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*Jan. 24, 25
**Feb. 11

RAYMOND D. WORKMAN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

WILLIAM HUCULAK .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Capital murder—Body of alleged victim never found—Circumstantial evidence—Theory that one of two accused merely an accessory after fact to murder committed by other—Whether sufficient reality to theory to require trial judge to place it before jury.

The two appellants, W and H, were convicted as principals, on a charge of capital murder. The victim's body was never found. The Crown's case relied exclusively on circumstantial evidence, and was based largely on the testimony of one O who testified as to events on the night of the alleged murder as well as to events before and after. A strong motive for murder was proved against W who devised the plan for the killing, but there was no evidence of motive against H who heard the plan on the day the deed was done. The common defence of both accused was that the death had not been satisfactorily proved, and that the Crown's case failed to meet the requirements for a conviction. In the Court of Appeal it was contended, for the first time, that the jury could have found that H was concerned not as a principal but as an accessory after the fact and that the trial judge erred in not putting this defence to the jury. The conviction was affirmed by the Court of Appeal. The accused appealed to this Court where the same submission on behalf of H was repeated.

Held: The appeal of W should be dismissed.

Held further (Ritchie and Hall JJ. dissenting): The appeal of H should be dismissed.

Per Fauteux, Abbott, Martland and Judson JJ.: The jury was correctly instructed that the case put against the accused was that they were both involved as principals, also as to the defence of both accused and as to the credibility of O's testimony. There was ample evidence upon which a jury could find beyond a reasonable doubt that the victim was dead, even though his body had not been found, and that the two accused were guilty as principals in his killing.

With respect to the submission of H, there was no possible ground for any instructions that, on any view of the evidence, H could be an accessory after the fact and not a principal. There could not be found in the

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*PRESENT: Kerwin C.J. and Fauteux, Abbott, Martland, Judson and Ritchie and Hall JJ.

**Kerwin C.J. died before the delivery of the judgment.

record any evidence which would convey a sense of reality in the submission. Failure of counsel to raise the matter does not relieve the trial judge of his duty to place a possible defence before the jury but there must be something beyond fantasy to suggest the existence of the duty.

Per Ritchie and Hall JJ., dissenting as to H's appeal: A trial judge, when addressing a jury in a criminal case, is not under a duty to explore all the remotest and most fantastic possibilities. Even though the alternative defence of H that he was an accessory after the fact rather than a principal relied on improbable suppositions, and even though it was extremely unlikely in the present case that the jury would have found in favour of such a defence, under all the circumstances such a direction should have been given. It could not be said to be impossible that the jury would have found H to be an accessory. The failure of the trial judge to place that defence before the jury entitled H to a new trial even though it was not raised at his original trial.

As to the case of W, the evidence against him was overwhelming.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming the convictions of the accused for capital murder. Appeal dismissed, Ritchie and Hall JJ. dissenting as to H's appeal.

T. J. Nugent, for the appellant Huculak.

F. S. Lieber, for the appellant Workman.

J. W. K. Shortreed, Q.C., for the respondent.

The judgment of Fauteux, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—The two appellants were convicted on a charge of the capital murder of one Frank Willey. Their appeal was dismissed by the Appellate Division of the Supreme Court of Alberta[1]. They appeal to this Court under s. 597(*a*) of the *Criminal Code*. The two accused were separately represented on both appeals. Neither gave evidence at the trial nor did they call any witnesses.

The learned trial judge instructed the jury that the case put against the accused was that they were both involved as principals in the offence charged and, in my respectful opinion, it was not open to objection on that basis, and, in fact, no objection was made by either counsel for the accused. The defence of both accused, also correctly and adequately put to the jury by the judge, was that the death of Frank Willey had not been satisfactorily proved, his body

[1] [1963] 1 C.C.C. 297.

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not having been found, and that the Crown's case, being based largely on circumstantial evidence, failed to meet the requirements for a conviction.

For the first time in the Court of Appeal counsel for Huculak submitted that on one view of the evidence, the jury could have found that his client was concerned not as a principal but as an accessory after the fact and that the learned trial judge erred in not putting this defence to the jury. The same submission was repeated in this Court and this makes it necessary for me to review the evidence.

Frank Willey was a golf professional in the City of Edmonton. At the time of his disappearance he was living in the same house as his wife and two children although there was strong evidence of an adulterous association between Workman and Mrs. Willey. Fourteen months before the disappearance of Willey, Workman had enquired of an Alberta solicitor whether it was possible for a guilty party in an adulterous association to get a substantial part of the property of the opposite party. When he was told that this was a very improbable result, he said to the solicitor "we'll just have to kill him." This was in February 1961. In July 1961, Mrs. Willey sued her husband for a judicial separation and claimed maintenance in the sum of $800 per month. Willey defended the action and also counterclaimed against Workman for damages for enticement and harbouring. This action was settled in January 1962.

Huculak did not come to Edmonton until February 1962. There is no evidence that he had ever known or even met Mrs. Willey or her husband or that he knew his co-accused Workman before he came to Edmonton or that he had any motive for joining in the killing of Willey.

One Paul Osborne, a neighbour of Huculak and one who had known him in Eastern Canada, gave evidence that on April 18, he met Workman and Huculak and had a conversation with them in a car, and that Workman suggested that he would like somebody "worked over." The three met again the following morning and, according to Osborne, Workman was still talking about "working this guy over." He eventually said that he wanted him killed and wanted it to look like an accident. "Knock this guy out, take him out in the country and hit him with another car." No name was mentioned and Osborne said that he immediately refused to have anything to do with the plan. Part of the plan was

to lure the victim to a partially built house somewhere. Workman telephoned Osborne at one o'clock in the afternoon of the same day, April 19, to find out whether his decision was final.

On the same day, Willey received a telephone call for the delivery of a set of ladies golf clubs, not to exceed $225 in value, as a present for the caller's wife. He accepted the order, procured the golf clubs and agreed to deliver them at 9 o'clock that night. There is evidence that on the afternoon of April 19, Workman was at the house where the killing is alleged to have been done and spoke to the painters. The purpose of his enquiry seems to have been to find out how late they would be working. Huculak was not with him. The house was under construction by a builder who employed Workman as a book-keeper.

On this date, April 19, Willey arrived home for dinner with the golf clubs and an extra bag in his car. He had dinner with his wife and family and with his sister and mother, who were visiting from Vancouver. After dinner he left with the car to deliver the golf clubs. A neighbour gave evidence of the presence of two cars and two men at a certain house. The two cars were identified as being white in colour. Willey owned an Oldsmobile which had a white body and brown top, and Workman had hired a white Pontiac a few days before April 19. It was in this house, which was the one which Workman had visited during the afternoon, that the police found a lot of blood, even after cleaning-up operations.

Between 9 and 10 on the same evening, April 19, Workman brought a tire to a service station. This tire came from Willey's car. At about 3 a.m. the following morning, he came back to this service station and picked up the wrong tire and rim. Instead of picking up the one from the Oldsmobile that he had left, he picked up one from a Cadillac belonging to another customer. This tire and rim were later found on Willey's car. There is a clear inference from this evidence that Workman at least was in possession of Willey's car when this tire and rim were removed and replaced by another not belonging to the car.

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To resume with Osborne's evidence, he said that about 10 p.m. on the evening of April 19, he received a telephone call from Workman who was enquiring about the whereabouts of Huculak:

Q. What did he say?

A. He asked me if I had seen Mr. Huculak.

Q. What did you say?

A. I said no.

Q. Anything else?

A. Oh, he said something about—I asked him what was the matter and he said everything went haywire. I said, you don't mean to tell me you went through with that thing and he said yes.

Q. Did you—did he ask or say anything more?

A. He asked me if I would phone around and see if I could get hold of Mr. Huculak.

Q. And what did you say?

A. I said I would, yes.

Q. Did you?

A. No sir I didn't.

Then, at 11.30 p.m., in response to a telephone call from Mrs. Huculak, Osborne and his wife went to the apartment where the Huculaks lived and which was close to where the Osbornes lived. He and his wife sat up with Mrs. Huculak until about 3 a.m. when Workman and Huculak came to the apartment together. Osborne noticed nothing unusual about Workman's appearance but he did notice that Huculak was very disturbed.

Well, Mr. Huculak was in pretty rough shape. I took him in the washroom and calmed him down. He kept mentioning about this guy's eyes sticking out of his head and something hanging out of the back of his head and he was just all shook up.

Workman also joined them in the bathroom. When they returned to the living-room Workman told Huculak to get rid of his shoes, which were very muddy. Mrs. Huculak cleaned them. Osborne said that the two stayed for about an hour and then went out again. On being asked whether either of them said anything before leaving, Osborne replied:

Yes, Mr. Huculak said there was a body in a shed somewhere and they had to go out and bury it.

Osborne had a further conversation with Huculak over the Easter week-end. He was not sure whether it was Satur-

day or Sunday. April 20 was Good Friday. This is the conversation that he reported with Huculak:

A. He mentioned something to me about something coming off a wrench or something, some bandages or tape or something that flew off.

Q. Did he say when it flew off or what caused it to fly off?

A. He said when the person was hit some tape or something on the end of this wrench flew off.

Q. Did he say anything else at this time?

A. Something about they would have to—if I remember correctly, they would have to go back to this house and get it, something to that effect.

Q. Back to the house?

A. To get this tape or whatever it was, I wasn't too clear on it, I wasn't listening to him too good.

Q. Did he say anything about the burying which they had talked about before?

A. Oh yes, he said they couldn't get this bury deep enough into the ground or something, the ground was frozen and they couldn't bury him deep enough.

On being brought back to the night of April 19 or the early morning of April 20, Osborne reported one further item of conversation—that they had to go back and clean up this house. Osborne also said that several days later Workman brought a Pontiac car into his driveway for the purpose of borrowing a hose to wash out the trunk of the car, and that a few days later he went for a drive in the country with Workman in the Pontiac. They turned off the main highway after driving south for about 12 miles and drove another 15 or 16 miles into the country. Workman stopped the car and told Osborne to drive down the road and come back in about 20 minutes to pick him up. Osborne said he did this but Workman said nothing about the purpose of the trip. He also said that at some time Huculak expressed a fear about some woman talking to the police about the night in question and that Workman said that he was not worried about that.

Rose Francis, the woman with whom Osborne was living and who passed as Mrs. Osborne, also gave evidence of the return of Huculak and Workman to the Huculak apartment about 3 a.m. in the early morning of April 20. She said that Huculak looked scared and that his wife cleaned his shoes, that Osborne, Workman and Huculak were all in the bathroom together and that Workman and Huculak remained in the apartment until about 4.30 a.m. She did not hear the

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conversation in the bathroom. She did hear Workman say that he was glad that it was a holiday week-end so that he could go back and clean the walls.

It is apparent that if the jury believed Osborne, there was a very strong circumstantial case against both the accused on a charge of capital murder. The learned trial judge gave clear directions on the question of credibility and pointed out that Osborne's criminal record went to the question of credibility. He also raised the question why it was that when Workman called about 10 p.m., he was enquiring about the whereabouts of Huculak if Workman and Huculak had been working in concert.

The defence submitted by counsel for Workman and put to the jury by the learned trial judge as applicable to both defendants was based upon what was alleged to be an infirm circumstantial case. With evidence of the kind that I have outlined and with the jury adequately charged on Osborne's evidence, including its weaknesses, I can see no possible ground for any instruction that, on any view of the evidence, Huculak could be an accessory after the fact and not a principal. Before this could be done, there must be found in the record some evidence which would convey a sense of reality in the submission: *Kelsey v. The Queen*[1]. Failure of counsel to raise the matter does not relieve the trial judge of his duty to place a possible defence before the jury but there must be something beyond fantasy to suggest the existence of the duty. The Court of Appeal, in the exercise of its function under s. 583A(3)(*b*) of the *Criminal Code,* in dismissing the appeals found no error on this ground and I respectfully agree.

There was a full review of the evidence in the charge of the learned trial judge. It was again reviewed in the reasons of the Court of Appeal and, finally, before this Court. My conclusion is firm that there was ample evidence upon which a jury could find beyond a reasonable doubt that Willey was dead, even though his body had not been found, and that the two accused were guilty as principals in his killing.

While there might be a question of the admissibility against Huculak of evidence of the solicitor's conversation with Workman in February 1961, it was admissible against Workman for the reasons given by the Court of Appeal.

[1] [1953] 1 S.C.R. 220, 226, 105 C.C.C. 97, 16 C.R. 119.

Huculak was not identified with any motive or animosity that Workman may have entertained and this was plain to be seen. But on the evidence of Osborne, which the jury must have accepted, Huculak was actively involved in the plan and in its execution. It is for this reason that I would hold that there was no substantial wrong or miscarriage of justice in the judge's failure to instruct the jury that the solicitor's evidence was admissible only against Workman.

The appeals of both appellants must be dismissed.

The judgment of Ritchie and Hall JJ. was delivered by

RITCHIE J. (*dissenting as to Huculak's appeal*):—This appeal is brought pursuant to the provisions of s. 597A of the *Criminal Code* from a judgment of the Appellate Division of the Supreme Court of Alberta[1] affirming the conviction of both the appellants on a charge of the capital murder of Frank Willey.

The evidence has been reviewed in the reasons for judgment of my brother Judson, which I have had the advantage of reading, and it would be superfluous for me to repeat it.

The main argument advanced by Mr. Nugent on behalf of the appellant Huculak was that the evidence against his client was not necessarily inconsistent with his having been an accessory after the fact rather than a party to the murder, and although this defence was not raised by counsel at the trial the failure of the trial judge to direct the jury with respect to it nevertheless constituted a miscarriage of justice entitling Huculak to a new trial.

It appears to me to be established that the failure of a defence counsel to advance an alternative argument does not relieve the judge from the duty of directing the jury with respect to it if there is any evidence to justify such a direction. This is supported by the decision of Viscount Simon in *Mancini v. Director of Public Prosecutions*[2], and the decision of Lord Reading in *Rex v. Hopper*[3], is to the same effect.

In this Court, in the case of *McAskill v. The King*[4], Duff J., as he then was, had occasion to say:

> The able and experienced judge who presided at the trial properly directed the attention of the jury to the defence as it was put before them by counsel for the prisoner; and having done this, he did not ask

[1] [1963] 1 C.C.C. 297.
[2] [1942] A.C. 1 at 7, 28 Cr. App. R. 65.
[3] [1915] 22 K.B. 431, 11 Cr. App. R. 136.
[4] [1931] S.C.R. 330, 3 D.L.R. 166, 55 C.C.C. 81.

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them to apply their minds to the further issue which we have just defined. *It was the prisoner's right, however, notwithstanding the course of his counsel at the trial to have the jury instructed upon this feature of the case.* We think, therefore, that there must be a new trial.

The position of a Court of Appeal in such circumstances appears to me to be well described in the decision of Lord Tucker speaking for the Judicial Committee of the Privy Council in *Bullard v. The Queen*[1]:

> In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. *Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible. . . .* Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached. Their Lordships are accordingly of opinion that the verdict of guilty of murder cannot stand in this case.

The same considerations, in my opinion, apply wherever it can be said that any alternative defence could properly arise on the facts in a murder case but it must be borne in mind that when non-direction by a trial judge is made a ground of appeal it is to be considered subject to the conditions outlined by Fauteux J. in *Kelsey v. The Queen*[2], where he said:

> The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance.

I am satisfied that there is ample evidence in the record before us to justify the jury in finding that Willey was killed, that Workman had a motive for killing him and that he did in fact cause him to be lured to a partially-built house where he was killed. The circumstances are also undoubtedly consistent with Huculak having taken part in the murder, but the narrow question to be considered is whether it can be said with certainty that a rational jury, after being instructed in the manner now suggested, would necessarily have concluded, in light of all the evidence,

[1] (1957) 42 Cr. App. R. 1 at 7.
[2] [1953] 1 S.C.R. 220 at 226, 105 C.C.C. 97, 16 C.R. 119.

that these circumstances were entirely inconsistent with Huculak's participation being limited to assisting in the disposal of the body and the cleaning up of the mess occasioned by the murder.

While it is appreciated that motive is not a necessary ingredient in the crime of murder, it nevertheless appears to me that the strong motive proved against Workman who devised and propounded the plan for killing Willey, and the complete absence of any evidence of motive for murder on the part of Huculak who heard the plan for the first time on the morning of the day the deed was done, place the two appellants in somewhat different categories and that this is something which can properly be taken into consideration in determining whether a separate defence should have been suggested to the jury by someone on Huculak's behalf. Save as hereinafter set forth, no attempt was made to sever the defences in any way.

The learned trial judge, during the course of his instructions to the jury as to the law, made the following statements:

> 1. The onus is on the Crown to establish to you, to your satisfaction, first, that Frank Willey is dead; secondly, that Frank Willey came to his death as a result of the actions of these two accused or one of them, or either of them, and that when the act causing death was carried into effect it was carried into effect as part of a planned and premeditated scheme to kill Frank Willey.
>
> 2. You must consider the evidence to determine the question of whether or not he came to his death through the criminal act or acts of the two accused in concert or either one of them by themselves.
>
> 3. If, however, you are satisfied that the death came about, that it was done by the accused or one or either of them, yet you are not satisfied of the planning and deliberation but you were satisfied that the two accused or either of them intended to kill but without the planning and deliberation then the verdict would be of murder, not capital murder . . . What is more, and I should make it clear to you, that if in your consideration of the evidence there were doubts in your minds as to whether one or the other of the two accused has the essential elements proved against him but that you are satisfied that it has been proved against the other, you can only convict the one.

In my view, these very proper instructions to the jury cannot be considered as a substitute for an express direction as to the defence that Huculak was an accessory after the fact if it can be said, to use the language of Fauteux J. in the *Kelsey* case, *supra,* that there exists "in the record some evidence or matter apt to convey a sense of reality" to such a defence.

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I think it must be accepted that the jury believed the evidence to the effect that on the morning of the 19th of April Workman proposed that Huculak and Osborne should join him in carrying out his plan to kill a man which Osborne refused to do, that Willey was lured to an empty house which two men were seen to be leaving at 9:45 p.m. in cars not dissimilar to Willey's Oldsmobile and Workman's rented Chevrolet, and that about 15 minutes after the murder had been committed Workman was telephoning to Osborne telling him that everything had gone "haywire" and asking him if he could "get hold of Huculak".

In my view, the question of whether or not a jury could properly have accepted the theory that the circumstances were not inconsistent with Huculak's involvement being limited to the role of an accessory after the fact must depend in large measure upon the weight to be attached to this telephone conversation, which was reported by Osborne as follows:

Q. From whom did you get the call?
A. From Mr. Workman.
Q. The accused?
A. Yes sir.
Q. What did he say?
A. He asked me if I had seen Huculak.
Q. What did you say?
A. I said no.
Q. Anything else?
A. Oh, he said something about—I asked him what was the matter and he said everything went haywire. I said you don't mean to tell me you went through with that thing and he said yes.
Q. Did you—did he ask or say anything more?
A. He asked me if I would phone around and see if I could get hold of Mr. Huculak.
Q. And what did you say?
A. I said I would, yes.
Q. Did you?
A. No sir, I didn't.

The only comment on this conversation made to the jury by anyone was the following observation by the learned trial judge:

Now one of the things that struck my mind as being a matter to consider in weighing the entire evidence of Osborne, and this is no reflection of his credibility, but on the basis of it being true one wonders why he gave evidence to the effect that at something like 11 o'clock at night on the evening of the 20th of April 1962 he had a phone call from Workman

in which Workman said something in effect that things had gone haywire. He wanted to know where Huculak was and Workman asked him, he didn't go through with that thing and he said yes. The query comes to mind that if Workman and Huculak had been working in concert in carrying out this plan just why it would be that Workman wouldn't know where Huculak was at that time of night when it is remembered that they both ultimately came into Huculak's suite at something after 3 o'clock in the morning. It just leaves a query in one's mind.

It is obvious that in this passage where the learned judge said "and Workman asked him, he didn't go through with that thing . . ." he meant "and Osborne asked him . . ." and it is equally clear from the evidence that the call was at 10 o'clock on the 19th and not at 11 o'clock on the 20th.

It is now suggested that the trial judge should not have stopped at telling the jury that this evidence left "a query" in his mind but that he should have gone on to point out that it was open to them to reach the conclusion that Huculak was an "accessory after the fact" rather than a principal in the murder, if they took the view that the other evidence, viewed in the light of this telephone conversation, was not inconsistent with Huculak, having backed out of the plan, failing to turn up at the time of the murder and subsequently having been persuaded by Workman to help in the disposal of the body.

The question, of course, is whether some such instruction should have been given by the learned trial judge and whether if it had been given a rational jury could have concluded that the whole evidence viewed in this manner was not entirely inconsistent with Huculak being an accessory after the fact rather than a party to the murder.

Osborne's story of the return of Huculak and Workman to the Huculak apartment at 3 o'clock, and of Huculak's wild statements about "a guy's eyes sticking out of his head and something hanging out of the back of his head" are fully reported in the reasons of my brother Judson. It will be noted that Huculak spoke of a body being in a shed somewhere and that they had to go out and bury it, and also that there was talk of going "back" to the scene of the crime, and a statement by Huculak which was not made until a day or two after the murder that they would have to go there to get "some bandages or tape or something that flew off" the end of the wrench when the person was hit.

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In order to find that there is any substance to the defence now suggested, it must be accepted that the muddy condition of Huculak's shoes at 3 o'clock in the morning and his description of the dead body which "they had to go out and bury" were not inconsistent with his role being limited to assisting the murderer to escape detection by getting rid of the body and the evidence of violence, and that his knowledge of the bandages or tape "that flew off" the wrench which he did not communicate to Osborne until much later was something which Workman had told him about when they were cleaning up at the scene of the crime. It is also necessary to accept Mr. Nugent's submission that the heel mark in the blood on the floor of the partially-built house which the police expert stated could have been made by Huculak's shoe might have been left when Huculak went there to clean up the mess.

While I am bound to say that these suppositions are improbable this does not answer the question of whether the jury should have been instructed on this feature of the case. The question is by no means an easy one, but I have come to the conclusion that under all the circumstances such a direction should have been given in this case.

I do not wish to be construed as saying that a trial judge, when addressing a jury in a criminal case, is under a duty to explore all the remotest and most fantastic possibilities but I do think that in a capital case where the two accused are jointly charged and no independent defence has been advanced to the jury on behalf of the one of them who has not been shown to have any motive for the crime then it does become necessary for the trial judge to scrutinize the circumstances with additional care in a conscious effort to insure that the jury has been informed of all defences for which any support can be found in the evidence. If under such circumstances some such defence should escape the notice of the trial judge then, in my view, the accused is entitled to a new trial.

Although I am of opinion that it is extremely unlikely in the present case that the jury would have found Huculak to be an accessory rather than a principal, it cannot be said

to be impossible. In this regard, I would adopt the language employed by Humphreys J. in *Rex v. Roberts*[1], where he said:

> The Court . . . cannot delve into the minds of the jury and say what they would have done if the issue had been left open to them.

In view of the above, I would allow the appeal of William Huculak, set aside his conviction and direct a new trial.

As to the case of Workman, I agree with the Court of Appeal that the evidence against him is overwhelming and I would dismiss his appeal.

Both appeals dismissed, RITCHIE *and* HALL JJ. *dissenting as to H's appeal.*

Solicitors for the appellant Huculak: Main, Dunne, Nugent & Forbes, Edmonton.

Solicitors for the appellant Workman: Lieber, Romaine & Koch, Edmonton.

Solicitor for the respondent: The Attorney-General for Alberta.