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The Supreme Court of Canada and the Doctrines of Mens Rea

TO THE EDITOR:

I have read with interest Professor Paul Weiler's article "The Supreme Court of Canada and the Doctrines of Mens Rea" [1] and, although I do not share all his views I found it to be a thought-provoking article, obviously resulting from a great deal of research.

I have not had an opportunity to consider in any great detail many of the cases referred to by Professor Weiler but I am familiar with *R.* v. *Trinneer*[2] referred to by him in the footnote which concludes his article on page 363. In this footnote, Professor Weiler states *Trinneer* in effect over-ruled the cases of *Cathro* v. *The Queen*[3] and *Chow Bew* v. *The Queen*[4] and that he believes the result was not linguistically required by the relevant sections.

Actually in my view not only does *Trinneer* not conflict with either *Cathro* or *Chow Bew* but these two cases support *Trinneer.* I am also of the view that the language of the relevant sections is not reasonably open to any other interpretation than that placed on it by *Trinneer.*

Trinneer arose out of the murder of one, Rose Vollet, who died as the result of being stabbed in the course of a robbery in Vancouver on December 19th, 1967. The evidence at Trinneer's trial upon a charge of non-capital murder indicated that he and another youth by the name of Isaac Frank were together at the time Mrs. Vollet was stabbed but that Frank, who was tried separately, did the actual stabbing. The submission of the Crown was that Trinneer was guilty by virtue of the combined effect of sections 202 and 21 of the Criminal Code. The trial judge directed

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[1] (1971), 49 Can. Bar Rev. 280.
[2] [1970] S.C.R. 638.
[3] [1956] S.C.R. 101.
[4] [1956] S.C.R. 124.

the jury to the effect that before they could find Trinneer guilty, it was necessary that they should find that he knew or ought to have known that in carrying out the robbery Frank would probably cause bodily harm to the deceased for the purpose of facilitating the commission of the robbery or flight after its commission but that it was not necessary that they should find Trinneer knew or ought to have known that the death of the deceased was likely to be caused. Trinneer was found guilty of non-capital murder but the Court of Appeal quashed the conviction holding that the trial judge should have directed the jury that before they could find him guilty, they must find that he knew or ought to have known that the deceased's death would be a probable consequence of carrying out the robbery.

The Supreme Court of Canada restored the verdict holding that the jury had been properly instructed and that the wording of section 21(2) did not require foresight of Mrs. Vollet's death as a probable consequence of the robbery before Trinneer could be convicted.

Both *Cathro* and *Chow Bew* arose out of the murder of a merchant by the name of Ah Wing, in Vancouver on January 6th, 1955, and involved sections 260 and 69 of the Criminal Code which were in effect at that time. These sections had been replaced at the time of *Trinneer* by sections 202 and 21, but with the exception that section 260 refers to the intention to inflict grievous bodily injury whereas section 202 refers to the intention to cause bodily harm, the effect of the sections appears to be the same.

The question before the Supreme Court in *Chow Bew* was whether, upon a charge of murder based on section 260(a) or (c) alone or on section 260(a) or (c) when section 69(2) is invoked, proof of intent to kill is necessary. It was held that it was not and it was also held, Cartwright J. (later C. J.), dissenting, that the charge to the jury as to this had been adequate. Cartwright J., held that the charge was such that the jury could reasonably believe they were entitled to convict of murder under section 260(a) and (c) apart from section 69(2) even if the accused had not personally used any force and he expressed the opinion that in light of these two sections:[5]

> . . . it should have been made plain to the jury that, if, in their view, the circumstances proved were not inconsistent with the view that the violence inflicted on Ah Wing was inflicted by Cathro alone, they could find the appellant guilty of murder only if they were satisfied beyond a reasonable doubt of two things, (i) that it was in fact a probable consequence of the prosecution of the common purpose of the appellant and Cathro to rob Ah Wing, that Cathro, for the purpose of facilitating the commission of the robbery, would intentionally inflict grievous bodily injury on Ah Wing or would wilfully stop his

[5] *Ibid.*, at p. 132.

> breath, and (ii) that it was known or ought to have been known to the appellant that such consequence was probable.

This was an adjudication by Cartwright J., on the point in issue in *Trinneer* and whilst he dissented as to the outcome, it was the only such adjudication on this point and there was no disagreement by any other member of the court in connection with these words.

In the *Cathro* case, the accused gave evidence and the defence was that Chow Bew was the one who had actually killed the deceased and that Cathro did not come within the provisions of section 69. The question relevant to *Trinneer* which the Supreme Court had to decide was whether this defence had been put to the jury fairly. Cartwright J., agreed with the majority of the court that there should be a new trial and specifically agreed with the reasons given by Estey J., and Rand J. Rand J., in his reasons reviewed the evidence given by the accused to the effect that there were no weapons and that Ah Wing must have met his death at the hands of Chow Bew. He then went on to say:[6]

> The truth of the whole or any part of this account, which is the only evidence of what actually took place in the shop, was for the jury. It was likewise for them in the event of their believing it and in the light of the evidence as a whole, uninfluenced by over-emphasis on any feature of it, to say whether the infliction of the grievous bodily harm or the strangulation by Bew was a "probable consequence" of the prosecution of the robbery. I am unable to say that the jury could not have found that it was not. They might equally have entertained a reasonable doubt that it was. They could, on the other hand, have come to the conclusion that the act either of that harm or strangulation was such a probability, but that determination was for them.

As to Professor Weiler's belief that the result in *Trinneer* was not lingualistically required by the relevant sections, it may be that this arises out of the reference in section 21(2) to anticipating the "commission of the offence". However, as Cartwright J., in delivering the judgment of the court in *Trinneer* points out:[7]

> The offence contemplated by section 21(2) (that is murder as defined in section 202(a) and/or (d)) was committed when Frank inflicted the bodily harm on the deceased for the purpose of facilitating the robbery or flight. Its character was determined when her death ensued.

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[6] *Supra*, footnote 3, at p. 109.
[7] *Supra*, footnote 2, at p. 644.
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