*Case Name:*

# R. v. Chambers

**Martin Chambers, appellant;**
**v.**
**Her Majesty The Queen, respondent.**

[1990] S.C.J. No. 108

[1990] A.C.S. no 108

[1990] 2 S.C.R. 1293

[1990] 2 R.C.S. 1293

119 N.R. 321

[1990] 6 W.W.R. 554

J.E. 90-1517

49 B.C.L.R. (2d) 299

59 C.C.C. (3d) 321

80 C.R. (3d) 235

11 W.C.B. (2d) 191

File No.: 21385.

Supreme Court of Canada

1990: May 28 / 1990: October 18.

**Present: Dickson C.J.* and Lamer C.J.** and La Forest, L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (64 paras.)

* Chief Justice at the time of hearing.

** Chief Justice at the time of judgment.

[Quicklaw note: An erratum was published at [1997] 1 S.C.R. iv. The change indicated therein has been made to the text below and the text of the erratum as published in SCR is appended to the judgment.]

*Criminal law -- Right to silence -- Evidence of accused's silence in face of incriminating question -- Trial judge neglecting request by both counsel to instruct jury to ignore evidence bearing on accused's silence -- Whether or not right to silence infringed.*

*Trial -- Process -- Juries -- Trial judge informed of juror's illness -- Juror discharged -- Whether or not trial judge erred in discharging juror without hearing -- Criminal Code, R.S.C. 1970, c. C-34, ss. 573(1), 577.*

*Evidence -- Evidence of bad character and immoral activity -- Unfortunate asides and comments made by Crown during cross-examination -- Sole issue one of credibility -- Whether or not trial judge erred in permitting cross-examination of appellant's immoral activity and in failing to direct the jury as to limited use of such evidence -- Whether or not trial judge erred in admitting evidence of appellant's immoral activity if not related to the offence -- Whether or not Crown counsel's inflammatory manner denied appellant a fair trial.*

Appellant was charged with conspiring to import cocaine. At his second trial his defence was that he had no intention of carrying out the agreement notwithstanding the appearance of his being an active conspirator. Rather, it was argued that his purpose was to recapture the affections of his former mistress who was one of the conspirators. The trial proceeded on the footing that if he raised a reasonable doubt on this point, he would be acquitted on the basis that such a defence was valid and came within the principles set forth in R. v. O'Brien, [1954] S.C.R. 666.

During the trial, allegations were made that appellant had bribed Panamanian officials and arranged to have a conspirator robbed of cocaine. The suggestion had been made, too, that one witness had been paid to testify favourably and inferences and asides were made as to the reliability of the defence witnesses. Crown counsel attacked appellant's silence on his arrest. Both counsel eventually requested the trial judge to direct the jury to completely ignore the questions and answers given pertaining to the appellant's silence on the issues of guilt or innocence and credibility. The trial judge neglected to include these instructions in his charge to the jury and neither counsel reminded him of his undertaking.

Some six weeks into the trial a juror fell ill and the Court was advised by the attending physician that the juror would not be available for at least a week. The judge discharged him, without objection on the part of counsel, pursuant to s. 573(1) of the Criminal Code.

Five issues were before the Court: whether the trial judge erred (1) in discharging, without a

hearing, a juror who had become ill; (2) in permitting cross-examination pertaining to bribery and in failing to direct the jury as the limited use of that evidence; (3) admitting evidence of alleged criminal or immoral activity on appellant's part when that activity was not related to the offence charged; (4) in allowing Crown counsel to conduct the trial in an inflammatory manner and therefore deny the appellant a fair trial; and (5) whether appellant's right to silence had been violated in that the trial judge allegedly erred in: (a) allowing Crown counsel to cross-examine appellant as to why he did not make a statement to the authorities upon his arrest or tell any person in authority about his defence until the trial; and (b) in failing to direct the jury as to the very limited use which they could make of that evidence.

The Court of Appeal dismissed the appeal as to the first four issues. On the last issue, the majority held that no substantial wrong or miscarriage of justice had occurred from the trial judge's omission to draw the jury's attention to the fact that no inference should be drawn from appellant's silence.

Held (L'Heureux-Dubé J. dissenting): The appeal should be allowed.

Per Dickson C.J. and Lamer C.J. and La Forest, Sopinka, Cory and McLachlin JJ.: It would be inappropriate for this Court to reconsider its decision in O'Brien here with a view to overturning the doctrine of "double intent". The Crown was aware that the defence would rely upon the principle of double intent and yet did not indicate at any time prior to or at the trial or on appeal, that it might eventually challenge the correctness of the decision. A challenge to the O'Brien decision at this late date would be unfair to the appellant.

The accused does not have an absolute right to be present at a hearing considering the dismissal of a juror for health reasons. He or she, however, should not be lightly deprived of the right to be tried by a jury of twelve persons and of the right to be present throughout the trial. Finally, the trial judge might advise counsel in court and in the presence of the accused of the nature of the health or hardship problem and invite counsel to make submissions if they so wished. The process need not necessarily take on all the trappings of a formal hearing. The Sheriff's officer's report and the call to the trial judge from the juror's doctor had nothing to do with establishing the accused's guilt or innocence and so did not constitute a part of the trial requiring his presence.

Crown counsel properly cross-examined the appellant and the witness as to whether appellant had bribed the witness in order to obtain his favourable testimony. Their credibility was fundamentally important to appellant's defence.

Crown counsel's personal opinion as to the veracity of the witnesses was improper and it would have been preferable if the trial judge had so advised the jury. The effects of these unfortunate remarks were sufficiently overcome by the trial judge's instruction to the jury that it was their exclusive province to make findings of fact and, therefore, to assess the credibility of witnesses.

The trial judge erred in failing to charge the jury as to the restricted use that they could make of the evidence of the appellant's allegedly immoral or criminal conduct. Evidence of an accused's bad

character should, as a general rule, be considered only on the issue of the accused's general credibility and not as a basis for determining guilt or innocence.

The evidence of bad character could only have been used by the jury in considering the appellant's credibility once appellant had conceded that he gave every outward appearance of entering into the conspiracy. The jury should have been instructed as to the limited use of this evidence but any failure to charge on the issue did not result in a miscarriage of justice because appellant's credibility was the only issue at trial.

The right to silence can properly be exercised by an accused person in the investigative stages of the proceedings and at trial and is a basic tenet of our legal system falling within the ambit of s. 7 of the Canadian Charter of Rights and Freedoms. It would be a snare and a delusion to caution the accused that he need not say anything in response to a police officer's question but nonetheless put in evidence that the accused exercised that right in the face of a question which suggested his guilt. Here, the Crown did not establish the necessary real relevance and proper basis for the admission of the questions on the ensuing silence. The trial judge's failure to instruct the jury, as requested by both counsel, that they were to ignore both the questions and the answers compounded the error and caused irreparable damage to the defence.

Section 613(1)(b)(iii) could not be applied to rectify the situation. Without a direction from the trial judge, the most reasonable and fair-minded juror might still draw an inference that the appellant should have said something. The Crown could not establish that, despite the error, the result must necessarily be the same. Defence counsel's failure to object to the omission can properly be taken into account in assessing the gravity of the omission and the consequences that should be attached to it. However, such a failure should not be a bar to directing a new trial where a significant injustice has been occasioned.

Per L'Heureux-Dubé J. (dissenting): The reasons of Cory J. on the first four issues were agreed with. With respect to the fifth, the accused was not unfairly prejudiced by the objectionable questioning and the absence of direction to the jury on this particular point. Since there was no substantial wrong or miscarriage of justice, it was therefore appropriate to apply s. 613(1)(b)(iii) of the Criminal Code.

**Cases Cited**

By Cory J.

Considered: R. v. Hertrich, Stewart and Skinner (1982), 67 C.C.C. (2d) 510; R. v. Robertson (1975), 21 C.C.C. (2d) 385; referred to: R. c. Chambers, [1986] 2 S.C.R. 29; R. v. O'Brien, [1954] S.C.R. 666; Basarabas v. The Queen, [1982] 2 S.C.R. 730; R. v. Barrow, [1987] 2 S.C.R. 694; Vézina and Côté v. The Queen, [1986] 1 S.C.R. 2; R. v. McNamara (No. 1) (1981), 56 C.C.C. (2d) 193; Rothman v. The Queen, [1981] 1 S.C.R. 640; R. v. Symonds (1983), 9 C.C.C. (3d) 225; R. v. Woolley (1988), 40 C.C.C. (3d) 531; Hebert v. The Queen, [1990] 2 S.C.R. 151; Colpitts v. The

Queen, [1965] S.C.R. 739.

**Statutes and Regulations Cited**

Canadian Charter of Rights and Freedoms, s. 7.
Criminal Code, R.S.C. 1970, c. C-34, ss. 423(1)(d), 573(1), 577, 613(1)(b)(iii).

APPEAL from a judgment of the British Columbia Court of Appeal (1989), 47 C.C.C. (3d) 503, dismissing appellant's appeal from conviction by Trainor J. sitting with jury. Appeal allowed, L'Heureux-Dubé J. dissenting.

Thomas R. Berger and David Martin, for the appellant.
S. David Frankel, Q.C., and Anne W. MacKenzie, for the respondent.

Solicitor for the appellant: Thomas R. Berger, Vancouver.
Solicitor for the respondent: John C. Tait, Ottawa.

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The judgment of Dickson C.J. and Lamer C.J. and La Forest, Sopinka, Cory and McLachlin JJ. was delivered by

**1** **CORY J.**:-- Although several issues are raised in this appeal, only one is crucial to its determination. That is whether the Court of Appeal erred in applying s. 613(1)(b)(iii) of the Criminal Code, R.S.C. 1970, c. C-34 (now R.S.C., 1985, c. C-46, s. 686(1)(b)(iii)), to dismiss the appeal when the appellant was improperly cross-examined with regard to exercising his right to silence and the trial judge failed to charge the jury with regard to that right.

Factual Background

**2** In December 1981, the appellant was charged with conspiring to import a narcotic (cocaine) contrary to s. 423(1)(d) of the Criminal Code. The appellant was then a lawyer practising in Vancouver. His trial was severed from that of the other co-accused and commenced in 1983. The bulk of the evidence against the appellant consisted of intercepted conversations. The trial judge held that the tapes of the telephone interceptions were inadmissible and a directed verdict of acquittal was entered. A new trial was ordered by the Court of Appeal. That order was upheld by this Court in 1986. See R. v. Chambers, [1986] 2 S.C.R. 29.

**3** The second trial of the appellant commenced in 1987. It was the appellant's defence that, although he appeared to agree and to participate with the others involved in the conspiracy, in

reality he had no intention of carrying out the agreement of bringing cocaine into the country. Rather, his purpose was to recapture the affections of Zina Pocius, his former mistress and one of the conspirators. His trial proceeded on the footing that if he raised a reasonable doubt on this point, he would be acquitted on the basis that such a defence was valid and came within the principles set forth by the majority of this Court in R. v. O'Brien, [1954] S.C.R. 666. Neither before the Court of Appeal nor at trial did the Crown indicate that it would question the correctness of this decision.

**4** The appellant testified that he had an affair with Zina Pocius which started in 1980. He maintained an apartment for her in Vancouver. At the same time he leased office space to Dumyn, one of the co-conspirators. Through Dumyn, the appellant was retained to go to Panama to see if he could arrange for Barudin, an associate of Dumyn's, to be released from jail. The appellant spent some time in Panama in the early spring of 1981 and succeeded in obtaining the release of Barudin and his cell mate Jay Gonzalez. Chambers testified that he had to bribe the Panamanian authorities in order to obtain this result, but added that the payment of bribes to government officials in Panama was not unusual. The intercepted communications indicated that the appellant also made some suggestion that his mistress, Zina Pocius, should have sexual relations with the Attorney General of Panama if that became necessary in order to obtain the release of Barudin, although at trial Chambers claimed this was only a joke.

**5** Upon their release, the prisoners, Pocius and the appellant proceeded to Miami. The evidence indicated that the conspiracy among Barudin, Dumyn, Pocius and Gonzalez to import cocaine into Canada started in Panama and was further discussed in Miami. The plan was to bring the cocaine from Miami to Vancouver where Barudin, Dumyn and Thomson resided. The appellant testified that in Miami he pretended to go along with the conspiracy. He said that he did this solely to maintain some connection with Pocius who, by this time, had become involved with Jay Gonzalez.

**6** The appellant flew back to Vancouver without Pocius. He later returned to Miami to again see Pocius and Gonzalez. He confronted them at a picnic, at which point Gonzalez drew a gun. The appellant did nothing further at that time but went back to Vancouver determined to regain the affections of Pocius. The appellant testified that he was obsessed with her. He gave evidence that he pretended to be a party to the conspiracy so that he could insist, as a condition of his involvement, that Pocius be returned to him.

**7** Through his involvement in the conspiracy, the appellant learned that Gonzalez was bringing cocaine to Vancouver, something which he claimed he did not wish to occur. He therefore hired Santiez Tabbance, also known as Kuko, to intercept Gonzalez in Florida. Kuko failed in the attempt. However, Gonzalez stopped over in Atlanta for two days and while there called Zina Pocius a number of times. Upon being informed by Pocius that Gonzalez was in Atlanta, the appellant arranged for Kuko to try once again to intercept Gonzalez. On the second attempt at Atlanta Airport, Kuko succeeded. Gonzalez claimed to have been injured during the robbery, as a result of which he had difficulty speaking. Kuko was not apprehended and the cocaine disappeared.

**8** Despite the fact that Gonzalez believed that Chambers was responsible for robbing him and for the assault upon him, he came to Canada to give evidence for the appellant. Gonzalez was given immunity from prosecution. During his cross-examination, Crown counsel suggested to Gonzalez that the only reason he had come to Canada to testify was for money which he either had been paid, was to be released from paying or would be paid in the future by the appellant. Gonzalez denied this suggestion.

**9** The day following his testimony, the appellant drove Gonzalez to the American border. Gonzalez was searched and nearly $10,000 was found secreted in his clothing. In cross-examination of the appellant, Crown counsel used this fact to again suggest that the appellant had paid for the testimony of Gonzalez. The appellant also denied this suggestion.

**10** At the conclusion of some fifty days of trial, the jury retired around noon to consider their verdict. The following day at 6:30 p.m. they brought in their verdict finding Chambers guilty.

The Court of Appeal

**11** The appeal came before a five-judge panel. Six issues were raised, five of which are before this Court. They are as follows:

(1) Whether the trial judge erred in discharging, without a hearing, a juror who had become ill.
(2) Whether the trial judge erred in permitting cross-examination pertaining to bribery and in failing to direct the jury as to the limited use they could make of such evidence.
(3) Whether the trial judge erred in admitting evidence of alleged criminal or immoral activity on the part of Chambers when that activity was not related to the offence charged.
(4) Whether the trial judge erred in allowing Crown counsel to conduct the trial in an inflammatory manner and therefore deny the appellant a fair trial.
(5) Whether the trial judge erred in: (a) allowing Crown counsel to cross-examine Chambers as to why he did not make a statement to the authorities upon his arrest or tell any person in authority about his defence until the trial; and (b) in failing to direct the jury as to the very limited use which they could make of that evidence. This, it was said, violated the appellant's right to silence.

**12** Hinkson J.A. on behalf of three members of the Court, Esson J.A. concurring in separate reasons, and Lambert J.A. dissenting in part, all agreed that the appeal as to the first four issues should be dismissed. I agree with the result reached by the Court of Appeal on these issues.

**13** On the last issue, Hinkson J.A., for the majority, recognized that there is a right of an accused

to remain silent, both at the investigative stage and at the trial. He acknowledged that counsel for the appellant had relied upon the statement of the trial judge that he would give a direction to the jury that they should not draw any inference from the fact that the appellant had not made a statement to anyone in authority before the trial. He conceded that the omission by the trial judge to give such a direction constituted non-direction amounting to misdirection. Nonetheless, he invoked s. 613(1)(b)(iii), now s. 686(1)(b)(iii), and concluded that no substantial wrong or miscarriage of justice had occurred as a result of the omission by the trial judge.

**14** Esson J.A., in his concurring reasons, agreed that evidence that the accused had failed to reply after being cautioned by the police was not admissible unless there was some issue in the case to which the evidence was relevant. However, he was satisfied that the appellant was not prejudiced by the questions and answers which breached his right to silence.

**15** Lambert J.A., in dissent, concluded that the questions posed breached the appellant's right to silence and that breach, coupled with the failure of the trial judge to give the promised direction to disregard these questions and answers, constituted such a serious error that s. 613(1)(b)(iii) could not be invoked. He would have directed a new trial. I think this conclusion should prevail.

Application of the Decision in R. v. O'Brien

**16** Before dealing with the issues raised by the appellant, it is necessary to say something with regard to the Crown's submission that R. v. O'Brien was wrongly decided by this Court.

**17** That case involved a charge of conspiracy to commit the indictable offence of kidnapping. The position of the Crown was that the two accused had entered into an agreement to commit a kidnapping. One of the accused alleged that he purported to enter the conspiracy but never intended to carry out the plan. The trial judge charged the jury that the mere agreement to commit the kidnapping was a sufficient basis upon which to found a conviction for conspiracy. This aspect of the charge was challenged by O'Brien. This Court, in a three to two decision, held that the trial judge was in error. The dissenting judges expressed the opinion that a mere mental reservation made at the time of agreeing to participate in a conspiracy was an insufficient basis upon which to acquit the accused. The majority, on the other hand, held in the words of Rand J., at p. 670, that:

> ... a conspiracy requires an actual intention in both parties at the moment of exchanging the words of agreement to participate in the act proposed; mere words purporting agreement without an assenting mind to the act proposed are not sufficient.

**18** The Crown suggested that this Court should reconsider its decision in O'Brien with a view to overturning the doctrine of "double intent". It would not be appropriate to undertake such a review in this case. For some five years prior to the second trial, as a result of other proceedings, the Crown was aware that the appellant would be relying upon the principle of double intent and that this would be the defence to the charge. The Crown did not at any time prior to the trial indicate that it

might eventually challenge the correctness of the decision. The defence put forward was based entirely upon the position set forth by the majority in O'Brien. At trial the Crown conceded that if the appellant raised a reasonable doubt based on this defence, then he should be acquitted. Similarly, the Crown did not indicate in the Court of Appeal that it would be challenging the decision. Indeed the first time he Crown raised the issue as to the correctness of the decision, was after it had received the appellant's factum. In view of the position taken by the Crown throughout the proceedings, it would be unfair to the appellant to permit the Crown to challenge the O'Brien decision at this late date. This is not to say that the Crown must in every instance give notice to the accused prior to trial that it will be challenging the correctness of a decision of this Court. However, in the circumstances of this case the raising of such an argument at this time is unfair to the appellant.

The Discharge of the Juror

**19** One morning, some six weeks into the trial, the trial judge was advised by the Sheriff's officer that one of the jurors, a Mr. Bishop, felt ill and before court commenced had left to see his doctor. When the court opened, the trial judge advised everyone, including the other members of the jury, of the situation. The court then adjourned to await the report from the doctor. Later that morning, court was reconvened. At that time, the trial judge stated that he had received a telephone call from Mr. Bishop's doctor who advised him that Mr. Bishop would not be available "for at least a week and perhaps longer". The judge then said that he was satisfied that Mr. Bishop should be discharged pursuant to s. 573(1) (now s. 644(1)) of the Criminal Code. The judge went on to advise that the doctor would be providing written confirmation as to Mr. Bishop's condition. Neither counsel took any objection to this procedure nor did they make any submissions with regard to the decision.

**20** The appellant contends that the trial judge ought to have held an inquiry in the presence of the accused to determine whether or not the juror should be discharged.

**21** Section 577 (now s. 650) of the Criminal Code provides that an accused must be present throughout his trial. This right is fundamental to the criminal trial process. Section 573(1) permits a judge to discharge a juror because of illness or for other reasonable grounds. That section reads as follows:

> 573. (1) Where in the course of a trial the judge is satisfied that a juror should not, because of illness or other reasonable cause, continue to act, the judge may discharge the juror.

**22** It has been held by this Court that an accused should not be lightly deprived of the right to be tried by a jury of twelve persons. See Basarabas v. The Queen, [1982] 2 S.C.R. 730, per Dickson J., as he then was, at p. 741. Further, the right of the accused to be present throughout the trial is of great importance. Martin J.A. in R. v. Hertrich, Stewart and Skinner (1982), 67 C.C.C. (2d) 510, recognized that this fundamental right was based upon two precepts. First, an accused has the right to hear the entire case made out against him so that full answer and defence can be made. Second,

the concepts of fairness and openness are values fundamental to the criminal justice system. The presence of the accused is required at all stages of the trial to afford him or her an opportunity of acquiring first-hand knowledge of all the proceedings. It would thus seem that the accused should be present when the decision is made to discharge a juror for reasons of health. Yet, although that may be the preferable procedure, it is not absolute. Some proceedings undertaken in the absence of the accused may be properly excused.

**23** In the Hertrich case, Martin J.A. undertook a scholarly review of cases from American jurisdictions. He found that they drew a distinction between those situations where there were allegations of partiality on the part of the juror and those where a juror is discharged on account of hardship or illness. The weight of American authorities concluded that although the accused certainly had the right to be present during any inquiry as to the partiality of a juror, the presence of the accused was not required at hearings pertaining to the discharge of a juror on grounds of hardship or illness. Martin J.A. concluded that the same principle should be applicable in Canada. His review of the authorities and his conclusions on this point were cited with approval by Dickson C.J. in R. v. Barrow, [1987] 2 S.C.R. 694, particularly at pp. 706-7.

**24** In Hertrich, Martin J.A. noted that not every communication between the judge and the jury or juror which may occur during the course of the trial is in fact part of that trial. He cited, as an example, that an administrative decision made and announced by the judge in the absence of the accused that lunch or supper would be provided for members of the jury should not constitute a part of the trial. Martin J.A. put the position in these words at p. 529: "... during the course of the trial things may occur that, although in one sense part of the trial, cannot reasonably be considered to be a part of the trial for the purpose of the present principle, because they cannot reasonably be said to have a bearing on the substantive conduct of the trial, or the issue of guilt or innocence." These reasons were cited with approval in Vézina and Côté v. The Queen, [1986] 1 S.C.R. 2.

**25** The appellant argued that the American practice of providing alternate jurors was the real basis for the American decisions. It was contended that since there were no alternate jurors in Canada, that the reasoning of the American authorities should not be applied to our country. I cannot accept that argument. It is not the presence or absence of alternate jurors that is basic to the American cases. Rather, what is fundamental is the conclusion that excusing a juror for reasons of illness or hardship cannot reasonably be said to have a bearing on the substantive conduct of the trial or the guilt or innocence of the accused which is fundamental. It is that principle which is as applicable to Canada as it is to the United States.

**26** In summary, the accused does not have an absolute right to be present at a hearing considering the dismissal of a juror for reasons of health. However, due to the importance of the step, it would be preferable for the trial judge to advise counsel in court and in the presence of the accused of the nature of the health or hardship problem and to invite counsel to make submissions if they wished to do so. The process need not necessarily take on all the trappings of a formal hearing with witnesses required to give evidence under oath on the issue. This could result in unwarranted delays and the

infliction of unnecessary hardship on jurors, their families and medical advisors. Rather, an explanation of the problem by the judge with an opportunity given to counsel to make submissions may often suffice. Such a procedure would serve to emphasize the importance of the decision and ensure that careful consideration was given to it.

**27** In this case neither the report of the Sheriff's officer nor the call from Mr. Bishop's doctor to the trial judge constituted a part of the trial which required the presence of the accused. They had nothing to do with establishing the guilt or innocence of the accused, nor did they have a bearing on the substantive conduct of the trial. Further, the transcript discloses that neither Crown counsel nor the experienced counsel acting for the appellant expressed any interest in the trial judge's conducting a hearing with regard to the discharge of Mr. Bishop. Nor did they seek to make any representations with regard to the issue, although they had an opportunity to do so. Although this is not determinative of the question, it is a factor which can be taken into account.

**28** It follows that in all the circumstances the failure to hold a formal hearing with regard to the discharge was not fundamental to the conduct of the trial and this ground of appeal cannot be accepted.

Allegations of Bribery

**29** The appellant takes the position that Crown counsel improperly cross-examined the appellant and Gonzalez as to whether Chambers had bribed Gonzalez in order to obtain his favourable testimony. The appellant contends that Crown counsel had no basis for such a cross-examination and, as a result, that it was improper. He argued that the trial judge ought to have prohibited it or at least charged the jury as to the impropriety of the Crown's conducting such a cross-examination.

**30** This contention should not be accepted. There was a sound basis for the Crown's pursuing this line of cross-examination. It will be remembered that the position of the appellant was that, although he appeared to agree to the conspiracy and his words and actions indicated his active participation to the co-conspirators, he never intended to participate in the scheme. This approach put the appellant's credibility in issue.

**31** It must be borne in mind that Gonzalez had been attacked, had suffered a serious injury to his mouth and had been robbed of a quantity of cocaine at the Atlanta Airport. Gonzalez stated that he suspected that Chambers was responsible for this attack and robbery. He also knew of Chambers' obsession with Pocius. Yet, despite all of this, he still came to Vancouver to testify on Chambers' behalf. The day after he testified, Gonzalez was then driven to the border by the appellant. Almost $10,000 was found hidden on Gonzalez's person. The circumstances are bizarre. Gonzalez's desire to assist the appellant seems, in the circumstances, somewhat incredible. In light of that background, it was certainly reasonable for the Crown to infer that bribery might be involved and it was thus proper to cross-examine Gonzalez and Chambers in this regard.

**32** The credibility of Chambers and of Gonzalez was fundamentally important to the defence put

forward by the appellant. It was quite proper to permit the Crown to proceed with the impugned cross-examination and for the jury to draw such inferences from the facts as they deemed appropriate. Further, the Crown stated to the members of the jury in his closing address in a manner, perhaps unduly favourable to the defence, that pursuant to the collateral evidence rule he had no alternative but to accept the answers given by the witnesses and could not seek to prove them false. This remark, erroneous though it may have been, certainly must have reduced any impact the cross-examination may have achieved. This ground of appeal thus cannot be accepted. I will refer later to the necessity of giving directions to the jury on this issue under the heading evidence of bad character.

Alleged Inflammatory Conduct of the Case by Crown Counsel

(a) Crown Only Calls Witnesses of Truth

**33** In his address to the jury, Crown counsel stated that the Crown only calls witnesses that, in the opinion of Crown counsel, can be relied upon to give truthful testimony. Further, he said that while the Crown can only call truth tellers, it is different for the defence.

**34** The majority reasons in the Court of Appeal properly referred to this unfortunate remark as an "unfounded claim" and a "nonsensical assertion". There can be no doubt that it was improper for Crown counsel to express a personal opinion as to the veracity of the witnesses. It would have been preferable if the trial judge had so advised the jury. Yet, perfection in a charge can neither be expected nor required. In any event, the trial judge did instruct the jury that it was their exclusive province to make findings of fact and in the course of that function to assess the credibility of witnesses. This was sufficient to overcome the unfortunate statements of Crown counsel. This submission cannot be accepted.

(b) Crown Counsel Indicated That He Did Not Believe the Testimony of the Appellant

**35** In cross-examination of the appellant, Crown counsel asked him whether his evidence was truthful. The appellant responded that it was. Crown counsel then said, "Let's move on. But don't think for a moment I accept that." This comment was clearly inappropriate and it was recognized as such by the Court of Appeal. Yet, it must be placed in context. The cross-examination continued for several days. The effect of this comment must have been diluted by the sheer volume of questions. Further, Crown counsel in his address advised the jury that his opinion should not be taken into account by them.

**36** Nonetheless, the appellant argued that one remark of the trial judge stressed the significance of the opinions of counsel. At one point in his charge he stated:

> Certainly I would think that you should give careful consideration to any opinions expressed by me or by counsel regarding the evidence, but you are quite

entitled to disagree with our opinions or our recollections of the evidence.

**37** The appellant's submission on this point places an unwarranted emphasis on one unfortunate comment by Crown counsel and a small portion of the charge taken out of context. There is nothing objectionable in these words of the trial judge. It cannot be forgotten that the trial judge carefully and properly instructed the jury that they were to make the findings of fact and in so doing to assess the credibility of the witnesses. The appellant's submission that these improprieties of the Crown counsel, coupled with the trial judge's failure to instruct the jury with regard to them, constitutes irreversible error cannot be accepted. In the circumstances of this case, it cannot be said that they amounted to a miscarriage of justice and it is appropriate to apply s. 613(1)(b)(iii).

Evidence of Bad Character

**38** The appellant takes the position that the trial judge erred in failing to direct the jury with regard to the limited use that it could make of evidence of bad character. Specifically, it is argued that the trial judge ought to have instructed the jury that evidence of bad character could only be used in assessing credibility and not as a basis for determining that, because of the evidence of bad character, the appellant was a person likely to have committed the offence with which he was charged.

**39** The evidence called by the Crown consisted in large part of intercepted conversations between the appellant and the co-conspirators. Those conversations indicated that Chambers used drugs himself; that he committed adultery; that he was quite prepared to bribe the Attorney General of Panama in order to obtain the release of prisoners in Panama; and that if the bribery failed he would encourage his mistress Pocius to seduce the Attorney General to obtain the release of Barudin and Gonzalez. There was as well the cross-examination of Gonzalez and Chambers which suggested that the appellant had bribed Gonzalez to testify. The appellant concedes that this evidence was admissible as going to credibility. I would add that it may also have been properly admitted as evidence going to the background of the conspiracy itself as well as going to the association and relationships which existed among the co-conspirators. Nonetheless, the question remains whether the trial judge erred in failing to charge the jury as to the restricted use that they could make of that evidence.

**40** There can be no doubt that if evidence of an accused's bad character is admitted, it should as a general rule only be considered on the issue of the accused's general credibility and not as a basis for determining guilt or innocence. It follows that a jury should be instructed that they cannot use the evidence of bad character in order to conclude that the accused is a bad person and therefore more likely to have committed the offence charged. See, for example, R. v. McNamara (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.). In my view the trial judge ought to have given such instructions. However, in this case that failure does not constitute a reversible error.

**41** It will be remembered that the appellant conceded that he appeared to be a member of the conspiracy. It would have appeared so to his co-conspirators or to a bystander listening to the

conversations. Thus his position as an apparent conspirator was not in issue and the evidence of bad character could not go towards establishing his membership in the conspiracy. The evidence may have indicated that Chambers was not a pleasant person nor one likely to be put forward as an example of moral virtue. However, once Chambers conceded that he gave every outward appearance of entering into the conspiracy, then the evidence of bad character could not have been used to determine that issue.

**42** The evidence thus could only have been used by the jury in considering the appellant's credibility. This was a permissible use of the evidence. It would certainly have been preferable if the jury had been instructed as to the limited use they could make of the evidence. However, in the particular circumstances of this case, namely that the appellant's credibility was the only issue at trial, no miscarriage of justice could have been occasioned by the failure to charge on this issue. Accordingly, this ground of appeal cannot be accepted.

The Right to Silence

**43** As a result of the dissenting reasons given by Lambert J.A., this issue is raised by the appellant as of right.

**44** The appellant submits that it was imperative in this case that the trial judge instruct the jury with regard to the appellant's right to silence. This is the crucial issue in this case, particularly in light of the manner in which it arose during the trial.

**45** During the course of his testimony the appellant gave evidence as to his arrangement with Kuko to rob Gonzalez of the cocaine before he flew to Vancouver. In response to a question, Chambers volunteered that he had never discussed his Kuko arrangements with anyone until several months before his second trial was to commence. Since the appellant had himself raised this issue, Crown counsel attempted to demonstrate that the evidence regarding Kuko was a recent concoction. He began his attack in this way:

> Q. Let me be plain, Mr. Chambers. I'm suggesting to you that your defence is a contrived one, it's a lie. This didn't happen the way you've described it, and you've been fine-tuning a defence for the last six years and you came up with this Kuko idea, this Kuko idea at the last moment?
> A. That's not so, Mr. DeBou.

Later in the trial Crown counsel continued the attack and asked the appellant why he had not made a statement when he was arrested.

> Q. Mr. Chambers, if that's the case, why did you not tell the authorities as soon as you were arrested that it may look bad, but you have an explanation for why it looks so bad. Why didn't you?
> A. Mr. DeBou, as a lawyer I would never talk to the authorities under any condition

where they've laid conspiracy charges and arrested a whole bunch of people.

Still later, Crown counsel asked the appellant as to why he had not made statements to persons in authority before the trial.

Q. Isn't this the first time, sir, in court, in these proceedings that you've actually told someone in authority your story about what happened?

MR. RUBIN: I think that's totally inaccurate. My friend knows the history of it. If you want to go through it with the jury out, I will, but this has been canvassed before in court. There was a severance application in court and all sorts of matters.

MR. DEBOU: My friend is quite wrong. This is an improper objection, I think, my lord.

MR. RUBIN: Maybe it should be done in the absence of the jury.

MR. DEBOU: He's interfering with cross-examination now. He's not referring to a statement of Martin Chambers. I'm asking specifically is this the first time that Martin Chambers --

THE COURT: That was the question. Whether or not Mr. Chambers -- this was the first time Mr. Chambers has.

MR. RUBIN: But that's not a question.

THE COURT: That's the question that was asked.

MR. RUBIN: All right.

MR. DEBOU: Isn't that correct?

THE COURT: And I don't know if that was in error. I thought you objected to that. Do you say that was wrong?

MR. RUBIN: I'm objecting to the inference that this is the first time the explanation has been offered, but I'll leave the witness to answer. I'm sorry, I apologize.

MR. DEBOU:

Q. Mr. Chambers, isn't it the first time that you have told someone in authority the true story of what happened from your standpoint?
A. Yes.

Later, the following transpired:

Q. ... Mr. Chambers, when was it that you first raised this whole subject of Kuko with anyone? Maybe you don't understand that question? I'm referring to the subject of you arranging for Kuko to take down the drugs at the Atlanta airport. When was it that you first raised that topic with him?
A. With my counsel.
Q. When, was the question, sir?
A. Prior to 19 -- prior to my trial in 1983. Probably at about the -- I can't tell you exactly, but it would have been somewhere in relationship to the severance application I guess.

MR. DEBOU: But, again, is it fair to say that you

didn't raise it with anyone in authority, police, crown counsel, up until this trial started here?

MR. RUBIN: I have an objection to that question, my lord. It can be dealt with later in the absence of the jury or now; it's up to your lordship when you want to deal with it. I have an objection. In the past I've tried not to interrupt my friend.

THE COURT: Does it have something to do with a definition of a person in authority?

MR. RUBIN: Well it's -- I have an objection to it that has to be dealt with in the absence of the jury. I'm at your leisure whether we do it now or later.

THE COURT: The jury will be excused.

**46** What follows is of great importance. When the jury retired, defence counsel objected strenuously for two hours to the line of questioning. The trial judge reserved ruling on the issue. The issue was raised again as the time approached for the appellant's counsel to re-examine him, a matter of considerable significance. Documentary evidence was available which demonstrated that five years earlier, on his severance application, Chambers had indicated that he would put forward the defence that although he had pretended to participate, he never had any intention of becoming a party to the conspiracy. It is not clear from the portions of the transcript made available to us whether the evidence pertaining to Kuko was made known to the Crown at the time of the severance application. From the transcript of counsel's submission, it does appear that the Crown was at least aware of the Kuko story in January before the trial began on February 6. It may have become apparent from the transcript of the evidence of Gonzalez taken on commission before he was granted immunity and testified at the trial. In any event, it was made clear to the Crown years before the commencement of the trial that Chambers would be putting forward his defence of double intent. Thus the defence could not be considered to have been recently concocted.

**47** Eventually Crown counsel appeared to agree with the position taken by counsel for the appellant. Both counsel requested the trial judge to direct the jury to ignore completely the questions and answers given pertaining to the appellant's silence not only on the issue of guilt or innocence, but also with respect to the issue of the appellant's credibility. The trial judge undertook to give these directions. It was on this basis that defence counsel advised that he would not

re-examine the appellant with respect to the issues arising from his right to silence. Although the trial judge confirmed that it was his responsibility to give these instructions to the jury, he neglected to do so. Neither counsel reminded him of his undertaking at the completion of the charge. Counsel must share with the trial judge the responsibility for the omission of this important direction. The remaining question is whether the omission constitutes a reversible error.

**48** It is now well recognized that there is a right to silence which can properly be exercised by an accused person in the investigative stages of the proceedings. The basis of the right was enunciated by Lamer J., as he then was, in his dissenting reasons in Rothman v. The Queen, [1981] 1 S.C.R. 640, at p. 683, in these words:

> In Canada the right of a suspect not to say anything to the police is not the result of a right of no self-crimination but is merely the exercise by him of the general right enjoyed in this country by anyone to do whatever one pleases, saying what one pleases or choosing not to say certain things, unless obliged to do otherwise by law. It is because no law says that a suspect, save in certain circumstances, must say anything to the police that we say that he has the right to remain silent, which is a positive way of explaining that there is on his part no legal obligation to do otherwise.

**49** The importance of the principle was emphasized by Martin J.A. in R. v. Symonds (1983), 9 C.C.C. (3d) 225 (Ont. C.A.), at p. 227:

> It is fundamental that a person charged with a criminal offence has the right to remain silent and a jury is not entitled to draw any inference against an accused because he chooses to exercise that right.

**50** Further the right to silence has now been recognized as a basic tenet of our legal system and as such is a right protected by the Canadian Charter of Rights and Freedoms. As a basic tenet of our law it falls within the ambit of s. 7 of the Charter. See R. v. Woolley (1988), 40 C.C.C. (3d) 531 (Ont. C.A.), and particularly Hebert v. The Queen, [1990] 2 S.C.R. 151. It follows that an accused person has the right to remain silent at the investigation stage as well as at the trial.

**51** It has as well been recognized that since there is a right to silence, it would be a snare and a delusion to caution the accused that he need not say anything in response to a police officer's question but nonetheless put in evidence that the accused clearly exercised his right and remained silent in the face of a question which suggested his guilt. In R. v. Robertson (1975), 21 C.C.C. (2d) 385 (Ont. C.A.), this very issue arose and the Court considered whether a police officer's accusation and the subsequent silence of an accused could be admitted in evidence. Dubin J.A., as he then was, dissenting in part, stated at p. 395:

> In my opinion the purported resumé of the facts as stated by Inspector Lyle, coupled with the response of "nothing", after being cautioned, was so

> highly prejudicial that I am not satisfied that the learned trial Judge's instructions to the jury could erase the prejudicial effect which that evidence would have on the jury. I cannot help but feel that most juries would assume that an innocent man would be prompted to deny any false accusations against him, and his failure to do so would tend to prove belief in the truth of the accusations.

He continued later at p. 400:

> In the absence of any issue raised by the defence, the mere silence of an accused during police interrogation cannot be said to advance the case for the Crown. It cannot be a step on the way to the proof of the accused's guilt. It, therefore, becomes, in my opinion, irrelevant to any issue at trial. To prove as part of the Crown's case the fact that the accused has exercised his common law right to remain silent would constitute silence a trap if his silence is placed in evidence against him at his trial.

**52** Martin J.A., writing for the majority, agreed that such questions and answers could only be admitted if they were relevant to an issue in the case. However, he disagreed with Dubin J.A. as to whether the statements were relevant in that case. He wrote at p. 420:

> Indeed, the learned trial Judge was disposed to rule out that evidence in this case as having no probative value, but for the fact that he ruled that the subsequent statements made by the accused after the caution were admissible as having been made voluntarily. He considered that in such circumstances it was relevant to show that the accused, prior to making those statements, had been cautioned. I agree with the conclusion which he reached.

It was also of great importance to Martin J.A. that the trial judge in that case had, immediately after he admitted the statement and again in his charge, instructed the jury in the clearest of terms that the fact that the accused had remained silent did not lend itself to any adverse inference and could not be used as an inference against him. It was because of the relevance of the statements and the clear warnings given on two occasions by the trial judge that Martin J.A. admitted the statement.

**53** Martin J.A. restated his position in R. v. Symonds, supra. In that case the Crown led evidence that the accused had refused to say anything to the police after he had been cautioned. Later, during the cross-examination of the accused, the Crown repeatedly asked him why he had not offered his innocent explanation of the events to the police prior to the trial. The trial judge did not instruct the jury that they should not draw any adverse inference from this evidence. At issue was whether the admission of the evidence and the failure of the trial judge to properly instruct the jury constituted a reversible error. At p. 227 Martin J.A. wrote:

> It is fundamental that a person charged with a criminal offence has the right to remain silent and a jury is not entitled to draw any inference against an

> accused because he chooses to exercise that right. We think that in the absence of some issue arising in the case which makes the statement of an accused, following the giving of a caution, that he has nothing to say relevant to that issue, such evidence is inadmissible. In the present case there was no issue with respect to which the appellant's failure to reply was relevant and the evidence should not have been tendered: see R. v. Robertson (1975), 21 C.C.C. (2d) 385, 29 C.R.N.S. 141.

The court directed a new trial.

**54** In my view, unless the Crown can establish a real relevance and a proper basis for their admission, neither the questions by the investigating officers nor evidence as to the ensuing silence of the accused should be admitted.

**55** In the case at bar, the Crown agreed that the trial judge should have instructed the jury that they were to ignore both the questions and the answers. It can therefore be taken that there was no relevant basis for asking these questions. The questions were improper and the evidence inadmissible. The failure of the trial judge to so instruct the jury, pursuant to his undertaking, compounded the error and caused, I fear, irreparable damage to the defence.

**56** Further, I am in agreement with the conclusion of Lambert J.A. that s. 613(1)(b)(iii) cannot be applied to rectify the situation. Without a direction from the trial judge, I would expect that the most reasonable and fair-minded juror might still draw an inference that the appellant should have said something regarding Kuko to persons in authority at the time of his arrest or at least well before trial. A juror could not be expected to understand that in the ordinary course of events neither the questions nor the answers pertaining to situations where the right to silence applied should be admitted. In those circumstances it would be impossible for the Crown to establish, as it must, that despite the error the result must necessarily be the same. See Colpitts v. The Queen, [1965] S.C.R. 739.

**57** The circumstances of this trial aggravated the effect of the omission. Based upon the judge's undertaking to charge with regard to the subject, counsel for the defence did not re-examine. That re-examination in itself might have had a significant effect. It would have demonstrated that the appellant had disclosed his proposed defence some years before the trial. The absence of the re-examination, coupled with the failure to give the requisite instructions on the subject, could only have resulted in a significant injustice. The jury were deprived of the evidence that would establish that the so-called double intent defence to which the "Kuko" evidence related was not of recent concoction. As a result of the Crown's cross-examination, the jury could well have been left with the erroneous impression that Chambers was under a duty to disclose the Kuko story to a person in authority. The failure to disclose a defence of alibi in a timely manner may be considered in assessing the credibility of that defence but that is a unique situation. As a general rule there is no obligation resting upon an accused person to disclose either the defence which will be presented or

the details of that defence before the Crown has completed its case. There was clearly no obligation resting upon the appellant to disclose either his defence of double intent or the Kuko story to the Crown or anyone in authority. The failure to correct such an impression by direction from the trial judge rendered the right to silence a snare of silence for the appellant. Without any direction to ignore these questions and answers, it is impossible to say that the verdict would necessarily have been the same.

**58** Defence counsel failed to object to the omission. Such a failure to object can properly be taken into account in assessing the gravity of the omission and the consequences that should be attached to it. However, such a failure can never be solely determinative of the issue, and should not be a bar to directing a new trial in a case such as this where a significant injustice has been occasioned. A new trial should be ordered in this case.

**59** It is not without considerable regret that I reach this conclusion. The trial was lengthy. The conduct of the trial judge throughout the long case was exemplary. Much of the charge was beyond reproach. Nonetheless, the failure to charge on this issue in the circumstances of the case constituted a serious miscarriage of justice that requires the direction of a new trial.

Disposition

**60** In the result, the appeal is allowed and a new trial ordered.

The following are the reasons delivered by

**61** L'HEUREUX-DUBÉ J. (dissenting):-- I have had the advantage of reading the reasons of my colleague Justice Cory and, with respect, I cannot agree with his disposition of this appeal. While I fully agree with his reasons on the first four issues which he thoroughly canvassed, I find myself unable to concur with my colleague's analysis and disposition of the last ground of appeal raised, which concerns the accused's allegation that his right to silence was violated and that such violation cannot be cured by the application of s. 613(1)(b)(iii) of the Criminal Code, R.S.C. 1970, c. C-34, (now s. 686(1)(b)(iii)).

**62** On that issue, I adopt the reasoning of Esson J.A. (now C.J.S.C.) in the Court of Appeal (1989), 47 C.C.C. (3d) 503. In the particular circumstances of this case, and in the context in which this matter arose, I agree that the accused was not unfairly prejudiced by the objectionable questioning and the absence of direction to the jury on this particular point. As Esson J.A. stated at p. 560:

> The objectionable question, that as to why Chambers did not tell the authorities of the explanation as soon as he was arrested, was neatly placed in its proper context by Chamber's [sic] answer to the effect that as a lawyer he knew that it would be futile to talk to authorities who had just laid conspiracy charges and arrested him under those charges.

> There were, on the following day, one or two further questions touching on the failure to say anything after arrest but Crown counsel shortly desisted from that line of inquiry. When the jury came to deliberate more than a month later, it may have seen some significance in Chamber's [sic] own evidence in direct that he had not told anyone this strange story until shortly before the second trial. That was a proper matter for their consideration. But it was in my view beyond the bounds of reasonable possibility that the jury attached significance to the questions relating to silence after arrest. Given the great length of time, and the mounds of evidence and argument which had been piled up between the time of the offending question and the judge's charge, it may well have been an act of charity to the accused to say nothing. The fact that defence counsel made no objection to the judge's failure to give the promised direction is an indication that, by that stage, it had ceased to be anything like a live issue in the eyes of anyone.

**63** I am in respectful agreement with this position. As a result, I cannot conclude that there has been a substantial wrong or miscarriage of justice in the circumstances. This is therefore an appropriate case to apply s. 613(1)(b)(iii) of the Criminal Code on this issue, as did the Court of Appeal.

**64** Accordingly I would dismiss the appeal.

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Erratum, published at [1997] 1 S.C.R. iv:

The Court's judgment is amended by adding the name of Justice Cory in the opinion statement preceding para. 1. The statement now reads: "The judgment of Dickson C.J. and Lamer C.J. and La Forest, Sopinka, Cory and McLachlin JJ. was delivered by".

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