## REGINA v. FALLOFIELD

*British Columbia Court of Appeal, Farris, C.J.B.C., Branca and Robertson, JJ.A. August 20, 1973.*

**Appeal — Sentence — Power of Court of Appeal to order discharge on appeal from sentence — Trial Judge refusing discharge — Whether Court has power to order — Cr. Code, ss. 662.1, 601, 614.**

A Court of Appeal has the power, on an appeal from sentence, to allow the appeal and order the accused discharged, since under s. 601 of the *Criminal Code* "sentence" includes a disposition under s. 662.1(1) (enacted 1972, c. 13, s. 57).

[*R. v. Christman* (1973), 11 C.C.C. (2d) 245, 22 C.R.N.S. 338, [1973] 3 W.W.R. 475, folld; *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53, [1973] 2 O.R. 314, 22 C.R.N.S. 350; *R. v. Stafrace* (1972), 10 C.C.C. (2d) 181, 22 C.R.N.S. 365, not folld]

**Sentence — Discharge — Possession of stolen property — Accused 26 years, married with no previous record — Conviction having possible effect on army career — Absolute discharge appropriate — Cr. Code, s. 662.1(1).**

[*Mark Fishing Co. Ltd. v. United Fishermen and Allied Workers' Union* (1968), 68 D.L.R. (2d) 410, 64 W.W.R. 530; *Ebrahimi v. West-*

*bourne Galleries Ltd.*, [1973] A.C. 360; *R. v. Derksen* (1972), 9 C.C.C. (2d) 97, 20 C.R.N.S. 129; *R. v. Stafrace* (1972), 10 C.C.C. (2d) 181, 22 C.R.N.S. 365; *R. v. Campbell* (1972), 10 C.C.C. (2d) 26, 21 C.R.N.S. 273, [1973] 2 W.W.R. 246; *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53, [1973] 2 O.R. 314, 22 C.R.N.S. 350; *R. v. Millen* (1973), 11 C.C.C. (2d) 70, 21 C.R.N.S. 225 [revd 13 C.C.C. (2d) 395]; *R. v. Christman* (1973), 11 C.C.C. (2d) 245, 22 C.R.N.S. 338, [1973] 3 W.W.R. 475, refd to]

APPEAL by the accused from his sentence for possession of stolen property.

*D. S. Lisson*, for accused, appellant.
*M. E. Mortimer*, for the Crown, respondent.

THE COURT:—The two questions in this appeal are:

1. Did the Provincial Court Judge err in refusing to grant an absolute or a conditional discharge, and
2. if the answer is yes, has this Court the power to make such an order.

In my opinion, the answer to both questions is yes.

The appellant pleaded guilty to a charge of being in unlawful possession of some pieces of carpet of a total value of less than $200, knowing the same to have been obtained by theft. The appellant is a corporal in the Canadian Armed Services, aged 26, married, and with no previous record. He and his two co-accused were employed by the Fairfield Moving & Storage Company in Victoria. Apparently the appellant was supplementing his income by what is commonly known as "moonlighting".

In September last, the three men were delivering refrigerators to a new apartment building and took from the premises some left-over pieces of carpeting. The accused had five pieces of carpeting of a value of $33.07. The co-accused likewise had small quantities of carpet.

The police officer who investigated the matter said that, when he attended at the residence of the accused, the accused turned over the five pieces of carpet and stated that he thought they were scraps. The officer also testified that he found the accused to be friendly and co-operative and would agree that "rather than being a thief, was more simply a foolish individual, getting involved in something slightly more serious than a foolish prank but not really a thief at nature".

A warrant officer from the Canadian Armed Services was called and testified that "Corporal Fallofield is one of the best men we have. He is a very good worker — a very conscientious man." He further testified that this conviction "could very possibly affect his future career in the Navy".

At the hearing in the Court below, counsel for the appellant applied under s. 662.1(1) [enacted 1972, c. 13, s. 57] of the *Criminal Code* for a conditional discharge. This section reads as follows:

> 662.1(1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against him, by imprisonment for fourteen years or for life or by death, the court before which he appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or upon the conditions prescribed in a probation order.

The trial Judge declined to grant the discharge, convicted the appellant, and sentenced him to a fine of $100, or in default, 30 days in prison. It is from this disposition of the matter that the present appeal is brought.

The basis of the trial Judge's refusal to grant the discharge was that he did not think that "this was a case of strict liability or that it is a case where the offence being committed was entirely completely unintentional or unavoidable". In doing so, he relied on an extract from Devlin, *Sentencing Offenders in Magistrates' Courts* (1970), which has reference to the provisions of the English legislation.

In my respectful opinion, the trial Judge proceeded upon a wrong principle. There is nothing in the language of the section that so limits its application. In *Mark Fishing Co. Ltd. v. United Fishermen and Allied Workers' Union* (1968), 68 D.L.R. (2d) 410, 64 W.W.R. 530 (B.C.C.A.), beginning at p. 422 there is a review of a number of cases, the gist of which may be gathered from one of the expressions quoted [at p. 423]: "a discretion which is unfettered by law must not be fettered by judicial interpretation of it". To the same effect, in *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 — where the case turned on the application of a clause in the *Companies Act* that authorizes a Court to wind up a company "if the court is of the opinion that it is just and equitable that the company should be wound up". Lord Wilberforce, with whose judgment other learned law Lords agreed, said at pp. 374-5:

> There are two other restrictive interpretations which I mention to reject. First, there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.

Nevertheless, it is useful to review the manner in which the Courts have dealt with cases arising under this section in less than two years since its enactment. In *R. v. Derksen* (1972), 9 C.C.C. (2d) 97, 20 C.R.N.S. 129, where the accused pleaded guilty to a charge of possession of *cannabis* resin, the provincial Court refused to grant an order of absolute or conditional discharge, notwithstanding that counsel for the Crown stated "that the Crown will in future adopt a more tolerant posture in these cases", namely, where the accused had no previous convictions and was of good character and reputation. The Judge held that the discharge provisions should never be applied routinely to any criminal offence.

In *R. v. Stafrace* (1972), 10 C.C.C. (2d) 181, 22 C.R.N.S. 365, the Court of Appeal of Ontario considered that where the appellant had been convicted of theft of two boxes of potato chips, having a value of approximately $10, the property of his employer, it was a proper case for the exercise of the power but that the Court of Appeal had no jurisdiction to grant the discharge.

In *R. v. Campbell* (1972), 10 C.C.C. (2d) 26, 21 C.R.N.S. 273, [1973] 2 W.W.R. 246, the District Court Judge granted an absolute discharge where the accused was charged with taking part in an immoral performance, after having been told that a Judge had recently held — wrongly, as was later decided on appeal — that taking part in a similar performance was not an offence.

In *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53, [1973] 2 O.R. 314, 22 C.R.N.S. 350, the Court of Appeal considered that a conditional or absolute discharge should not be granted in a shop-lifting case, although they agreed that their decision did not mean that shop-lifting could never be an offence in respect of which s. 662.1(1) can apply.

In *R. v. Millen* (1973), 11 C.C.C. (2d) 70, 21 C.R.N.S. 225 [reversed 13 C.C.C. (2d) 395], the accused was granted an absolute discharge where he had pleaded guilty to a charge under s. 236 of the *Criminal Code* of driving with more than 80 mg. of alcohol in his blood.

In *R. v. Christman* (1973), 11 C.C.C. (2d) 245, 22 C.R.N.S. 338, [1973] 3 W.W.R. 475, a conditional discharge was granted by the Alberta Court of Appeal in respect of a charge of theft under s. 294(*b*) of the *Criminal Code*.

In *R. v. Leonard*, an unreported decision dated March 22, 1973 [since reported 11 C.C.C. (2d) 527], of the Ontario Court of Appeal, a conditional discharge was approved on a charge of stealing a licence plate from an automobile.

In *R. v. Hampton*, an unreported judgment of this Court dated February 13, 1973, an absolute discharge was granted in respect of a charge of shop-lifting, on the ground that there was "good reason for thinking that it will be in the public interest to grant a discharge".

In *R. v. Barrett*, an unreported judgment of the Court of Appeal for the Yukon Territory delivered on March 2, 1973, the accused was found guilty of theft by conversion; instead of being convicted, he was granted a conditional discharge. On appeal this disposition was set aside, a conviction was entered and a term of imprisonment was imposed, the Court being of the opinion that the magistrate had overlooked that he could grant a discharge only if he was of the opinion that so to do was not contrary to the public interest.

In *R. v. Tifenbach*, an unreported judgment of this Court dated May 18, 1973, absolute or conditional discharge was refused where the accused had been found guilty on two counts of indecent assault on a male person.

From this review of the authorities and my own view of the meaning of s. 662.1, I draw the following conclusions, subject, of course, to what I have said above as to the exercise of discretion.

(1) The section may be used in respect of *any* offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.

(2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.

(3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

(4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.

(5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or

to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

(6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.

(7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.

(8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

Applying these conclusions, this is a case where it is appropriate to grant an absolute discharge. It is clear that it is in the best interests of the accused that such a discharge be granted. I cannot see that such a grant is contrary to the public interest. I find it difficult to believe that the deterrence of others will be in any way diminished by the failure to render a conviction against this accused.

Accordingly, if this Court has the power so to do I would grant a discharge and I see no point in imposing conditions.

In determining whether this Court has the power to grant an absolute or conditional discharge reference must be made to the following sections of the *Criminal Code*:

> 662.1(1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against him, by imprisonment for fourteen years or for life or by death, the court before which he appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or upon the conditions prescribed in a probation order.
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> (2) Subject to the provisions of Part XIV, where an accused who has not been taken into custody or who has been released from custody under or by virtue of any provision of Part XIV pleads guilty of or is found guilty of an offence but is not convicted, the appearance notice, promise to appear, summons, undertaking or recognizance issued to or given or entered into by him continues in force, subject to its terms, until a disposition in respect of him is made under subsection (1) unless, at the time he pleads guilty or is found guilty, the court, judge or justice orders that he be taken into custody pending such a disposition.
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> (3) Where a court directs under subsection (1) that an accused be discharged, the accused shall be deemed not to have been con-

victed of the offence to which he pleaded guilty or of which he was found guilty and to which the discharge relates except that

(a) the accused or the Attorney General may appeal from the direction that the accused be discharged as if that direction were a conviction in respect of the offence to which the discharge relates or, in the case of an appeal by the Attorney General, a finding that the accused was not guilty of that offence; and

(b) the accused may plead *autrefois convict* in respect of any subsequent charge relating to the offence to which the discharge relates.

(4) Where an accused who is bound by the conditions of a probation order made at a time when he was directed to be discharged under this section is convicted of an offence, including an offence under section 666, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 664(4), at any time when it may take action under that section, revoke the discharge, convict the accused of the offence to which the discharge relates and impose any sentence that could have been imposed if the accused had been convicted at the time he was discharged, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the accused be discharged.

601. In this Part

"sentence" includes a declaration made under subsection 181(3), an order made under section 95, 653, 654 or 655, and a disposition made under subsection 662.1(1), subsection 663(1) or subsection 664(3) or (4); [rep. & sub. 1972, c. 13, s. 52]

603(1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal

(a) against his conviction . . .

(b) against the sentence passed by the trial court . . .

614(1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive,

(a) vary the sentence with the limits prescribed by law for the offence of which the accused was convicted, or

(b) dismiss the appeal.

(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

In *R. v. Stafrace, supra*, the Ontario Court of Appeal held that the power conferred upon a Judge of first instance by s. 662.1 of the *Criminal Code* to order an accused discharged is to be exercised "instead of" entering the conviction and if a conviction is entered there is no power as far as an appellate Court is concerned to enter a discharge unless the conviction can be vacated upon proper grounds. Thus, if the accused proceeds on an appeal from sentence alone there is no jurisdiction to grant a discharge.

In a later case of *R. v. Sanchez-Pino, supra,* the Ontario Court of Appeal held that, if the Court of Appeal considered that the trial Judge erred in law in entering a conviction instead of granting an order for discharge, this would enable the Court of Appeal to quash the conviction and order a new trial. At such a new trial the trial Judge would then consider whether he should make an order for discharge or enter a conviction.

In *R. v. Christman, supra,* the Appellate Division of the Supreme Court of Alberta reached a different conclusion. Delivering the judgment of the Court, Clement, J.A., said in part [at pp. 247-8]:

> I have no doubt that the determination by the trial Court whether or not it will make an order for discharge is a disposition under s-s. (1) of s. 662.1
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> . . . . . .
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> Since it is the "disposition" that is in appeal as a matter of sentence, this Court is empowered to vary the disposition within the limits prescribed by law. Those limits range from an unfavourable exercise of the discretion (as in the present case), to an order directing an unconditional discharge. If the disposition by the trial Court is varied on such an appeal against sentence, the judgment of the Court of Appeal has the same force and effect as a disposition duly made by the trial Court. The consequence is that the conviction recorded against the accused must be expunged, since by statute an order directing a discharge is made *instead* of making a conviction, and in its place the order directing a discharge is recorded and by virtue of s. 614(2) must have the same effect as if made by the trial Court prior to formal conviction.
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> I regret that the foregoing views are at variance with those expressed by the Court of Appeal of Ontario in *R. v. Stafrace* . . . Our divergence appears to arise largely because of the effect above given to the statutory definition of "sentence".

With respect, I agree with the views of the Alberta Court of Appeal and think that they are to be preferred to the views expressed in the decisions of the Ontario Court of Appeal. The line of reasoning that commends itself to me is briefly as follows. Under s. 601 the word "sentence" in Part XVIII of the *Criminal Code* includes a disposition made under s. 662.1(1). A determination by a trial Court before which an accused pleads guilty or by which an accused is found guilty whether or not it will make an order for discharge is such a disposition. Section 603(1)(*b*) confers a right of appeal against a sentence and so against such a disposition. Under s. 614(1) the Court of Appeal may vary a sentence and, applying the reasoning above, may substitute for the decision to convict the accused instead of discharging him an order directing that he be discharged.

Accordingly, it is my opinion that this Court has the power to grant a discharge. The order I would make would be to allow the appeal from sentence, to quash the conviction and to order that the appellant be discharged absolutely.

*Appeal allowed;*
*accused discharged.*