character goes to the issue, that is the probability of the accused having committed the offence while credit goes to the collateral issue, that is the weight to be attached to the testimony of the accused". See also *R. v. McLean* (1940), 73 C.C.C. 310 (N.B.S.C. App. Div.). An accused puts his credit in issue as does any other witness if he testifies, but he does not thereby put his character in issue. He puts his character in issue by calling evidence of good character whether he testifies or not.

I believe this distinction is sound. As McIntyre J. acknowledges, polygraph evidence is adduced "solely for the purpose of bolstering a witness's credibility". It is not introduced to show that the accused is not the sort of person who would commit the offence. It is introduced to provide evidence that the accused's physiological reactions are consistent with those of someone who is telling the truth.

39. If, however, I am wrong in this and the polygraph evidence can be viewed as going to the accused's character as well as to his credibility, is there a rule precluding the admission of this evidence? The general rule seems to be that if the accused puts his character in issue by cross-examining Crown witnesses or by calling

defence witnesses other than the accused, then evidence tendered must relate to the general reputation of the accused and not to specific incidents of good behaviour. If the accused himself testifies he may give evidence of specific incidents. My colleague infers from these rules that, since it is the polygraph operator and not the accused himself who is giving evidence of specific incidents, the evidence must be excluded despite the fact that the accused testified. This approach seems to me to create a very artificial distinction: if the accused testifies and puts his character in issue he may rely on specific incidents of good behaviour provided he relates these incidents to the court himself. Yet, although an accused who has taken the stand and put his character in issue is allowed to adduce evidence of specific incidents to establish good behaviour, he is not allowed to call the witnesses necessary to give meaning to these incidents. The spirit of the rule, in my view, militates in favour of admission where the accused has testified.

40. (4) *The Expert Evidence Rule*

41. The point made here is that expert evidence is not necessary when the issue is the credibility of a witness. This is an issue that juries are specially qualified to decide. They do not require the assistance of experts in making such a determination.

42. In my respectful view, the polygraph operator does not give an opinion on the credibility of the witness. Rather, she interprets the physiological data and gives an opinion as to whether the data pattern conforms to that of a person who is telling the truth. The operator will also testify as to the nature and accuracy of the device itself. The jury will consider this evidence along with the other evidence going to the issue of credibility in order to reach their final conclusion. Thus, the polygraph operator provides an expert opinion on the interpretation of the polygraph results. This evidence is relevant to, but not determinative of, the credibility issue.

43. I question whether the fear that the polygraph operator will usurp the role of the jury is well-founded. Juries of today are much more sophisticated than they were when some of our restrictive rules of evidence were developed. They are well versed in modern technology, thanks to the influence of the mass media, and are not today in awe of scientific evidence as they might have been a hundred or even fifty years ago. I think the decision of the British Columbia Supreme Court in *R. v. Wong (No. 2)* (1976), 33 C.C.C. (2d) 511, illustrates this very well. The jury in that case found the accused guilty even although the polygraph tests conducted by both the police and the expert called by the defence indicated that the accused had not killed the victim. Meredith J. had admitted the polygraph evidence. He disagreed with the Ontario High Court in *R. v. Phillion* (1972), 10 C.C.C. (2d) 562, that lie detector evidence would inevitably dictate the jury's decision. He said at p. 514:

I do not share Van Camp, J.'s concern on the evidence led in this case, that the jury "by reason of the technicality of the evidence, might be tempted blindly to accept the witness' opinion". Here, the evidence is reasonably comprehensible and I believe the jury will have sufficient information to give proper assessment to its weight. The evidence certainly does not suggest that the polygraph technique is infallible; I do not think the jury will treat it as such.

44. He also disagreed with the Ontario Court of Appeal (1974), 20 C.C.C. (2d) 191 that the evidence should not be admitted because it went directly to the question of whether the accused committed the offence. He said at p. 515:

I am not aware of any convincing reason to exclude the opinion of the polygrapher because it bears on almost the very question the jury is called upon to answer, unless the jury may be inclined to give undue weight to it. Moreover, opinion evidence, I would have thought, is frequently admitted in our Courts going directly to issues to be resolved by Judge or jury.

Meredith J. concluded that while polygraph tests are not one hundred per cent accurate, they do have a high degree of reliability and, indeed, the police themselves had initiated their use in this particular case.

45. Meredith J. was, however, reversed on appeal (1978), 41 C.C.C. (2d) 196, following the decision of this Court in *Phillion*. McFarlane J.A. stated succinctly at p. 199:

The latter judgment makes it clear that the opinion evidence about the polygraph tests should not have been admitted.

The Rule Against Bolstering the Credibility of One's Own Witness

46. Because I do not believe that any of the other rules preclude the admission of polygraph evidence, I return to the rule against bolstering the credibility of one's own witness. The existing case law on this subject seems to be divisible into two categories namely (1) cases in which the evidence was led for the sole purpose of bolstering the witness's credibility; and (2) cases where evidence was led that had the effect of indirectly bolstering the witness's credibility.

47. (1) *Sole Purpose the Bolstering of Credibility*

48. Only three cases, all Canadian, and all involving Crown witnesses, seem to fall into the first category. *R. v. Kyselka* (1962), 133 C.C.C. 103 (Ont. C.A.), and *R. v. Burkart; R. v. Sawatsky*, [1965] 3 C.C.C. 210 (Sask. C.A.), were both cases in which the Crown called a psychiatrist who testified that, because the complainant was of low intelligence, she was unlikely to fabricate a false story to tell the court. In both cases the evidence was held inadmissible as evidence going solely to the witness's credibility. *R. v. Clarke reflex*, (1981), 63 C.C.C. (2d) 224 (Alta. C.A.), followed *Kyselka* and *Burkart*. In that case the Crown called a prison inmate as a witness. The Crown asked a series of questions about the witness's conversion to a life of honesty and about his rehabilitation as a lead in to his significant testimony that an inculpatory statement had been made to him by the accused in prison. The court held the preliminary questions to be improper as they served only to bolster the credibility of the witness.

49. (2) *Indirect Bolstering of Credibility*

50. In two English cases and in one Australian case, the accused testified that he did not commit the crime he was charged with and attempted to introduce psychiatric or psychological evidence to support his version of what took place. The evidence went to the accused's state of mind at the time of the crime. It did not go directly to whether the accused was likely to tell the truth as a witness. However, if the evidence was believed, it would have supported the accused's version of what took place. Thus, it would have indirectly bolstered the accused's credibility.

51. The first of these cases is *Lowery v. The Queen, supra*. Here the issue was whether one accused could call evidence of a psychologist relating to the respective personalities of the two accuseds. The psychologist's evidence suggested that the second accused was more likely to have killed the victim than the first was. Thus the credibility of the first accused was inferentially bolstered. The Court held the evidence to be admissible. The key to the ruling was that the evidence was clearly relevant to the issue of which of the two accused to believe. As the Court puts it at p. 101:

The case being put forward by counsel on behalf of King involved posing to the jury the question "which of these two men is the more likely to have killed this girl?" and inviting the jury to come to the conclusion that it was Lowery. If the crime was one which was committed apparently without any kind of motive unless it was for the sensation experienced in the killing then unless both men acted in concert the deed was that of one of them. It would be unjust to prevent either of them from calling any evidence of probative value which could point to the probability that the perpetrator was the one rather than the other.

52. The subsequent decision of the Court of Appeal in *R. v. Turner*, [1975] 1 All E.R. 70, however, treated *Lowery* as decided on and limited to "its special facts". In *Turner* the accused had killed his lover. His defence

was provocation. He testified that when the woman told him that she had slept with other men while he had been in prison, he lost all control. The accused's counsel sought to call a psychiatrist to testify to the general disposition of the accused. This evidence would suggest that the accused was generally quite placid and was driven to a blind rage by the events preceding the killing. By supporting the accused's version of what happened, the psychiatric evidence inferentially bolstered the credibility of the accused. The Court of Appeal held that this evidence must be excluded. The Court's reasoning parallels that of McIntyre J. in dealing with the expert evidence rule. Lawton L.J. states at p. 74:

Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life. It follows that the proposed evidence was not admissible to establish that the appellant was likely to have been provoked. The same reasoning applies to its suggested admissibility on the issue of credibility. The jury had to decide what reliance they could put on the appellant's evidence. He had to be judged as someone who was not mentally disordered. This is what juries are empanelled to do. The law assumes they can perform their duties properly. The jury in this case did not need, and should not have been offered the evidence of a psychiatrist to help them decide whether the appellant's evidence was truthful.

53. A recent Australian case has adopted the *Turner* approach. In *R. v. Nelson*, [1982] Qd. R. 636 (Q. Ct. of Crim. App.), the accused was charged with and convicted of throwing acid on his wife. The accused testified that he did not intend to disfigure his wife. He sought to call a doctor to give evidence that the traumas the accused had suffered made it unlikely that he would have had the capacity to form the required intent. The Court held that the evidence was properly excluded. It followed *Turner* in concluding that "to admit the evidence of Dr. Quinn ... would have amounted to an usurpation of the function of the jury to decide a matter which they were able to judge for themselves" (p. 640).

54. In my view, polygraph evidence goes directly to the issue of the credibility of the accused. It is evidence of the degree to which his or her physiological reactions conform to those of a person who is telling the truth. Thus, the issue of the admissibility of this evidence is more analogous to the first category of case discussed above rather than to the second category. The second category of case is concerned with evidence going to the likelihood that the accused committed the offence and is only inferentially concerned with the accused's credibility.

55. The cases on point seem to me, therefore, to support the contention that the Crown will not be allowed to adduce evidence solely to bolster the credibility of its witnesses. This rule could arguably be extended to apply to the accused by analogy to *Turner* and *Nelson*. Although these two cases do not deal with direct evidence as to the credibility of the accused, the conservative conception of the jury's role embodied in them could be seen to support the exclusion of polygraph evidence tendered by the accused. The emphasis in *Lowery*, on the other hand, in permitting an accused to call all relevant evidence would argue against drawing such an analogy.

56. With all due respect to those who think otherwise I would not extend the rule in *Kyselka* to the respondents in this case and I take some comfort from *Lowery* and from the minority judgment of this Court in *Phillion*. As in the case of *Lowery* the central issue in this case is who to believe. It was the word of the informer Grenier against the word of the respondents. Because no acts in implementation of the alleged conspiracy had taken place, there was no other evidence implicating the respondents in it. I believe that in these circumstances it would be unjust to prevent the respondents from calling any evidence of probative value indicating that they were telling the truth. This was their defence to the charge. I think they should have been allowed to make it under s. 577(3) of the *Code*.

57. I believe that the decision of this Court in *Phillion* is clearly distinguishable from the case at bar. *Phillion* had admitted his guilt and did not testify at his trial. This was crucial to the majority decision. Ritchie J., delivering the judgment of the majority, stated at p. 25:

The admission of such evidence would mean that any accused person who had made a confession could elect not to deny its truth under oath and substitute for his own evidence the results produced by a mechanical device in the hands of a skilled operator relying exclusively on its efficacy as a test of veracity.

And later at the same page:

The elementary right of an accused not to give evidence is in no way at issue here, but that right having been exercised, it appears to me to run contrary to the basic rules of evidence to permit the substitution of the opinion of a polygraph technician for the evidence which could have been given by the appellant himself.

He then stated at p. 26 that:

For these reasons alone I am satisfied that the learned trial judge was correct in excluding the results of the polygraph test.

58. As has been pointed out by several commentators on *Phillion*, each court which heard the case excluded the polygraph evidence on different grounds. The trial judge held that, if it was admitted, the jury would place too much weight on it. The Court of Appeal found that it was opinion evidence going to the very question before the court and should not be admitted for that reason. And it seems to be implicit in the majority judgment of this Court that the polygraph evidence was inadmissible because it was hearsay. In my opinion the polygrapher's evidence should not be characterized as hearsay. It was not being admitted for the truth of the statement but merely for the limited purpose of forming the basis of the expert's opinion. Evidence has frequently been admitted by this Court for that purpose: see *City of Saint John v. Irving Oil Co.*, 1966 CanLII 64 (S.C.C.), [1966] S.C.R. 581; *R. v. Lupien*, 1969 CanLII 55 (S.C.C.), [1970] S.C.R. 263.

59. While the minority of the Supreme Court of Canada (Laskin C.J. and Spence J.) concurred with the majority in *Phillion* that the polygraph evidence should not be admitted in the circumstances of that case, it expressly left open whether such evidence might not be admissible in "other circumstances". I believe that the case at bar raises such "other circumstances".

60. It is argued, however, by the Crown that polygraph evidence should not be admitted because it is "not reliable to an acceptable standard". This is, of course, not consistent with the view of the minority of this Court in *Phillion* that there may be circumstances in which it would be appropriate to admit it. It is, in effect, a plea for the acceptance in Canada of the *Frye* test initially applied in the United States (see *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) which has since been considerably eroded by the courts of that country. The "general acceptance" test in *Frye* has now given way in the United States to the "reasonable reliability" test. Mark McCormick in his article "Scientific Evidence: Defining a New Approach to Admissibility" (1982), 67 *Iowa L. Rev.* 879, explains why at p. 904:

The courts that have moved away from *Frye* have obviously done so because of a perception that the standard is too rigid, somewhat unclear, and an unnecessary and undesirable barrier to the admissibility of scientific evidence in some situations. The effect of the departure from *Frye* has been a liberalization in the admission of scientific evidence. A discernible trend toward an expansive admissibility standard plainly exists.

Based on his analysis of the American cases modifying or rejecting *Frye*, McCormick concludes that the traditional test of relevancy and helpfulness provides a means for retaining the values of *Frye* without the cost of its disadvantages.

61. Having regard to the fact that it is completely open to the opposing party to cross-examine the operator as to the weaknesses inherent in the process and to call an opposing expert to dispute the validity or interpretation of the results, I see no reason to exclude the evidence of the polygraph. It is, moreover, well within the purview of the judge to issue a caution to the jury not to give undue weight to polygraph evidence if he or she considers

such a caution warranted.

Conclusion

62. The polygraph evidence is clearly relevant. I am not persuaded that it falls within any of the exclusionary rules advanced by the Crown. I believe this case is clearly distinguishable from *Phillion*.
63. In the ordinary course the foregoing reasons would dictate a dismissal of the Crown's appeal. However, I do not believe that the Quebec Court of Appeal had jurisdiction under s. 613(2) of the *Criminal Code* to make the order it did. I would, therefore, allow the appeal and order a new trial.

The following are the reasons delivered by

64. LA FOREST J.--I have had the advantage of reading the judgment of my colleague, McIntyre J. and agree with his proposed disposition of this appeal. I prefer, however, to base my decision solely on the following factors identified by him in the latter part of his judgment, namely, human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science, and the inadvisability of expending time on collateral issues.

Appeal allowed, LAMER and WILSON JJ. dissenting on the merits.

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