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Book Review: Cases and Materials on Criminal Law and Procedure, Fourth Edition, edited by M. L. Friedland

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Cases and Materials on Criminal Law and Procedure. Fourth Edition. Edited by M. L. FRIEDLAND. Toronto: University of Toronto Press. 1974. Pp. xv, 1021. (\$25.00)

The first thing one notices about the new edition of Professor Friedland's well-known casebook on criminal law and procedure is that there has been a vast increase in size over the last edition, from 701 pages to 1021 pages—a not inconsiderable expansion for a set of materials which, unlike its major competitor,¹ purports to deal only with the general principles of criminal law and does not contain chapters on the better known substantive offences such as murder, assaults, theft and fraud. This said, however, the increase in coverage has been very well used indeed so that this volume, which sells at a special student price, is almost certainly the best casebook in the field available to Canadian law teachers. Indeed, the great improvements over the third edition come as something of a surprise on account of the very modest preface to this new edition which tends to place emphasis on the fact that the basic structure has remained the same. While this is true, the expansions and additions are such that this work now stands on its own as a very complete treatment of the subject area and the usual law teacher's desire to supplement with further personal

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¹ D. A. Schmeiser, *Criminal Law: Cases and Comments* (2nd ed., 1973).

distributions to students can now be, thankfully, resisted without loss of pedagogic effect.

Quite apart from obviously new material such as bail procedures and wire-tapping legislation, much of which shall have to await further development by case-law, many of the well-known areas have been strengthened. This is so, for example, in omissions (with an excellent note from Macaulay and the Indian Law Commissioners of 1837 to remind us that the discovery of "new" solutions may, on occasion, be little more than a re-discovery of excellent legal scholarship from the past) and automatism (by the challenging re-arrangement of provocation within this title to force us, if we can, to distinguish the two phenomena which, on the facts of a given case, can be somewhat closer than the very different legal results which follow a finding of one or the other, would indicate). That a successful plea of provocation only reduces murder to manslaughter while a successful claim of automatism results in the accused going totally free has been judicially dealt with, to date, by what Schroeder J.A., in the Ontario Court of Appeal,² has described as a "wholesome skepticism" towards the automatism defence. But is this enough? There is no doubt that insanity, provocation and automatism create difficult problems within the general principles of criminal liability and this new arrangement certainly highlights the dilemma.

The remarks which follow are some samples of the experience gained with this edition which I used recently in teaching a course in elements of criminal law and procedure in the Centre of Criminology Certificate Programme at the University of Toronto.

Is it correct to say, as the author does,³ that offences over which the magistrate has absolute jurisdiction cannot (sic) be tried by indictment? It is true that offences under section 483 of the Criminal Code will, in practice, almost invariably be tried by a magistrate (Provincial Court judge) but section 485(1) makes it clear that the magistrate can, if he wishes, send such cases for trial following a preliminary inquiry and, more generally, section 426 makes it clear that every superior court of criminal jurisdiction has jurisdiction to try *any* indictable offence.⁴ In addition,

² *R. v. Szmusiak* (1972), 8 C.C.C. (2d) 407.

³ P. 3.

⁴ For an application of this, see *R. v. Holliday* (1974), 26 C.R.N.S. 279 (Alta C.A.).

the excellent schematic⁵ depicting the appellate routes for both summary and indictable offences could be strengthened by changing the description of trials of indictable offences by magistrates under Part XVI of the Code from "Summary Trial" to simply "Trial by Magistrate" since the current description causes needless confusion with summary trials under Part XXIV which are subject to a quite different procedure and appellate hierarchy from Part XVI trials.

The section on certainty in the law contains, understandably, an excerpt from Cartwright J. in *Frey v. Fedoruk*⁶ in which it is made clear that conduct likely to result in a breach of the peace (in this case the actions of a "peeping tom") was no offence in Canada. This is all very well as far as it goes, but leaves students with a somewhat incomplete view of the law in this area because the casebook does not go on to mention the powers of justices to bind people over to be of good behaviour—as might well be the fate of a "peeping tom".⁷ Thus a defendant in Canada, it seems, may content himself that the law is too certain to convict him of such a vague offence, but not so insipid that, for similar conduct, it cannot require him to find sureties for his good behaviour and send him to prison if he fails or declines to do so!

The topic of morality and the criminal law⁸ raises, of course, the whole question of whether, and to what extent, criminality and immorality can or should be co-extensive. Students today tend to be somewhat restive with a discussion which emphasizes, as the casebook does, the narrow areas of homosexuality and abortion in this connection. It seems that one of the penalties of the Judeo-Christian culture is the tendency to regard immorality *per se* and sexual immorality in particular as synonymous. In an age where political expedience and crime have sometimes become blurred and where our consciousness of the ill-defined nature of the boundary between successful business practice and "price-rigging", environmental pollution, false advertising and the manufacture of unsafe products has been heightened by daily revelations in our newspapers, it is clearly time to trade off extra coverage in such well-tilled fields as homosexuality and abortion for some asexual considerations in this area.

⁵ P. 8.

⁶ [1950] S.C.R. 517, casebook, p. 151.

⁷ See *Mackenzie v. Martin*, [1954] S.C.R. 361 which held that common law preventive justice was in force in Ontario and neither the sections of the Criminal Code dealing with this subject (now ss 745 and 746) nor any other section interfered with this jurisdiction.

⁸ Ch. 4.

The law of attempt has always been an area much loved by law professors and much hated by students who have had to grapple with such imponderables as legal and factual impossibility. That this edition went to press before the House of Lords case of *Haughton v. Smith*⁹ could be included (other than as a footnote¹⁰) was a great misfortune, since, although the case could have been decided on classic *Percy Dalton*¹¹ lines, their Lordships have been tempted by way of *obiter dicta*, into casting great doubt on the "empty pocket" attempted theft cases which, until now, we all thought we understood.¹² Can stolen corned beef, although recovered by the police, be allowed to continue to its destination so that the recipients, though not guilty of possessing stolen goods, may be convicted of the "attempt"? The House of Lords would say "No" but the *obiter* now raises a host of new problems. It looks as if the future of generations of criminal law examiners and examinees is secure! Although this chapter worked very well in class, my students were mystified by the inclusion of a section on *agents provocateurs* under "attempts".¹³ Would this subject not be better dealt with in one of the sections in Chapter 2 on police powers, investigation or discretion? In addition, the *Bainbridge* case¹⁴ would be much more appropriately classified under "aiding and abetting" rather than "Incitement", especially since, on the facts, Bainbridge would appear to have played only a minor preparatory role in the criminal enterprise and certainly incited no-one. Far from being a user of others he seems, himself, to have been used.

Chapter 8, entitled The Mental State: Requirements of Culpability, is one of the best in the book making judicious use of United States, English and Canadian material. In particular my students found the ordering of the cases to show the various meanings which the courts have given to "intent" very illuminating. The old case of *Dunbar*,¹⁵ although short, is very instructive and looks set fair for reconsideration by the Supreme Court

⁹ [1974] 2 W.L.R. 1.

¹⁰ P. 339.

¹¹ *R. v. Percy Dalton (London) Ltd* (1949), 33 Cr. App. Rep. 102 (C.C.A.).

¹² An excellent note appears in [1974] Crim. L.R. 305 in which Prof. J. C. Smith, the "High Priest" of the legal and factual impossibility dichotomy is forced to look again at all of the stalwart work he has done in this field stretching back to (1957), 70 Harv. L. Rev. 422.

¹³ P. 340.

¹⁴ P. 350.

¹⁵ (1936), 67 C.C.C. 20 (S.C.C.), casebook, p. 413.

of Canada on the question of the availability of the defence of duress to "participants" in crime who have been coerced by the principal offenders. In a case which was recently before the Ontario Court of Appeal,¹⁶ the majority view in *Dunbar* was given an almost statute-like interpretation by the court which denied the defence to an accused who claimed to have been coerced into being the "getaway" driver in a robbery, an offence expressly excluded from the operation of such excuse by section 17 of the Criminal Code. There may be much to be said for the dissent of Crocket J. in *Dunbar* who would excuse persons who lacked a "common intention".¹⁷ This clearly recognizes that there are special circumstances surrounding the involvement in crime of persons *other* than those who, at common law, would have been described as principals in the first degree, that is, the more remote from the crime, the more need for *mens rea* in its classical sense or, put another way, the more remote from the crime the less application should there be of constructive or notional intent. Hopefully, future editions of Friedland may be able to include a longer, more closely argued judgment on this point than *Dunbar* currently gives us and *Paquette* will present the Supreme Court of Canada with just such an opportunity.

One or two editorial aspects could be improved in future editions, for instance, the result in the *Quick* case¹⁸ reads "Appeal Dismissed" instead of "Appeal allowed and conviction quashed" and more generous spacing on page 151 would make it clearer where the excerpt from an article by Dr Mewett ends and an editorial note leading into the excerpt from *Frey v. Fedoruk*¹⁹ begins. But these are quibbles. In accordance with the now expected high standard of the University of Toronto Press, this casebook is very finely finished and solidly bound—a not inconsiderable feature in an era where one sees more and more students struggling with self-destructing casebooks only five or six weeks into a semester.

As a final comment I would only question, whether fourteen years after the enactment of the Bill of Rights, it is still proper that this potentially important topic in the field of criminal law and, more particularly, criminal procedure, should only have attained the meagre status of "Supplementary Materials" at the end of the book. Is it not time for an organized chapter on the

¹⁶ *R. v. Paquette* (1974), 5 O.R. (2d) 1.

¹⁷ Now s. 21(2).

¹⁸ P. 644.

¹⁹ [1950] S.C.R. 517.

Bill of Rights using some of the more enterprising lower court decisions which have made use of its provisions, such as *Littlejohn*²⁰ and excerpts from the growing Canadian literature on the subject as it relates to criminal procedure?²¹

ALAN GRANT*

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²⁰ [1972] 3 W.W.R. 475.

²¹ Ch. VII. See W.S. Tarnopolsky, *The Canadian Bill of Rights*, (2nd rev. ed., 1975), esp. bibliography, pp. 415-418.

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