



Regina v. Graham

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Commentary

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Case Comments

Regina v. Graham

ADMISSIBILITY OF EXCULPATORY STATEMENTS

“You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence *against* you.” Those addicted to detective stories and late-night movies will recognize this formula, although they may be disappointed to hear that the words “against you” have now been dropped. In 1918, the judges of the King’s Bench promulgated a supplement to the so-called judges’ rules of 1912,¹ in which it was stated that: “Care should be taken to avoid any suggestion that the [suspect’s] answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.”² This note will show that the present hostility of the courts to the admissibility of exculpatory statements makes the old caution more appropriate³ and that neither form of caution is fair to the suspect in that both fail to inform him of the dangerous consequences of silence. This will become clear after a discussion of the recent judgment of the Supreme Court of Canada in *R. v. Graham*.⁴

I.

Mr. Graham and a Miss McKenzie⁵ were tried jointly and convicted by a jury of having been in possession of a quantity of jewellery of a value in excess

¹ The 1912 rules may be found in *R. v. Voisin*, [1918] 1 K.B. 531 at 539. For a short history of the rules see the law reports in the Times, January 24, 1969 and Gooderson, *The Interrogation of Suspects* (1970), 48 Can. Bar Rev. 270.

² (1918), 145 Law Times 389.

³ Indeed, in *Trepanier v. The King* (1911), 19 C.C.C. 290 at 296, it was held that if a suspect is told that anything he says might be used in evidence *for him*, that would lead: “him to expect he might obtain some benefit from making the confession” and that the confession would therefore be inadmissible as made involuntarily. Cf. *R. v. Lantin* (1943), 80 C.C.C. 375.

⁴ (1972), 7 C.C.C. (2d) 93. For discussions of *Graham*, see Jack, *The Doctrine of Recent Possession and the Rule Against Hearsay Evidence* (1973), 15 Crim. L.Q. 195; Chasse, *Annotation* (1972), 19 C.R.N.S. 137 and Ratushny, *Statements of an Accused: Some Loose Strands* (Parts I and II) (1972), 14 Crim. L.Q. 306 and 425, at 452-62. For discussions of the doctrine of recent possession, see e.g. Morton, *Burdens of Proof and the Doctrine of Recent Possession* (1959), 2 Crim. L.Q. 183 and Chitty, *Recent Possession, id.*, at 196. For a discussion of the admissibility of previous consistent statements, see Gooderson, *Previous Consistent Statements*, [1968] Cam. L.J. 64.

⁵ Miss McKenzie’s appeal to the S.C. of Can. is discussed below.

of \$50 knowing that it was obtained by the commission of an indictable offence.⁶ The facts were as follows:

The evidence disclosed that [Graham] and his co-accused, Miss McKenzie, were found together by the police in a hotel room where an attache case containing jewellery recently stolen from a shop in Calgary was found behind a chesterfield. The key to the attache case was in Miss McKenzie's possession and when it was found, [Graham] at once said 'I have never seen it before in my life.' [Graham] and Miss McKenzie were both then arrested and as they were leaving the hotel [Graham] told the police officer that he wished to telephone a certain lawyer and that if he could get in touch with him he might then have something further to tell about the matter. The officer replied that they were still conducting the investigation and as soon as possible they would do what they could for him in that regard. Approximately two hours later the same police officer received a message from [Graham] to the effect that he wanted to speak to him, and a short time later two police officers came to the jail where [Graham], in their presence, wrote out a statement . . .⁷

In the statement,⁸ Graham explained that he had a friend in Calgary, Mendelman, who owned a jewellers which had been broken into and from which some jewellery had been stolen. According to Graham, Mendelman had asked him to locate the stolen articles and to offer a reward for their return. Graham stated that he had heard that the jewellery was possibly in Vancouver and that while in Vancouver on other business, he contacted Jean McKenzie "who knew of someone who . . . knew of some stolen jewellery." Graham told McKenzie that he did not wish to have anything to do with any jewellery other than that for which he was looking, that he wished to do everything through a named lawyer and that he wished to have the jewellery in question taken to that lawyer's office in order that the necessary checks could be made to see whether it belonged to Mendelman, the jeweller in Calgary. In his statement Graham further stated that he had no knowledge that McKenzie had the jewellery in the hotel room, that it was not his room and that he had stayed there with her for the night.

At the trial Mendelman testified for the Crown to the effect that he had indeed asked Graham to recover certain jewellery and Graham's statement to the police was "also borne out by the evidence given at the trial by his co-accused", Miss McKenzie.⁹ Graham, himself, did not testify, but defence counsel tried to have the contents of Graham's statement introduced into evidence during the cross-examination of the detective who had taken it. The statement was, however, ruled inadmissible and Graham was convicted. The conviction was appealed on the grounds that the statement should have been admitted.

The Court of Appeal, following its earlier decision in *R. v. Hodd*,¹⁰ held that the statement, made as it was shortly after the arrest but clearly anticipated at the time of the arrest, should have been admitted and, not having been so, a new trial must be ordered.¹¹ The Court was of the view that it was

⁶ S. 313 of the Criminal Code, R.S.C. 1970, c. C-34.

⁷ *R. v. Graham* (1972), 7 C.C.C. (2d) 93 at 95.

⁸ *Id.*, at 95-96.

⁹ *Id.*, at 96.

¹⁰ (1970), 1 C.C.C. (2d) 363.

¹¹ [1971] 2 W.W.R. 45 at 49-50.

improper for the prosecution to rely on the presumption arising from the "unexplained possession" of stolen goods and at the same time refuse to give into evidence the very explanation which had been given for that possession.¹² The Court quoted from their earlier decision in *Hodd* to the effect that:

In order to discharge its burden of proving the prisoner's guilt beyond a reasonable doubt by reliance upon the presumption, the Crown had to prove the facts that made the presumption applicable, i.e. either that [the accused] gave no explanation, or, if he did give one, that it was one that could not reasonably be true. It did not attempt to do that, and so failed to show that the presumption was applicable, and therefore did not discharge the burden of proof resting upon it.¹³

Indeed in *Hodd*, Branca J. A. had been particularly critical of the handling of the case by Crown counsel, who had proved on a *voir dire* that *Hodd's* exculpatory statement was voluntary and then had declined to tender it in evidence. The learned judge, with whose reasons for judgement the two other members of the Court agreed, stated that he was:

firmly of the opinion that the practice that has developed recently of Crown Counsel having a Court hold a *voir dire* to determine the admissibility of a prisoner's statement, without any intention of putting it in, simply to force the prisoner into the box on the *voir dire* and to expose him to cross-examination,¹⁴ is quite improper and must stop.¹⁵

He had earlier stated, no less firmly, that to refuse to tender an explanation and to rely upon the presumption:

would not only be unfair, but would be against all fundamental precepts of justice and contrary to the foundation upon which the presumption of guilt rests, namely, that the accused has given no explanation or an explanation which is not reasonably true.¹⁶

II.

The Crown's appeal from the decision of the British Columbia Court of Appeal in *Graham*¹⁷ was unanimously allowed and the conviction restored. The Supreme Court of Canada was of the view that *Graham's* statement made at the police station was inadmissible. However, three members of the Court concurred in the result but for reasons different from those given by the other four.

Miss McKenzie's appeal against conviction was also allowed by the British Columbia Court of Appeal.¹⁸ It was contended on her behalf that *Graham's* written statement, consistent as it was with her testimony, would

¹² *Id.*

¹³ *R. v. Hodd, supra*, note 10 at 365.

¹⁴ A practice permitted by the decision of the Supreme Court of Canada in *R. v. Declerq*, [1968] S.C.R. 902.

¹⁵ *R. v. Hodd, supra*, note 10 at 373-74 (footnote added).

¹⁶ *Id.*, at 372; see also at 370, where the learned judge said that to put the stamp of approval to that practice would be to permit a conviction on the basis of a misrepresentation of the true facts to the jury.

¹⁷ The Crown appealed the decision in *Hodd* out of time and leave to extend was refused. An "appeal" from that refusal was declined on jurisdictional grounds: [1971] S.C.R. vi.

¹⁸ [1971] 2 W.W.R. 45.

have undoubtedly strengthened her evidence and so the non-admission of the statement unfairly prejudiced her. This argument was accepted by the Court of Appeal who quashed her conviction and directed a new trial. The Supreme Court of Canada unanimously allowed the Crown's appeal and restored the conviction.¹⁹ The members of the Court were all of the opinion that, Graham's statement being inadmissible to help him, it was also inadmissible to help her. Since the decision of the Supreme Court in *McKenzie* adds nothing of relevance to the present discussion, we can ignore it and concentrate on the decision rendered upon the appeal of her co-accused.

In *Graham*, Ritchie J. (with whom Martland, Judson and Pigeon JJ. concurred) began his statement of the appropriate law by saying that: "generally speaking, self-serving statements of accused persons cannot be introduced by means of cross examination of others."²⁰ The learned judge then stated that an examination of the nature and effect of "the presumption of guilt flowing from the possession of recently stolen goods" was necessary in view of the Court of Appeal's decision "that in a case where the Crown relies on the presumption . . . it is fixed with the burden of proving either that the accused made no explanation or if he did it was one that could not reasonably be true."²¹ The learned judge stated that the presumption had been considered by the Supreme Court in a number of cases and that all of them appeared to approve the explanation of the presumption by Lord Reading in *R. v. Schama*; *R. v. Abramovitch*.²² Lord Reading there stated that, on proof of possession of the goods and on proof that they had been recently stolen, "the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the person guilty" and that if "the jury think that the explanation may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to an acquittal."²³

Ritchie J. went on to say:

There is nothing in any of these authorities to suggest that in relying upon the presumption of guilt flowing from possession of recently stolen goods, the Crown has the burden of proving that no explanation has been given by the accused at any time prior to his trial, or that if such an explanation has been given, it could not reasonably be true . . .

In cases such as that of *Schama* where the accused has given an unsworn explanation before the trial and a later explanation from the witness-box in the presence of the jury, I think, with all respect for those who take a different view, that when the Court of Appeal refers to the result 'if the jury think that the explanation may reasonably be true' they are to be taken to be referring to the sworn explanation which the jury has heard and seen delivered in the Court rather than any unsworn statement made before the trial.

There may, of course, be cases in which the prosecution elects to use a declaration made by an accused out of Court as a part of the Crown case and the declaration

¹⁹ (1972), 7 C.C.C. (2d) 112.

²⁰ (1972), 7 C.C.C. (2d) 93 at 97.

²¹ *Id.*

²² (1914), 11 Cr. App. R. 45.

²³ *Id.*, at 49. Besides being applicable on charges of theft and possession the presumption can be used for related offences: *infra*, note 41. There seems no good reason why this direction should not be phrased in the language ordinarily used to describe the burden of proof: e.g. the Crown must prove beyond a reasonable doubt that the explanation is not true, Cf. *R. v. Hart* (1972), 9 C.C.C. (2d) 248.

then becomes evidence for the prisoner as well as against him . . . If in such a case the declaration is capable of being construed as an explanation which might reasonably be true, the accused is, of course, entitled to all the advantages of it.²⁴

Ritchie J. concluded his judgment by saying that Graham's verbal statement which was made at the time the police found the attache case and which was to the effect that he had never seen it, was properly admitted in evidence:

Explanatory statements made by an accused upon his first being found 'in possession' constitute a part of the *res gestae* and are necessarily admissible in any description of the circumstances under which the crime was committed.²⁵

However, the written statement made in the station "was not made contemporaneously with the discovery but rather ample time had elapsed for reflection."²⁶ Ritchie J. went on to say:

In my view if this statement were to be admitted it would mean that any person accused of receiving stolen goods could, after due consideration, devise an explanation which might easily be true for the goods having been found in his possession and could thus avoid the necessity of presenting himself as a witness and be afforded the full benefit of his explanation without being subjected to cross-examination. Such an explanation, is in my view, inadmissible under the general rule in criminal cases that self-serving statements made by an accused cannot be introduced on the cross-examination of third parties . . .²⁷

The second statement being inadmissible, according to Ritchie J., the Court of Appeal was in error in allowing the accused's appeal against conviction. The Crown's appeal was therefore allowed and the conviction restored.

It seems clear from this passage of the judgment that Ritchie J. was not giving due weight to what the British Columbia Court of Appeal had said. That Court did not hold that such a statement was always admissible through the mouth of a witness other than the accused. The Court of Appeal was in effect saying only that the Crown cannot "have its cake and eat it". If the Crown wishes to rely on the presumption, then it may do so if there was no explanation, or, if there was one, then only if the Crown puts it in evidence. If it is put in evidence, the Crown will then, of course, argue that the explanation could not reasonably be true and that the accused should, therefore, be convicted. If, however, the Crown does not wish to rely on the presumption, then the explanation is not admissible, except perhaps, and the Court of Appeal in *Hodd* did not deal with this issue, through the mouth of the accused.

Spence J. gave a separate judgment concurring in the result but for reasons which, in his view, "differed markedly" from those of Ritchie J.²⁸ Spence J. stated that the *Graham* case concerned explanations for the fact of possession given at the time of arrest or shortly thereafter. He stated that he would not be concerned in his judgment with explanations "given a very long time after the arrest" and where there has been "an opportunity to concoct a story".²⁹ In his view, Graham's statement made at the station did not come

²⁴ (1972), 7 C.C.C. (2d) 93 at 98-99.

²⁵ *Id.*, at 99.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*, at 99-100.

²⁹ *Id.*, at 100.

within this latter category. Unlike Ritchie J., Spence J. was of the view that the explanation referred to in the statement of the presumption is the explanation (if any) given at the time of the arrest³⁰ and that any explanation given for the first time at trial is given when the accused "has had opportunity to concoct a story and when he has had an opportunity to obtain the aid of others in such concoction."³¹

Spence J. went on to quote from, and concur with, a passage from the judgment of Branca J. A. in the *Hodd* case to the effect that:

- (a) the Crown may rely on the presumption if there was no explanation, or
- (b) if there was an explanation, the Crown may "conceivably" withhold it and elect to proceed without the aid of the presumption, or
- (c) if there was an explanation, put it into evidence, rely on the presumption and leave it to the jury to decide whether the explanation given might reasonably be true.³²

Spence J. justified this conclusion by saying that to permit the Crown to rely on the presumption arising from the absence of an explanation when an explanation had been made at the time of the arrest or shortly thereafter, would have the result "that the accused is driven to give testimony in his own defence".³³ This result, in the view of the learned judge, was "unpalatable for two reasons":

. . . first, it is, in my opinion, contrary to the firmly established principle in the administration of criminal law that the accused need prove nothing and that each essential ingredient of the offence must be proved by the Crown beyond reasonable doubt; secondly, it submits the accused to an examination upon his previous record not in reference to the particular offence charged but generally ranging over the whole history of his conduct prior to the circumstances which resulted in his arrest on the present charge. This course may be adopted by the Crown upon the slim argument that the Crown is entitled to examine the credibility of accused. Jurors must be warned that they are only to consider evidence so adduced upon the question of the accused's credibility but the effect is inevitably so prejudicial to the accused person that counsel for the accused will but rarely adduce the evidence of his client if that client has a record for previous criminal convictions.³⁴

Spence J. then quoted the provisions of the English Criminal Evidence Act, 1898,³⁵ which normally precludes cross-examination of the accused as to previous convictions or as to his bad character and went on to say:

Unless and until a statutory provision of like import comes into effect in Canada it would seem that the number of instances in which an accused person, despite

³⁰ *Id.*, at 100-104.

³¹ *Id.*, at 100.

³² *Id.*, at 102.

³³ *Id.*, at 104.

³⁴ *Id.* As to cross-examination of the accused on his record and character, see Hartt, "Character Evidence" in *Studies in Canadian Criminal Evidence* (ed. by R.E. Salhany and R.J. Carter) (Toronto: Butterworths, 1972) at 259-92 and Doob and Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused* (1972), 15 *Crim. L.Q.* 88.

³⁵ 61 and 62 *Vict. c. 36*, s. 1(f). See the Eleventh Report of the English Criminal Law Revision Committee (Evidence) 1972, *Cmd. 4991*, for a discussion of this section and for recommendations for changes.

the principle that the accused need prove nothing, must go into the box to establish a defence should be minimized.³⁶

Spence J. concluded his judgment by saying that, in the case at bar, the Crown did not rely on, nor did the trial judge direct the jury as to,³⁷ the presumption arising from the *unexplained* possession of goods recently stolen. The second statement was, therefore, in his view, properly ruled inadmissible by the trial judge and the conviction had to be restored. In other words, Spence J. was of the opinion that the alternative set out above in paragraph (b) of the summary of the judgment of Branca J.A. in the *Hodd* case, was the one applicable in the *Graham* case.

Laskin J. (with whom Hall J. concurred) gave separate reasons, agreeing with the result reached by Ritchie and Spence JJ., but disagreeing in part or in whole, with their reasons. Laskin J. first pointed out that the word "presumption" was too strong and that the word "inference" should be substituted for it.³⁸ The learned judge went on to say that:

No adverse inference can be made from the fact that an accused is found in possession without explanation³⁹ unless the possession was recent, and this may involve a question of law for the presiding Judge according to whether there is any evidence upon which a finding thereon can be made.⁴⁰

He continued by saying:

If the accused has made a pre-trial statement in explanation of his recent possession, it is for the trial Judge to decide as a question of law whether that statement has contemporaneity; and if so, no adverse inference of guilty knowledge⁴¹ is open if the trier of fact, upon an instruction to that effect, should find that the explanation is one that may reasonably be true.

. . . If the ruling is against admissibility, because the explanation was made beyond the time when it would be reasonable to expect the person found in possession to

³⁶ (1972), 7 C.C.C. (2d) 93 at 105. Cf. Jack, *supra*, note 4 at 216-19.

³⁷ The trial judge had directed the jury that, if they did not believe Graham's explanation given at the time of his arrest, then the presumption would not be rebutted and they might, but were not obliged to, convict him.

³⁸ *Id.*, at 108. (See also *R. v. Hart* (1972), 9 C.C.C. (2d) 248 (B.C.C.A.) to the same effect) At 110, Laskin J. said that the misuse of the term "presumption" may lead to injustice because of its strong connotation. See also *R. v. Ortt*, [1970] 1 C.C.C. 223, in which the Ontario Court of Appeal stated that the expression "inference of intent" was to be preferred to the expression "presumption of intent".

³⁹ It is not clear what Laskin J. meant by adding the words "without explanation". Whether or not the possession was recent is, presumably, still relevant even if the accused did make an explanation. If the possession was recent, then any explanation put into evidence by the Crown must be tested by the trier of fact to see whether it is one that may reasonably be true. If the possession was not recent and if the Crown does not wish to tender the explanation, then it will be inadmissible at the option of the defence except, perhaps, to show consistency with the testimony (if any) of the accused at trial or except if the explanation forms part of the *res gestae*. If the possession was not recent but the Crown decides to tender the explanation anyway, then, presumably, the Crown must prove beyond a reasonable doubt that the explanation was not true.

⁴⁰ *Id.*

⁴¹ In his judgment Laskin J. talks only about the inference of guilty knowledge. It is this inference that applies in a case of possession. However in a case, for example, of theft, it should be remembered that the inference arising from the recent possession of stolen goods may help to prove that the accused committed the theft. For other offences to which the presumption may apply, see Tremear's *Annotated Criminal Code* (6th Ed.) at 437.

give an innocent account for it, the Crown may rely on the inference, provided the recency of the possession is established.⁴²

Laskin J. then explained the various alternatives open to the Crown when the accused has made a statement explaining his recent possession:

- (a) He may have the statement go in as part of the Crown's case, thus avoiding any ruling on what I have called contemporaneity; and any inference of guilty knowledge from the fact of recent possession will then depend, other evidence aside, on whether the jury or other trier of fact finds that the statement is one that could not reasonably be true.
- (b) He may decide not to put in the statement and seek to prove his case without the benefit of any inference from the fact of recent possession, so informing the trial Judge.
- (c) . . . he may decide not to put in the statement, intending to seek the benefit of the inference arising upon proof of unexplained recent possession, because of his view that the statement would be inadmissible . . .⁴³

Where alternative (c) applies then the defence, if not aware of the statement, must be informed that it was made and the defence may then adduce it on cross-examination provided that the trial judge rules it to be sufficiently contemporaneous.⁴⁴ Laskin J. then gave a fourth alternative:

. . . Crown counsel deliberately refuses to put in an explanatory statement of the accused which was clearly contemporaneous with his being found in recent possession.⁴⁵

Laskin J. accepts that Crown counsel is entitled to do this, provided that, as in alternative (c), he brings the explanation to the attention of defence counsel so that the latter may introduce it in cross-examination if he so wishes. Laskin J. then states that, subject to this qualification, he would agree with what was stated in *Hodd*.⁴⁶ The difference between Laskin J. and the British Columbia Court of Appeal is that, in the view of Laskin J., Crown counsel can rely on the inference arising from unexplained recent possession even if there is a contemporaneous explanation, provided that defence counsel has been informed of the existence of that explanation and has chosen not to put it in evidence. In the view of the Court of Appeal (and of Spence J.), there could be no reliance on the inference unless the Crown tenders the statement in evidence itself. The difference between the two positions is, I suppose, this: Laskin J. puts a higher premium on knowledge on the part of defence counsel!⁴⁷

After a further short explanation of the inference (an explanation which I confess not fully to understand⁴⁸), Laskin J. considers how these rules should

⁴² *Id.*, at 108-109. Cf. *supra*, note 23.

⁴³ *Id.*, at 109. The letters (a), (b), and (c) have been added by me to make the passage easier to follow.

⁴⁴ *Id.*

⁴⁵ *Id.*, at 109-10.

⁴⁶ *Id.*, at 110.

⁴⁷ Even if the statement is put in on cross-examination of Crown witnesses, it will, in the view of Laskin J., be evidence of the truth of its contents and the accused must be acquitted if it may reasonably be true: *id.* If an accused is unrepresented, Laskin J. would presumably agree that either the judge or counsel for the Crown must explain the rule to him.

⁴⁸ *Id.*, at 110. The part in question is the paragraph which starts "What is important in this area . . ." I do not think, however, that the passage is of particular importance.

be applied to the facts of the *Graham* case. Laskin J. thought that "there was no [appealable?] error in the way the trial judge dealt with the written statement" because "although the matter is a close one, I cannot say that the trial Judge was wrong in the view that he took."⁴⁹ Laskin J. appears to be implying (although it is certainly not all that clear) that, in his view, the trial judge could, upon the facts, properly (or, at least, unappealably) rule that the statement was not made contemporaneously.⁵⁰

There are, however, two difficulties with this conclusion. First, it is not clear, at least on the evidence presented in the reported judgments, that the trial judge ever put his mind to the issue of contemporaneity, as that expression might have been defined by Laskin J.⁵¹ Secondly, it is arguably implicit in the judgment of the Court of Appeal that the statement made in the station was sufficiently contemporaneous.⁵² If this is so, then the Attorney General had no right of appeal on this point, it being a question of fact and not of law.⁵³

Having looked at all the judgments in the *Graham* case, we should now try to compare them. Let us suppose that A, charged with an offence to which the presumption arising from the recent possession of stolen goods is applicable,⁵⁴ makes statement (a) when he was found committing the offence,⁵⁵ statement (b) some time after the arrest and statement (c) "a very long time after the arrest",⁵⁶ all of which statements are exculpatory. If the Crown wishes to put any of these statements into evidence, then they must be proved (or *semble* admitted⁵⁷) to be voluntary⁵⁸ and, if admitted, they can be relied on

⁴⁹ *Id.*, at 111-12.

⁵⁰ For instance, he compares the statement in *Graham* to the statement in *Hodd*, saying that the latter was made "at the earliest possible moment to the arresting officer" and that this was not the case in *Graham*: (*id.*, at 111).

⁵¹ Understandably perhaps, Laskin J. gives little help on what is the test for contemporaneity.

⁵² [1971] 2 W.W.R. 45 at 49. In *Hodd*, Branca J.A. apparently thought that all pre-trial explanations had to be placed before the Court if the Crown wished to rely upon the presumption: (1970), 1 C.C.C. (2d) 363 at 372-73. See also Jack, *supra*, note 4 at 208-209.

⁵³ S. 621 of the Criminal Code, R.S.C. 1970, c. C-34.

⁵⁴ *Supra*, note 41.

⁵⁵ A statement made prior to the time when he is found committing the offence (i.e. A tells his friend B that he just bought a T.V. set for \$500 and A is later found by the police in possession of the T.V. set which had in fact been stolen) will be inadmissible at the option of the accused, because of either the hearsay rule or the self-serving evidence rule. Whether or not the statement would be admissible after the accused had testified that he had bought the T.V. set for \$500 in order to show consistency, will be dealt with below.

⁵⁶ These were the words used by Spence J., at 100.

⁵⁷ *R. v. Bohack* (1972), 6 C.C.C. (2d) 457 at 461. Cf. *R. v. Peterson* (1971), 1 C.C.C. (2d) 197 and *R. v. Regnier* (1955), 112 C.C.C. 79.

⁵⁸ *R. v. Piché*, [1971] S.C.R. 23. Cf. Chasse, *Annotation* (1971), 12 C.R.N.S. 288 at 290.

by the defence as evidence of the truth of the contents.⁵⁹ Why then might the Crown wish to put in an exculpatory statement? Clearly the Crown does not want to prove the truth of its contents — indeed if the jury has any reasonable doubt as to whether the contents are true, the accused must be acquitted. The Crown might, however, wish to put it in because there is clear evidence that it is in part or in whole a lie and, in the words of the British Columbia Court of Appeal:

A lie . . . is cogent evidence of guilt, and a substantial link in a chain of circumstantial evidence.⁶⁰

Secondly, the Crown might wish to put it in “pour que la justice la plus complète soit rendue”⁶¹ and, if so, it is submitted that the trial judge would have no right to exclude it.⁶²

Assuming that the Crown does not wish to put in the exculpatory statements, then, as far as statement (a) is concerned (made when he was found committing the offence) there seems no doubt that it is admissible at the option of the defence and will be evidence of the truth of its contents. According to Ritchie J., such a statement is admissible because it constitutes part of the *res gestae*.⁶³ Whether or not this elastic and much criticized⁶⁴ doctrine renders admissible a statement made at the time when the accused is found committing the offence, need only concern those anxious to keep track of the exceptions to the rule against hearsay. What matters is that it be admissible.

Two problems arise, however, if such a statement is only admissible as part of the *res gestae*.⁶⁵ First, the courts have sometimes taken a very strict view of the requirement of contemporaneity.⁶⁶ So, for example, a statement made after a caution could only be said with difficulty to be part of the *res gestae*. Secondly, it may well be that the doctrine of *res gestae* would not render admissible a statement made by the accused at the time of his arrest, if at that time he was not found committing the offence. In *Graham*, Ritchie J. stated that “explanatory statements made by an accused upon his first being found ‘in possession’ constitute a part of the *res gestae*”.⁶⁷ He did not say whether such statements would also be admissible if made at the time of arrest rather than at the time that the accused was first found in possession.

⁵⁹ See e.g. *R. v. Graham* (1972), 7 C.C.C. (2d) 93 at 98; *R. v. Rosik* (1970), 13 C.R.N.S. 129 at 137 (aff'd by the S.C. of Can. (1970), 14 C.R.N.S. 400) and the authorities there cited. If a statement is partly inculpatory and partly exculpatory, then the Crown is obligated to put in the whole statement if it wishes to have the inculpatory parts in evidence: see e.g. *R. v. Rosik, id.*

⁶⁰ *R. v. Sigmund*, [1968] 1 C.C.C. 92 at 101, strongly criticized by Ratushny, *supra*, note 4 at 312-21.

⁶¹ *Boucher v. The Queen*, [1955] S.C.R. 16 at 21. It would still have to be evidence of the truth of its contents otherwise there would be no point in putting it in at that stage. Cf. *R. v. Storey* (1968), 52 Cr. App. R. 334.

⁶² Cf. *R. v. Rosik, supra*, note 59 at 134 and Ratushny, *supra*, note 4 at 323.

⁶³ (1972), 7 C.C.C. (2d) 93 at 99.

⁶⁴ See e.g. R. E. Salhany and R. J. Carter, *supra*, note 34 at 23-26.

⁶⁵ This is discussed at length by Chasse, *supra*, note 4.

⁶⁶ See e.g. *R. v. Leland* (1951), 98 C.C.C. 337; cf. *R. v. Rattan*, [1971] 3 W.L.R. 930 (P.C.).

⁶⁷ (1972), 7 C.C.C. (2d) 93 at 99.

Neither Spence nor Laskin JJ. discussed the admissibility of the statement made by Graham at the time of his arrest. It is therefore not clear whether they would have agreed with Ritchie J. that an exculpatory statement may be admissible if it forms part of the *res gestae*. This is not unimportant in view of the fact that, according to Spence and Laskin JJ. (as well as the British Columbia Court of Appeal) the Crown may keep out an exculpatory statement provided that no reliance is placed on the presumption. One can speculate, however, that they would have agreed with Ritchie J. that a statement forming part of the *res gestae* is admissible, even if the Crown does not wish to put it in and does not wish to rely on the presumption.

As far as statement (b) is concerned (the statement made sometime after the arrest) it is the view of Ritchie J. that it could not "be introduced in the cross-examination of third parties".⁶⁸ Ritchie J. did not (and in his view did not have to) decide whether a statement, which did not form part of the *res gestae*, could ever be introduced on the cross-examination of third parties. He stated that Graham's statement was made "after ample time had elapsed for reflection"⁶⁹ — would it have made any difference if the statement had not been made contemporaneously with the finding but had also not been made before ample time had elapsed for reflection?

In the view of Spence J., the Crown would have to put statement (b) in evidence unless it wished to forego any reliance on the presumption.⁷⁰ Laskin J. would say that, if the accused's statement was sufficiently "contemporaneous with his being found in recent possession",⁷¹ the defence could introduce it on cross-examination of Crown witnesses or on examination of its own witnesses, but only if the Crown wished to rely on the presumption. Once in, it would then be evidence of the truth of its contents. Laskin J. does not deal with the issue of the admissibility of such a statement if the arrest occurs after the finding. For example, let us assume that the police make a search of the accused's apartment when he is not there and find stolen goods but are unable to arrest him until a week later. Would an exculpatory statement made by him at the moment of arrest be admissible through the cross-examination of third parties? It seems probable that Laskin J. would put such a statement in the same category as a statement made at the time of the finding of the goods.

As far as statement (c) is concerned (the one made a very long time after the arrest), it would certainly be the view of Ritchie and Hall JJ. that such a statement would be inadmissible through the mouth of a third party and that the Crown could rely on the presumption arising from *unexplained* recent possession.⁷² Spence J. did not express any view on this point.

⁶⁸ *Id.*

⁶⁹ *Id.* In view of the fact that Graham's story was worthless unless supported by Mendelman and in view of the fact that Graham probably thought that the police would be able to contact Mendelman before he, Graham, could do so, one must doubt whether Graham would have spent the two hours making up a story. If Graham did make up the story, then it would seem that he must have prepared it prior to his arrest.

⁷⁰ *Id.*, at 100.

⁷¹ *Id.*, at 109-110.

⁷² Cf. *supra*, note 52.

In the *Graham* case, the accused did not testify and therefore his only explanations for possession were those made at the time of, or shortly after, his arrest. If he had testified, would he then have been able to tell the jury about the statement he made at the police station? Prior consistent statements are normally inadmissible because of the self-serving evidence rule. The effect of that rule and its relation to the rule against hearsay are described by Professor Cross:

There is an old general rule under which a witness may not be asked in chief whether he has formerly made a statement consistent with his present testimony. He cannot narrate such statement if it was oral or refer to it if it was in writing (save for the purpose of refreshing his memory), and other witnesses may not be called to prove it. If the statement were proved by the witness who made it, the rule against hearsay, as formulated in this book, would not be infringed because that rule is confined to statements by persons other than the witness who is testifying. If other witnesses were called to narrate the statement, the rule against hearsay would not be infringed if the purpose of placing the statement before the court were to demonstrate the reliability of the witness's present testimony by proving its consistency with his past utterances.⁷³

An example of this rule may be found in *R. v. Pappin*.⁷⁴ The accused, charged with possession of drugs for the purpose of trafficking, was refused permission by the trial judge to testify concerning statements which were made by him to the police at the police station after his arrest and in which he had stated that he did not know that the package taken from him contained drugs. The majority held that the trial judge was right in ruling that the accused's testimony as to his own statement was not admissible because it was self-serving.

To the rule against self-serving evidence, there are a few exceptions, two of which concern us here. First, prior consistent statements which form part of the *res gestae* are, of course, admissible.⁷⁵ Secondly, prior consistent statements are admissible to rebut the imputation of recent contrivance.⁷⁶ In the words of Dixon C. J.:

If the credit of a witness is impugned as to some material fact to which he deposes upon the ground that his account is a late invention or has been lately devised or reconstructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as to the account he gave as a witness, if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or reconstruction. But, inasmuch as the rule forms a definite exception to the general principle excluding statements made out of court and admits a possibly self-serving statement made by the witness, great care is called for in applying it.⁷⁷

Whether or not there is an imputation of recent contrivance will often be difficult to decide. For example, in *R. v. Pappin*,⁷⁸ the facts of which were

⁷³ R. Cross, *Evidence* (3rd ed.) at 193 (footnotes omitted). There is an excellent criticism of the rule by Ratushny, *supra*, note 4, at 425-42. See also Gooderson, *supra*, note 4.

⁷⁴ (1970), 12 C.R.N.S. 287. The case is annotated by Chasse, *id.*, at 288.

⁷⁵ Cross, *supra*, note 73 at 200-201.

⁷⁶ *Id.*, at 201-202. See also Gooderson, *supra*, note 4 at 86-89.

⁷⁷ *Nominal Defendant v. Clements* (1961), 104 C.L.R. 476 at 479; followed and applied in *R. v. Oyesiku* (1971), 56 Cr. App. R. 240, where a prior consistent statement made two days after the event was held admissible.

⁷⁸ (1970), 12 C.R.N.S. 287.

set out above, one member of the Court was of the view that the accused was entitled to give evidence of what he said to the police:

The Crown's case was that the accused knew that the package contained drugs when he had the package in his possession and the Crown led evidence leading to an almost irresistible inference that he did have that knowledge. Therefore, it was implicit in the Crown's case that when the accused said at trial that he did not know what was in the package, he must have recently contrived that evidence.⁷⁹

The view of the majority, on the other hand, was that the evidence was inadmissible because "there was no issue *expressly* raised as to whether the denial of knowledge of the contents of the package had been recently concocted."⁸⁰ There is a marked contrast in these two views. According to the first, prior consistent statements would almost always be admissible when the accused testifies. According to the latter view, they would only be admissible if the Crown expressly raises the issue of recent concoction.⁸¹

In the *Graham* case, there is some suggestion that Ritchie J. thought that the statement made by Graham at the police station would have been admissible if he had testified.⁸² However, the learned judge was not directing his mind to this point. Likewise, Spence J. does not deal with it. Laskin J., however, stated that if Graham:

... made a pre-trial explanation, it may be brought out in his examination but only to show the consistency of his trial evidence, and for no other purpose.⁸³

Notwithstanding these suggestions to the contrary, it can, I think, be assumed that, if Graham had testified, his prior statement would have been admissible only if the Crown had suggested that his testimony was a "recent contrivance".⁸⁴

If Graham had testified, could his testimony have been an "explanation" for the purposes of the presumption? In other words, could the trial judge have then directed the jury that there was a presumption (inference) that Graham knew the goods to be stolen and that, if they did not think that the explanation given by him on the witness stand might reasonably be true, they might convict him, but were not obliged to do so? Also, if Graham had testified, how should the trial judge have then directed the jury about the explanation given by him when he was first found in possession, to the effect that he had never seen the *attache* case before in his life? Ritchie J. stated that the "explanation" to which the presumption is addressing itself is "the sworn explanation which the jury has heard and seen delivered in the Court rather than any unsworn statement made before the trial".⁸⁵ If, in the view of the jury, this explanation may not reasonably be true, then the accused may, but not must, be convicted. However, and this may seem strange, Ritchie J. also

⁷⁹ *Id.*, at 288.

⁸⁰ *Id.*, at 287 (italics added).

⁸¹ See further Ratushny, *supra*, note 4 at 444-52.

⁸² (1972), 7 C.C.C. (2d) 93 at 97 and 99.

⁸³ *Id.*, at 109.

⁸⁴ If the accused is permitted to testify about the contents of prior consistent statements under the "recent contrivance" exception, then the witnesses who took or heard those statements will also be able to testify to support the accused's evidence: see e.g. *R. v. Rosik* (1970), 13 C.R.N.S. 129 at 167 (aff'd by S.C. of Can. (1970), 14 C.R.N.S. 400).

⁸⁵ (1972), 7 C.C.C. (2d) 93 at 98.

added that where "the prosecution elects to use a declaration made by an accused out of Court as a part of the Crown case" then if "the declaration is capable of being construed as an explanation which might reasonably be true, the accused is, of course, entitled to all the advantages of it."⁸⁶ Presumably Ritchie J. would agree that the same result obtains if the defence puts the statement in evidence, either because it is part of the *res gestae* or because the Crown permits the defence to put it in.⁸⁷ The only time that a pre-trial statement put into evidence cannot be treated as an "explanation which might reasonably be true" is, presumably, when it is admitted under the "recent contrivance" exception to the self-serving evidence rule.

Both Spence and Laskin JJ. took a different view from Ritchie J. According to them, the explanation referred to in the presumption is an explanation given prior to the trial.⁸⁸ In the words of Laskin J.:

There is no basis for reliance by the Crown upon the inference of guilty knowledge if either in its case in chief or in cross-examination of its witnesses an out-of-Court statement of the accused has been put into the record and it carries an explanation of his recent possession which may reasonably be true.⁸⁹

There seems no reason to doubt that Laskin J. would have put in the same category an out-of-court statement of the accused admitted into evidence as part of the case for the defence, otherwise than to prove consistency.⁹⁰ If the accused testified then, according to Laskin J.,

. . . if an explanation of his recent possession is part of his testimony, it simply goes into the record as part of his defence referable to the burden on the Crown to prove his guilt beyond a reasonable doubt. If he had made a pre-trial explanation, it may be brought out in his examination but only to show the consistency of his trial evidence, and for no other purpose.⁹¹

If, of course, his pre-trial explanation had already been admitted into evidence, then it would be an explanation which, if it could reasonably be true, would lead to an acquittal.

There is an important difference between the position of Ritchie J. on the one hand and Spence and Laskin JJ. on the other. In Ritchie's view (and this, it should be remembered, is the view of the majority), the jury may not be told to draw any adverse inferences from the fact that the accused remained silent at the time of his being found in possession or at the time of his arrest. If the accused testifies then, according to Ritchie J., any explanation given in his testimony is the one to which the jury should address their attention to see if it might reasonably be true. Only if no pre-trial explanation made by the accused has been admitted into evidence and the accused has not testified,⁹²

⁸⁶ *Id.*, at 98-99.

⁸⁷ Cf. *supra*, note 62.

⁸⁸ *Id.*, at 101-102, *per* Spence J. and at 108-109, *per* Laskin J.

⁸⁹ *Id.*, at 110. In the view of Laskin J., as we saw earlier, the Crown, if it wishes to rely on the presumption, is only obliged to put in those pre-trial statements which are sufficiently contemporaneous.

⁹⁰ E.g. a statement admitted because it was part of the *res gestae* or because it was sufficiently contemporaneous.

⁹¹ *Id.*, at 109.

⁹² It would theoretically be possible for the accused to testify without giving an explanation, but because this would be unrealistic it has been left out of the hypothesis.

may the trial judge point out to the jury that there has been no explanation and that therefore the presumption is applicable.⁹³ On the other hand, in the view of Spence and Laskin JJ.:

- (a) if there has been no pre-trial statement admitted into evidence otherwise than to show consistency, and
- (b) if the Crown has not forfeited its right to rely on the presumption by failing to put in (or, in the opinion of Laskin J., by failing to advise the defence about) a pre-trial explanation upon the admission into evidence of which the defence can insist,

then the judge may instruct the jury that they are entitled to draw an adverse inference from the failure of the accused to make an explanation, provided that the other requirements of the presumption are satisfied (e.g. recentness of possession). The fact that the accused may have given an explanation while testifying does not prevent the trial judge from inviting the jury, if they so wish, to draw this adverse inference.

III.

Having looked at the decision in some detail, I should now like to make some comments on it. It is difficult to avoid a sense of disappointment about the way that the majority in *Graham* dealt with the arguments of the British Columbia Court of Appeal and, particularly, of Branca J. A. Between the two cases of *Hodd* and *Graham*, four members of the Court (Davey C.J.B.C., Tysoe, Bull and MacLean J.J.A.) had expressed their agreement with Branca J. A. that it is quite improper for the Crown to represent to the jury that no explanation has been given when that is "patently untrue".⁹⁴ Surely the views of the British Columbia Court of Appeal, which is by no means a consistently pro-accused Court, deserved more attention than the cursory treatment given them by Ritchie J. in the Supreme Court of Canada,⁹⁵ particularly when those views were expressed so strongly!

Before overruling the decisions in the British Columbia Court of Appeal, perhaps the Supreme Court should have asked itself why there is an absence of English and Australian authorities on the point. The answer appears to be, that, in those jurisdictions, the Crown does usually tender the accused's exculpatory statements in evidence, or, at least, does not object to their elicitation on cross-examination.⁹⁶ In England, counsel for the Crown does, as a matter of course, tender all of an accused's statements made to the police at the time of arrest or when told he will be prosecuted, whether inculpatory or

⁹³ Because of section 4(5) of the Canada Evidence Act, R.S.C. 1970, c. E-10, and because of the rule which puts restrictions upon the right to comment upon silence at the time of the arrest (both of which are discussed below), the trial judge will have to be careful not to say anything more than that there has been no explanation.

⁹⁴ *R. v. Graham and McKenzie*, [1971] 2 W.W.R. 45 at 50, per Bull J.A.

⁹⁵ That part of the judgment of Ritchie J. devoted to answering the objections of the Court of Appeal takes up only two pages in the C.C.C.

⁹⁶ Cf. Chasse, *Annotation* (1971), 12 C.R.N.S. 288 at 290-95.

exculpatory.⁹⁷ According to a Crown prosecutor in the State of Victoria, there is a similar practice in that jurisdiction:

. . . prosecutors have ordinarily tendered all the accused's statements, to which the defence took no exception, whether or not the Crown was assisted partly as an exercise in fairness, and partly I suspect because it is better to have the accused pinned down to a story, even an untrue one, when he enters the witness box. Moreover judges and prosecutors in Victoria have habitually allowed or not objected to the elicitation of self-serving explanations in cross-examination, though I cannot cite authority for the practice. At all events I find your recent decision on recent possession [the decision of the Supreme Court of Canada in *Graham*] somewhat surprising, and without precedent here.⁹⁸

In Canada, attitudes towards an accused's exculpatory statements probably differ across the country. In the words of one prosecutor who practises in Toronto:

. . . it has been the practice of many judges to allow the accused's first statement on being found in possession to be compelled into evidence, although this practice is not reflected in the case law. And some prosecutors take the position that they will not object to the accused's statement given on being found in possession being elicited during cross-examination by the defence if it is understood that the accused is to be called as a witness. There is a feeling that the relevance of such utterances exceeds the danger as to contrived statements, although up until now this has arisen because of concern as to the tactical burden the doctrine of recent possession places on the accused and not because of thoughts of the *res gestae*.⁹⁹

Decisions in the United States appear to support the conclusions of Laskin J. in *Graham*, although, unlike Laskin J. and like Ritchie J., they rely on the *res gestae* exception. According to those decisions an explanation made by an accused "in regard to the property which he is charged with stealing" is admissible "if made at or *about the time* the property was taken or immediately on discovery, as a part of the *res gestae*, but it is not admissible in accused's behalf as *res gestae* where sufficient time has elapsed for him to reflect and fabricate an explanation."¹⁰⁰

Ritchie J. stated that there was nothing in any of authorities to suggest that:

. . . in relying upon the presumption of guilt flowing from possession of recently stolen goods, the Crown has the burden of proving that no explanation has been

⁹⁷ My own experience as well as that of others supports this statement. See also Archbold, *Criminal Pleading Evidence and Practice* (38th Ed.) at para. 1392 and *R. v. Storey*, *supra*, note 61.

⁹⁸ Extract from a letter written by Mr. A. E. Dixon to the author, 18 Sept. 1972. Mr. Dixon went on to say, however, that due to new developments, he felt that the situation called for closer analysis. He expressed concern at the fact that clients of some of the busiest criminal lawyers in Melbourne frequently appear at police stations where they are charged, clutching exculpatory statements. He also stated that the Australian courts appear to be following the view in Canada that if the Crown puts a statement in, then it becomes evidence for the accused (see *Sharpe v. Hotel International*, [1969] V.R. 103). He went on to say that, in view of this, he could not envisage any Australian court forcing a prosecutor to help prove the defence's case where the exculpatory statement appears in any way contrived (e.g. prepared by a solicitor).

⁹⁹ Chasse, *supra*, note 4 at 147.

¹⁰⁰ 22A C.J.S. Criminal Law, para. 667 (italics added). See also 4 Wigmore, *Evidence*, para. 1144 and *Gilbreath v. Texas* (1966), 408 S.W. 2d 513.

given by the accused at any time prior to his trial, or that if such an explanation has been given, it could not reasonably be true.¹⁰¹

But apart from this, all that Ritchie J. said, in answer to Branca J. A., was:

In my view if this statement were to be admitted it would mean that any person accused of receiving stolen goods could, after due consideration, devise an explanation which might easily be true for the goods having been found in his possession and could thus avoid the necessity of presenting himself as a witness and be afforded the full benefit of his explanation without being subject to cross-examination. Such an explanation is, in my view, inadmissible under the general rule in criminal cases that self-serving statements made by the accused cannot be introduced on the cross-examination of third parties because they cannot themselves be tested by cross-examination of the accused person who made them, and their introduction in such manner deprives the jury of the benefit of appraising his credibility from observing his demeanour.¹⁰²

A number of comments should be made about this passage. First, it will be noted that Ritchie J. gives as his reason for disagreeing with Branca J. A. that an accused could, after due consideration, devise an explanation and thus avoid the necessity of presenting himself as a witness. But although this may be a good reason for rejecting the views of Branca J. A., it certainly does not support Ritchie J.'s narrow rule that the only exculpatory statements which are admissible to prove the truth of their contents without the consent of the Crown are those which form part of the *res gestae*. It would seem quite unreasonable to imply, as Ritchie J. does, that any explanation which does not form part of the *res gestae* is inherently unreliable because the maker will have had an opportunity to concoct it.¹⁰³ In other words, the reason given by Ritchie J. for disagreeing with the conclusions of the British Columbia Court of Appeal does not support his own formulation of the rule, but rather supports the formulation of the rule of Spence and Laskin JJ. in their "dissenting" judgments. In the words of the latter, only the absence of an explanation or the presence of an explanation "made beyond the time when it would be reasonable to expect the person found in possession to give an innocent account for it",¹⁰⁴ permits the Crown to rely on the presumption (inference).

Secondly, Ritchie J. does not make any attempt, either here or elsewhere in his judgment, to meet the objections made by Spence J. to an exclusionary rule which has the result of forcing the accused to testify. The objections of Spence J. were set out above¹⁰⁵ and it is submitted that they, at least, deserved consideration. Ritchie J. could, for example, have argued that the police can be trusted to check out explanations given at the time of arrest and only to process through to trial those accused whose explanations are suspect and that, as far as those accused are concerned, the small risk of an innocent person

¹⁰¹ (1972), 7 C.C.C. (2d) 93 at 98. The last part of that sentence (after the words "or that if") are inconsistent with a passage a few lines further on when he states that if an out of Court declaration is put in as part of the Crown case then if "the declaration is capable of being construed as an explanation which might reasonably be true, the accused is, of course, entitled to all the advantages of it": *id.*, at 98-99.

¹⁰² *Id.*, at 99.

¹⁰³ Why is it that confessions are always reliable if voluntary and exculpatory statements always unreliable unless they form part of the *res gestae*?

¹⁰⁴ *Id.*, at 109.

¹⁰⁵ Text accompanying note 34, *supra*.

being convicted because the trier of fact was overly influenced by his criminal record can be ignored.

Thirdly, the judgment of Branca J. A. (as well as those of Spence and Laskin JJ.) was based on the grounds that it is both unfair and dishonest to say that there is no explanation when the participants, other than the finders of fact, know that there is one. It is true that Ritchie J. could reply that the jury are only really being told that there is no admissible explanation and that the jury are often told that there is no evidence on a certain point when all concerned know that there is evidence but that it is inadmissible. Admitting that it is a question of degree, one could still hope that more attention would be paid to answering the objections of five members of the British Columbia Court of Appeal and of three members of the Supreme Court of Canada that such conduct is unfair and dishonest.

Fourthly, it must be doubted whether it is sufficient to say that Graham's explanation was inadmissible because of the general rule that self-serving statements made by an accused cannot be introduced on the cross-examination of third parties. There is a questionable assumption in the proposition, inherent in the judgment of Ritchie J. and stated expressly by a commentator on the decision in *Hodd*,¹⁰⁶ that the doctrine of recent possession is no more than another illustration of:

. . . circumstantial evidence which raises an inference (and not an onus-reversing presumption) which goes to prove the mental element of knowledge or that the accused was the thief.¹⁰⁷

It is submitted that the doctrine of recent possession differs from the ordinary rule relating to circumstantial evidence in two respects. First, it seems to be the only presumption the effect of which is to direct the fact-finder that guilt may be inferred from the fact that the accused remained silent during the trial (in the view of Ritchie J.) or on his arrest (in the view of Spence and Laskin JJ.). It is true, as we shall see below, that where the accused gives an explanation for his conduct for the first time at trial, that may be taken into account in determining what weight to give to it, provided that the jury are told that the accused was under no obligation to speak. But that proviso does not appear to have ever formed part of the doctrine of recent possession. Furthermore, courts have recently expressed a reluctance to permit any adverse inferences to be drawn from silence at the time of arrest.¹⁰⁸ Secondly, being a presumption which is specifically mentioned to the jury, it is likely that it will have more impact than the general explanation to the jury about inferences from circumstantial evidence. One may wonder whether trial judges and juries do not sometimes give far too much weight to the presumption.¹⁰⁹

¹⁰⁶ Chasse, *supra*, note 96.

¹⁰⁷ *Id.*, at 289.

¹⁰⁸ See e.g. *Hall v. The Queen*, [1971] 1 W.L.R. 298 (P.C.); *R. v. Eden*, [1970] 3 C.C.C. 280, noted by Sheppard in (1970-71), 13 Crim. L.Q. 399; Tremear, *supra*, note 41 at 744-45. Cf. *R. v. Heminger*, [1969] 3 C.C.C. 201 at 202.

¹⁰⁹ The presumption arising from recent possession has so far escaped the anti-presumption stance of the United States Supreme Court. For a discussion of the United States decisions, see Mandel, *The Presumption of Innocence and the Canadian Bill of Rights: Regina v. Appleby* (1972), 10 Osgoode Hall Law Journal 405.

Turning away from a discussion of this passage in the judgment of Ritchie J., I would like to consider two other issues. The first concerns the explanation: should the presumption apply if the accused gave no explanation at the time of, or shortly after, his arrest or should it apply if he does not testify during his trial. As we have already seen, Ritchie J. chose the latter alternative although he was also of the opinion that, if a pre-trial statement is made part of the Crown's case and if it could reasonably be true, the presumption also disappears.¹¹⁰ If the accused does not testify and no pre-trial statement is admitted in evidence then, in the view of Ritchie J., the presumption arising from unexplained possession applies.

One would have thought, from a historical point of view, that the presumption was referring to any explanation made at the time that the accused was found in possession because it was not until the end of the 19th century that the accused was able to testify under oath.¹¹¹ However, the accused could give an unsworn statement and none of the classical treatises which talk about the presumption make it clear whether the relevant explanation was the one given prior to trial or at the trial.¹¹² This confusion as to the relevant time seems to persist in England today. However, in the United States it is now clear that the controlling explanation is that made by the accused when his possession of the recently stolen property was first questioned.¹¹³ Prior to the decision in *Graham*, there was also Canadian authority to the effect that:

The explanation with which the Court is concerned . . . is the explanation given by an accused person when he is found in possession of the stolen goods or within a reasonable time thereafter and not the account given by him or on his behalf at his trial.¹¹⁴

As a result of the judgment of Ritchie J. in *Graham*, a court should now only direct the jury in terms of the presumption arising from the *unexplained* possession of stolen goods either (a) when there is no explanation before the court in the form of a pre-trial statement or (b) when the accused has given no explanation in his testimony. This result has a certain common sense appeal in that one would expect an innocent person, found in possession of recently stolen goods, to explain away that possession either at the time of his arrest or by testifying at his trial or on both occasions. However, the "bastard" nature of the presumption can clearly be seen if one imagines a conversation between a trial judge and a jury who are anxious to have explained to them what was meant by "unexplained" possession. If the trial judge were to say that he was directing the jury in terms of "unexplained" possession because

¹¹⁰ See text accompanying note 24, *supra*.

¹¹¹ See *R. v. McDonald* (1938), 70 C.C.C. 17 at 19.

¹¹² See e.g. Best's *Treatise on Presumptions of Law and Fact* (1844), at 304. See also 3 Wigmore, *Evidence*, at para. 2513 and *R. v. Smith* (1862), 3 F. and F. 123 where the accused's pre-trial exculpatory statement was admitted in evidence and he later made a statement to the same effect during his trial.

¹¹³ 52A C.J.S., *Larceny*, para. 110. The fact that no one asked him to make an explanation has been held to be irrelevant: *State v. Martinez* (1968), 442 P. 2d 943.

¹¹⁴ *R. v. Davis* (1959), 30 C.R. 142 at 146 (Ont. C.A.). See also *R. v. McDonald* (1938), 70 C.C.C. 17 and the authorities there cited. In *R. v. Scott* (1919), 31 C.C.C. 399 the Supreme Court of Alberta, Appellate Division, that "there can be little doubt that a Judge or jury would in most cases be affected, and properly so, by the failure of an accused to support by his own testimony an explanation formerly given . . .": *id.*, at 406.

the accused had not testified, he would not only be commenting on the failure of the accused to testify but also inviting the jury to draw adverse conclusions therefrom. Such a direction would clearly contradict the provisions of section 4(5) of the Canada Evidence Act.¹¹⁵ If, alternatively or additionally, he were to say to the jury that the presumption applied because the accused had said nothing when he was found by the police in possession or when he was arrested, this would also be a misdirection. It is true that where an accused gives an alibi or an explanation for his conduct for the first time at trial, the trial judge is entitled to direct the jury to take that into account in determining the weight to give to it. However, he must also tell the jury that the accused was under no obligation to speak at the time of his arrest and that guilt could not be inferred from silence at that time.¹¹⁶ On this question of silence at the time of arrest, the Privy Council has also recently stated.

It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordship's view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation.¹¹⁷

The Court went on to say that it made no difference whether a caution had been administered:

The caution merely serves to remind the accused of a right which he already possesses at common law. The fact that in a particular case he has not been reminded of it is no ground for inferring that his silence was not in exercise of that right, but was an acknowledgment of the truth of the accusation.¹¹⁸

In the United States where it is clear that the controlling explanation is the one given at the time when the accused's possession was first questioned, constitutional attacks were made upon the presumption¹¹⁹ following the decision of the Supreme Court in *Miranda v. Arizona*.¹²⁰ In a footnote in that case the Court said:

In accord with our decision today, it is impermissible to penalize an individual for exercising his fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.¹²¹

¹¹⁵ R.S.C. 1970, c. E-10. Cf. *R. v. Avon*, [1971] S.C.R. 650. It may well be, of course, that the jury draws these adverse inferences anyway: Molot, *Non-Disclosure of Evidence* (1971), 10 Alberta L.R. 45 at 65-67.

¹¹⁶ See *R. v. Itwaru*, [1970] 4 C.C.C. 207. The English cases are discussed in the Eleventh Report, *supra*, note 35 at 16-17. Cf. *Russell v. The King* (1936), 67 C.C.C. 28 (S.C.C.); *R. v. Howarth* (1970), 1 C.C.C. (2d) 546.

¹¹⁷ *Hall v. The Queen*, [1971] 1 W.L.R. 298 at 301. See also *R. v. Eden* and comment thereon, cited *supra*, note 108.

¹¹⁸ *Id.*

¹¹⁹ See e.g. Note (1968), 20 So. Carolina L. Rev. 457 (the decision discussed in that Note was later overruled: *State v. Young* (1968), 217 So. 2d. 567, cert: denied 396 U.S. 853) and Note (1969), 24 Univ. of Miami L.R. 200.

¹²⁰ (1966), 384 U.S. 436.

¹²¹ *Id.*, at 468 n. 37. This passage has been applied in a large number of cases, see e.g. the cases cited in McCormick on *Evidence* (2nd ed.) at 354 n. 4.

Notwithstanding this, the courts have, almost without exception, sustained the constitutional validity of the presumption arising from unexplained possession.¹²²

The final comment that I wish to make concerns the admissibility of pre-trial exculpatory statements (otherwise inadmissible) when the accused testifies. As we have already seen,¹²³ these statements are apparently only admissible under the "recent contrivance" exception to the self-serving evidence rule. It is true that the Court in *Graham* did not deal with this issue and that the point is therefore left open for the future, but its importance merits some discussion here.

If the presumption merely reflects the common sense notion that an innocent person would try to explain as soon as possible why he was in possession of stolen goods, then it seems most unfair to leave the jury with the idea that the accused had never before given the explanation that he gave in the witness box.¹²⁴ This is not a problem unique to the presumption of recent possession. We have already seen that in other areas the trial judge is entitled to tell the jury that, in assessing the credibility of the accused's explanation given at trial, account may be taken of the fact that it had not been given earlier.¹²⁵ If Crown counsel made a similar allegation, any pre-trial consistent statement would then be admissible under the "recent contrivance" rule. If Crown counsel had avoided that implication then, in a jury trial, the trial judge would have to have been informed about the existence of any pre-trial consistent statements so as to avoid making this comment to the jury. However, there is a good chance that the jury may draw that adverse inference without any direction and without knowing that it was not justified. Likewise, a trial judge sitting alone who is unaware of the existence of any earlier statement, may also decide to discount the accused's story told in the witness box because it was (apparently) not given earlier. In the light of this, it is submitted that the courts should re-consider their attitude towards prior consistent statements, at least wherever it is possible for the jury to infer from earlier silence that the accused's story in the witness box should be disbelieved.¹²⁶

Returning to the theme set out in the introduction, I think we can now see why it is that the form of caution currently used is both less honest than the old form of the caution and is also misleading. It is less honest than the form of caution that contained the words "against you" because, as we have seen, an exculpatory statement made by the suspect will normally be inadmissible unless he testifies and, even then, only if his testimony is attacked as a recent concoction. The caution is also misleading in that it does not warn

¹²² McCormick, *id.*, at 277.

¹²³ See text accompanying notes 82-84, *supra*.

¹²⁴ By refusing permission to defence counsel to ask about the pre-trial statement it also prevents the jury from hearing whether or not the police checked up on the validity of such a statement. See e.g. *R. v. McCleghren* (1920), 34 C.C.C. 93.

¹²⁵ *Supra*, note 116.

¹²⁶ See also Jack, *supra*, note 4 at 215-216; Borins, *Confessions* (1958), 1 Crim. L.Q. 140 at 157-59; Gooderson, *supra*, note 4; Study Paper No. 3 (1972) of the National Law Reform Commission recommends the abolition of the restrictions on the admissibility of self-serving statements.