Regina v. R.T.
[Indexed as: R. v. T. (R.)]

10 O.R. (3d) 514
[1992] O.J. No. 1914
Action No. 668/90

Court of Appeal for Ontario,
Goodman, Galligan and Doherty JJ.A.
September 15, 1992

Charter of Rights and Freedoms -- Right to counsel -- Accused advised by duty counsel and Crown counsel to retain counsel before pleading guilty to serious offences -- Accused refusing to do so -- Court not obliged to force counsel on accused who clearly wished to be unrepresented -- Accused's right to counsel not violated -- *Canadian Charter of Rights and Freedoms*, s. 10(b).

Charter of Rights and Freedoms -- Fundamental justice -- Full answer and defence -- Crown not providing accused with statements made by accused to police officers before accused pleaded guilty to serious offences -- Failure of Crown to make full disclosure (assuming existence of duty to do so before guilty plea) not affecting accused's right to make full answer and defence as undisclosed material would not have affected his decision or validity of his plea -- *Canadian Charter of Rights and Freedoms*, s. 7.

Criminal law -- Trial -- Plea -- Accused pleading guilty to serious offences after speaking to duty counsel but without being represented by counsel -- Plea being voluntary, unequivocal and informed -- Alleged failure by trial judge to conduct adequate factual inquiry before accepting plea irrelevant given validity of plea and non-existence of any defence on facts.

Criminal law -- Sentence -- Aggravated assault -- Unlawfully causing bodily harm -- Total sentence of 12 years' imprisonment for three counts of aggravated assault and one count of unlawfully causing bodily harm reduced on appeal to 10 years.

The accused pleaded guilty in Provincial Court to three counts of aggravated assault and one count of unlawfully causing bodily harm. He was not represented by counsel when he entered his pleas, although he had spoken to duty counsel. Crown counsel suggested a sentence of seven to ten years' imprisonment. The trial judge imposed a total sentence of 12 years' imprisonment. The accused appealed the conviction and the sentence.

Held, the appeal from conviction should be dismissed; the sentence appeal should be allowed.

An appellate court will permit the withdrawal of a guilty plea and quash the consequent conviction where there are valid grounds for doing so. To constitute a valid guilty plea, the plea must be voluntary, unequivocal and informed. A guilty plea will be presumed to be voluntary unless the contrary is proven. The accused was not a person of limited intelligence, there was no evidence of any mental disorder which could have impaired his decision-making powers, he was not under the effect of any drug, and he was not offered any inducement. The pleas entered by him were voluntary and clearly unequivocal. The accused understood that he would be convicted on the basis of his pleas, and also knew, before he

pleaded guilty, that the Crown would seek a prison term of seven to ten years. The accused was fully aware of the effect and consequences of his pleas.

It was not necessary to decide whether the *Canadian Charter of Rights and Freedoms* has altered the obligation on a trial judge to make inquiries as to the validity of a guilty plea, or whether the inquiry conducted in this case was adequate according to a Charter standard. Even if the inquiry in this case was inadequate, the failure to conduct a proper inquiry could only support a quashing of the consequent conviction if there was reason to doubt the validity of the pleas. That was not the case here.

Although the trial judge's factual inquiry into the charges revealed that the accused was intoxicated at the time of the offences, self-induced intoxication could provide a defence to the charges only if it was so extreme as to involve an absence of awareness akin to a state of insanity or automatism. Nothing put before the trial judge suggested the extreme level of intoxication necessary to put the accused's state of mind, as it related to the intention to apply force to the victim, in issue. If the trial judge had conducted a further inquiry into the state of the accused's intoxication, that inquiry would have confirmed that no defence of intoxication was available to the accused.

The fact that the trial judge did not insist that the accused be represented by counsel did not deprive him of his right to counsel contrary to s. 10(b) of the *Charter*. There is no obligation on a court to force counsel on an accused who clearly wishes to be unrepresented. The accused was aware that he had the right to counsel and that duty counsel thought it advisable that he retain counsel. He chose not to do so.

Assuming, without deciding, that there was a constitutional obligation on the Crown to make full disclosure to the accused of all relevant material in its possession before the accused pleaded guilty, the Crown's failure to provide the accused with transcripts or copies of statements that he gave to the police could impact on the accused's right to make full answer and defence only if the material that was not disclosed could have effected the accused's decision to plead guilty, or if the undisclosed material undermined the validity of the pleas or the propriety of the convictions. That was not the case.

The accused had five prior assault-related convictions. The offences in this case revealed shocking brutality and cruelty, and demonstrated a persistent course of conduct involving the domination and terrorization of a weaker and apparently psychologically dependent person. However, the position taken by the Crown at trial, the accused's obvious remorse, his plea of guilty at the first opportunity, and his genuine desire to avoid further trauma to the victim, rendered 10 years a fit total sentence. The sentence should be reduced accordingly.

APPEAL from conviction for aggravated assault and unlawfully causing bodily harm and from sentence.

R. v. Stinchcombe, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, 8 C.R. (4th) 277, 83 Alta. L.R. (2d) 193, [1992] 1 W.W.R. 97, 130 N.R. 277, consd

Other cases referred to *Adgey v. R.*, 1973 CanLII 37 (SCC), [1975] S.C.R. 426, 13 C.C.C. (2d) 177, 23 C.R.N.S. 298, 39 D.L.R. (3d) 553; *Boykin v. Alabama*, 395 U.S. 238 (1969); *Brady v. United States*, 397 U.S. 742 (1970); *Brosseau v. R.*, 1968 CanLII 59 (SCC), [1969] S.C.R. 181, [1969] 3 C.C.C. 129, 5 C.R.N.S. 331, 2 D.L.R. (3d) 139, 65 W.W.R. 751; *Korponay v. Canada (Attorney General)*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41, 65 C.C.C. (2d) 65, 26 C.R. (3d) 343, 132 D.L.R. (3d) 354, 44 N.R. 103 sub nom. *R. v. Korponay; McCarthy v. United States*, 394 U.S. 459 (1969); *Perka v. R.*, 1984 CanLII 23 (SCC), [1984] 2 S.C.R. 232, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113, 13 D.L.R. (4th) 1, [1984] 6 W.W.R. 289, 55 N.R. 1; *R. v. Bernard*, 1988

CanLII 22 (SCC), [1988] 2 S.C.R. 833, 45 C.C.C. (3d) 1, 67 C.R. (3d) 113, 90 N.R. 321; *R. v. Clarkson*, 1986 CanLII 61 (SCC), [1986] 1 S.C.R. 383, 25 C.C.C. (3d) 207, 19 C.R.R. 209, 50 C.R. (3d) 289, 26 D.L.R. (4th) 493, 69 N.B.R. (2d) 40, 177 A.P.R. 40, 66 N.R. 114; *R. v. Jobidon*, 1991 CanLII 77 (SCC), [1991] 2 S.C.R. 714, 66 C.C.C. (3d) 454, 7 C.R. (4th) 233, 49 O.A.C. 83, 128 N.R. 321; *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, 37 C.C.C. (3d) 1, 32 C.R.R. 41, 44 D.L.R. (4th) 193, 82 N.S.R. (2d) 271, 207 A.P.R. 271, 80 N.R. 161; *R. v. Quin*, 1988 CanLII 21 (SCC), [1988] 2 S.C.R. 825, 44 C.C.C. (3d) 570, 67 C.R. (3d) 162, 90 N.R. 389; *R. v. Rosen*, 1979 CanLII 59 (SCC), [1980] 1 S.C.R. 961, 51 C.C.C. (2d) 65, 13 C.R. (3d) 215, 108 D.L.R. (3d) 60, 30 N.R. 483

Statutes referred to *Canadian Charter of Rights and Freedoms*, ss. 7, 10(b), 11(d) *Criminal Code*, R.S.C. 1985, c. C-46, s. 100 [am. R.S.C. 1985, c. 11 (1st Supp.), s. 2, Sch. item 1; c. 27 (1st Supp.), ss. 14, 203; c. 27 (2nd Supp.), Sch. item 6(4),(5); 1990, c. 16, s. 2; c. 17, s. 8]

Authorities referred to "Double Jeopardy Pleas and Verdicts", Law Reform Commission of Canada , Working Paper No. 63 (1991); p. 30 Fitzgerald, The Guilty Plea and Summary Justice (1990), pp. 71, 192-203, 211

Julian N. Falconer, for appellant.

James K. Stewart, for the Crown, respondent.

The judgment of the court was delivered by

DOHERTY J.A.:--

I. OVERVIEW

The appellant pleaded guilty in Provincial Court (Criminal Division) to four charges:

-- Aggravated assault of G.L. on or about November 5, 1988 (count 5 in the information);

-- Unlawfully causing bodily harm to G.L. between December 1 and December 7, 1988 (count 7 in the information);

-- Aggravated assault of G.L. on or about July 26, 1989 (count 2 in the information);

-- Aggravated assault of G.L. between August 6 and August 14, 1989 (count 3 in the information).

The appellant received a sentence of one year on count 5, one year consecutive on count 7, 10 years consecutive on count 2, and three years concurrent on count 3, for a total sentence of 12 years. The trial judge also made a prohibition order under s. 100 of the *Criminal Code*, R.S.C. 1985, c. C-46 for the minimum period of five years.

The pleas were made and the sentences imposed at the appellant's first appearance before the Provincial Court judge. He had been arrested some three days earlier and held in custody. The appellant was not represented by counsel when he entered his pleas.

The appellant appeals the convictions and, in the alternative, seeks leave to appeal the sentences. Before turning to the grounds of appeal, I will summarize the facts as read into the record before the Provincial Court judge.

The victim, G.L., and others lived with the appellant in a commune in the bush near Lindsay, Ontario. The appellant was the leader of the commune. He drank excessively and was prone to fits of rage and acts of extreme cruelty when drinking.

On November 5, 1988, Ms. L. was troubled with a toothache. The appellant, who had been drinking, decided to extract the tooth. He proceeded to remove eight teeth from Ms. L.'s lower jaw, none of which was the tooth that was causing Ms. L. discomfort. In the process, he damaged Ms. L.'s jawbone and gums. This event gave rise to count 5 in the information (aggravated assault).

Later in November 1988, Ms. L. cut her hand. She left the commune and travelled to Peterborough for medical assistance. The cut had damaged the tendons of her fingers. A doctor placed her hand in a cast and fixed wires to the tendons. Ms. L. returned to the commune in December 1988. Shortly afterwards, the appellant decided that her cast should be removed. He was drunk. He removed the cast in a rough and clumsy manner. He then tried to pull the surgically implanted wires from Ms. L.'s hand. She fled the commune again and returned to Peterborough. This event gave rise to the charge in count 7 of the indictment (unlawfully causing bodily harm).

Ms. L. was with the appellant from time to time in the first half of 1989. In July 1989, the appellant, Ms. L. and the others returned to the commune. On the evening of July 26, 1989, the appellant became intoxicated. He insisted on examining Ms. L.'s injured hand. He took a knife and drove it through the back of her hand, impaling it on the kitchen table. Ms. L. stood with her hand impaled on the table, bleeding profusely, for about 45 minutes. The appellant decided that her arm should be removed. He took a kitchen knife and cut through the flesh to the bone. He then used a cleaver to chop through the bone, severing Ms. L.'s arm between the shoulder and the elbow. Ms. L. was left lying on the kitchen floor overnight. The next day, on the instructions of the appellant, one of the other members of the commune stitched the stump of Ms. L.'s arm. The removal of Ms. L.'s arm gave rise to count 2 in the information (aggravated assault).

Ms. L. fled the commune for a short period of time after her arm had been severed. She returned on about August 7, 1989. A short time later she fled into the bush, but returned to the commune when she was led to believe that there was no alcohol in the camp. When she returned the appellant and the others seized her and tied her up. The appellant, who was drunk, cauterized the stump of Ms. L.'s amputated arm, using a heated piece of metal from the drive shaft of a car. The appellant wielded the metal pipe while the others held Ms. L. down. In the course of this attack, Ms. L. suffered burns to the stump of her arm and other parts of her body. This event gave rise to count 3 in the information (aggravated assault).

II. THE APPEAL AGAINST CONVICTION

An accused who is convicted upon his or her plea of guilty may appeal that conviction. An appellate court will permit the withdrawal of a guilty plea and quash the consequent conviction where there are

"valid grounds" for doing so: *Adgey v. R.*, 1973 CanLII 37 (SCC), [1975] 2 S.C.R. 426 at p. 431, 13 C.C.C. (2d) 177 at pp. 189-90. No finite list of all "valid grounds" can be provided.

Counsel for the appellant advanced a number of grounds in support of his submission that "valid grounds" existed to require the withdrawal of the guilty pleas and the quashing of the convictions. I will consider these submissions under four headings:

(i) Were the guilty pleas valid?

(ii) Did the trial judge make an adequate inquiry before accepting the guilty pleas?

(iii) Should the trial judge have accepted the guilty pleas and entered convictions in light of his factual inquiry into the charges?

(iv) Regardless of the validity of the pleas, was the appellant denied his constitutional rights during the proceedings?

(i) Were the guilty pleas valid?

Where the validity of a guilty plea is raised for the first time on appeal, the appellant has the onus of showing that the plea was invalid. The appellate court will examine the trial record and any additional material proffered by the parties which, in the interests of justice, should be considered in assessing the validity of the plea. In this case, both parties had submitted material which, in my view, should be received and considered in assessing the validity of the pleas.

A guilty plea is a formal admission of guilt. It also constitutes a waiver of both the accused's right to require the Crown to prove its case beyond a reasonable doubt and the related procedural safeguards, some of which are constitutionally protected: *Korponay v. Canada (Attorney General)*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41 at p. 49, 65 C.C.C. (2d) 65 at p. 74; *Brady v. United States*, 397 U.S. 742 (1970), at p. 748, Fitzgerald, The Guilty Plea and Summary Justice (1990) at pp. 192-203.

To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea: *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309 at p. 371, 37 C.C.C. (3d) 1 at p. 52; Law Reform Commission of Canada Working Paper No. 63, "Double Jeopardy Pleas and Verdicts" (1991) at p. 30.

In assessing the validity of the appellant's guilty plea, I have considered the record of the court proceedings on October 10, 1989, as well as the additional material provided to the court by counsel for the appellant and the Crown. That material includes a statement made by the appellant to the police on October 6, 1989 (three days before his appearance in court), comments made by the appellant to a newspaper reporter two days after his plea, the affidavit of the appellant sworn in March 1989, some six months after his pleas, and an agreed statement of facts respecting the involvement of duty counsel with the appellant prior to his pleas.

I will first address the voluntariness of the appellant's guilty pleas. A voluntary plea refers to the conscious volitional decision of the accused to plead guilty for reasons which he or she regards as appropriate: *R. v. Rosen*, 1979 CanLII 59 (SCC), [1980] 1 S.C.R. 961 at p. 974, 51 C.C.C. (2d) 65 at p. 75. A

guilty plea entered in open court will be presumed to be voluntary unless the contrary is shown: Fitzgerald, The Guilty Plea and Summary Justice, supra, at p. 71.

Several factors may affect the voluntariness of a guilty plea. None are present in this case. The appellant was not pressured in any way to enter guilty pleas. Quite the contrary, he was urged by duty counsel not to plead but to accept an adjournment. No person in authority coerced or oppressed the appellant. He was not offered a "plea bargain" or any other inducement. He was not under the effect of any drug. There is no evidence of any mental disorder which could have impaired his decision-making processes. He is not a person of limited intelligence.

In his affidavit the appellant asserts that he was anxious and felt himself under pressure when he entered his pleas. No doubt most accused faced with serious charges and the prospect of a substantial jail term have those same feelings. Absent credible and competent testimony that those emotions reached a level where they impaired the appellant's ability to make a conscious volitional choice, the mere presence of these emotions does not render the pleas involuntary.

The pleas entered by the appellant were voluntary.

I will next consider whether the pleas were unequivocal. When the appellant and his co-accused appeared before a Justice of the Peace on October 10, 1989, there was some initial confusion as to what the appellant and his co-accused wanted to do. The Crown Attorney suggested that all of the matters should be adjourned to some later date for a bail hearing. The appellant immediately spoke up: "I want to plead guilty. I'll plead guilty."

In light of this clear assertion, the case was traversed to the Provincial Court judge. Later, on the same day, after a proper election and arraignment on each charge, the appellant entered unqualified guilty pleas to each charge separately. The investigating officer then gave evidence and read into the record a detailed statement given by Ms. L. The court then asked the appellant: "Are those facts correct, as best he can recall?" The appellant replied: "Yes."

Later, when the appellant was invited to speak to sentence, he said:

> Your Honour, and the member of this court, I believe that the real truth has come from G.L. because she has been involved in that case, and I didn't know everything about that thing because I was drunk. Now I know, and it's horrible, no excuse, and before when I start drunk I was sober, and I'm guilty because I took the bottle, nobody force me to take, and I feel very sad about that, and I need help.

I do not take the appellant's purported lack of total recall of all of the events, or his reference to the role of alcohol in the commission of the offences as any qualification of his guilty pleas. His comments were a plea in mitigation of sentence, not unlike pleas regularly made by counsel on behalf of convicted accused who have acted under the influence of alcohol. Nothing of the record of the proceedings before the Provincial Court judge suggests that the appellant's guilty pleas were in any way qualified, modified or uncertain.

The additional material placed before us confirms the unequivocal nature of the guilty pleas. The appellant's statement to the police is a detailed confession and is totally consistent with his subsequent pleas. In the appellant's comments to the newspaper reporter, he affirmed his admission of liability

without any qualification. Even in his affidavit, the appellant does not suggest that he did not intend to plead guilty or that he intended to qualify his pleas in any way.

The pleas were unequivocal.

Was the appellant aware of the nature of the charges? Prior to his pleas, the charges were read to the appellant. Each charge referred to an assault on G.L. and provided a date and location of the assault but no further particulars. The detailed recital of the facts provided by the investigating officer did not specifically identify the facts relied on in support of each charge, although they did refer to the dates particularized in the counts. When the appellant was given the opportunity to comment on the facts, he expressed no uncertainty about the nature of the charges or the allegations and said nothing which would suggest any confusion in his mind.

In these circumstances, where there were four similar charges arising out of a nine-month course of conduct, it would have been preferable to specifically identify each charge by particularizing the counts in the information or by reference to the individual counts during the recitation of the facts. However, any concern about the appellant's understanding of the nature of the charges is removed upon a consideration of his statement of October 6, 1989, and his statement to the newspaper reporter on October 12, 1989. Before commencing the statement on October 6, the police told the appellant that one charge related to the amputation of Ms. L.'s arm and another to the cauterization of the stump of her arm. The appellant indicated that he understood and wanted "to tell the truth". He then provided a detailed confession with respect to those allegations. Later, the appellant was asked specifically about the removal of the victim's teeth. He again provided a detailed account of that event.

In his conversations with the newspaper reporter, the appellant revealed no misunderstanding of the charges but rather indicated that the victim's statement as read into the record by the investigating officer was "substantially correct" and that it was not worthwhile to have a trial to "fight over one word here and there".

The only reference in the appellant's affidavit to his understanding of the nature of the charges appears in para. 12:

> In the anxiety of the proceedings before His Honour Judge Inrig I was not capable of having a full understanding of the nature of the charges and the consequences of my entering pleas of guilty.

There is no indication in the affidavit of what the appellant meant by a "full" understanding of the nature of the charges or what it was he did not understand about the charges when he pleaded guilty. His bald assertion cannot be given any credence in light of his statement to the police, his conduct during the proceedings and his statement to the newspaper reporter. The appellant knew full well that each charge related to an assault by him on G.L. and he knew the factual basis for each allegation.

Before leaving this point, it should be observed that although the appellant's first language is French, there is no suggestion that he had any difficulty understanding the proceedings. He was provided with a French translator during the proceedings and in his consultations with duty counsel. In any event, he clearly had no difficulty understanding and communicating in English.

As to the effect of the guilty pleas, the trial record leaves no doubt that the appellant was aware when he pleaded guilty that there would be no trial and he would be dealt with by the Provincial Court judge

before whom he was appearing. After the appellant was put to this election as to his mode of trial, the following exchange occurred:

If I plead guilty, I don't have to choose to have a trial?

THE COURT: No, but if he wishes to enter a plea of guilty he must indicate that he wishes then to be tried by this court.

THE ACCUSED T.: I plead guilty and I want to be tried by this court.

The appellant was also aware that he was entitled to the assistance of counsel, to an adjournment, to elect his mode of trial, and to plead not guilty and have a trial. It is crystal clear from the record that the appellant was prepared, indeed anxious, to forego those rights in order to dispose of the charges on that day.

The additional material filed before this court confirms that the appellant was aware of his legal rights and chose not to exercise them. The police carefully advised the appellant of his right to counsel on October 6, 1989. He declined to exercise that right. Duty counsel, on two occasions before the appellant pleaded guilty, told the appellant that he should have his own lawyer and that he should not proceed on that day. The appellant chose not to accept this advice.

In the appellant's conversation with the newspaper reporter, he acknowledges that he was entitled to a trial and to require the Crown to prove its case. He said:

> Sometimes in your life you feel enough is enough. To go for a trial it takes a long time and costs a lot of money, and a lot of people -- taxpayers -- have to pay. The testimony [of Ms. L.] was substantially correct and just to fight for one word here or there might cost $20,000.

The appellant does not suggest in his affidavit that he did not understand that by pleading guilty he was foregoing his right to a trial and the various procedural and constitutional rights to which he would otherwise be entitled. I also observe that the appellant was no stranger to the criminal justice system. He had several prior convictions, some for similar offences.

I will next address the appellant's understanding of the consequences of his guilty plea. By an understanding of the consequences of his pleas, I mean the realization that convictions would flow from his pleas, as well as an appreciation of the nature of the potential penalty he faced. It is not disputed that the appellant understood he would be convicted on the basis of his pleas. That is exactly what he wanted. The seriousness of the offences was self-evident. The appellant also knew, before he pleaded guilty, that the Crown would seek a prison term of seven to ten years. In addition, the appellant had been sentenced to a significant jail term for assault related offences several years earlier. I have no trouble concluding that the appellant knew that upon conviction he would receive a substantial jail term.

In his affidavit, the appellant asserts that when he appeared in court on October 10 he was unable to address the consequences of his pleas because of his anxiety and concern for the victim and others in his "family". I am at a loss to know what particular consequence the appellant did not understand. The affidavit offers no assistance in this regard. It contains no assertion of any misunderstanding of the procedure attendant upon a guilty plea or any misunderstanding of the potential penalties the appellant

faced. I can only conclude that the unspecified reference to consequences in the appellant's affidavit does not pertain to any legally relevant consequence.

In summary, the entire record before this court demonstrates that the appellant entered voluntary, unequivocal pleas to the charges, knowing full well the effect and consequences of those pleas. Not only has the appellant failed to establish the invalidity of the pleas, the total record before this court leaves no doubt that the pleas were valid in every relevant sense.

(ii) Did the trial judge make an adequate inquiry before accepting the guilty pleas?

Counsel for the appellant argues that as a guilty plea constitutes a waiver of constitutional rights, a trial judge is required in every case to make inquiries to insure that the plea meets the standards demanded where waiver of a constitutional right is asserted by the prosecution. Counsel relies on the dissent of Laskin J. in *Adgey v. R.*, *supra*, at p. 440 S.C.R., p. 183 C.C.C.; and American jurisprudence, e.g., *McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969); see also Fitzgerald, The Guilty Plea and Summary Justice, *supra*, at p. 211.

In the alternative, he submitted that if the pre-*Charte*r standards remained applicable, the circumstances surrounding the appellant's pleas demanded that the trial judge make inquiries as to the validity of the pleas before accepting them: *Adgey v. R.*, per Dickson J. at pp. 428-29 S.C.R., p. 188 C.C.C.; *Brosseau v. R.*, 1968 CanLII 59 (SCC), [1969] S.C.R. 181 at pp. 188-89, [1969] 3 C.C.C. 129 at p. 137. In this regard, counsel referred to the timing of the pleas (at first appearance), the fact that the appellant was not represented by counsel, rejected the advice of duty counsel, and the seriousness of the charges.

The trial judge did made inquiries before accepting the pleas. He learned that the appellant had spoken to duty counsel on two occasions, had received advice from counsel, and had indicated earlier in open court that, contrary to that advice, he wished to proceed that day and plead guilty without the assistance of counsel. Counsel for the appellant contends that this inquiry was inadequate as it did not address all factors relevant to the validity of the pleas.

In my opinion, it is not necessary to decide whether the *Canadian Charter of Rights and Freedoms* has altered the obligations on a trial judge to make inquiries as to the validity of a guilty plea, or whether the inquiry conducted in this case was adequate according to the *Charter* standard advocated by counsel for the appellant, or the standard set down by the majority in *Adgey v. R.* Assuming the inquiry was inadequate, the failure to conduct a proper inquiry could only support a quashing of the consequent convictions in this court if there was reason to doubt the validity of the pleas. For the reasons set out above, the material placed before this court leaves no doubt as to the validity of the plea. I would hardly serve the interests of justice to quash the convictions and permit the withdrawal of the guilty pleas based on an inadequate inquiry into the validity of the pleas at trial when, after a full inquiry in this court, their validity was established.

(iii) Should the trial judge have accepted the guilty pleas and entered convictions in light of his factual inquiry into the charges?

A trial judge is not required to make any inquiry into the factual basis for the charges to which an accused has pleaded guilty: *Adgey v. R.*, at p. 429 S.C.R., p. 188 C.C.C. In practice, some inquiry is usually made. Where that inquiry reveals no legal basis for a conviction, a dispute as to facts essential to the

charge, or any other "valid reason", the trial judge should decline to accept the guilty plea and refuse to register a conviction: *Adgey v. R.*, at pp. 430-31 S.C.R., pp. 189-90 C.C.C.

The trial judge heard evidence in support of the charges and he invited the appellant to comment on that evidence. Counsel for the appellant maintained that the trial judge should have exercised his discretion and declined to accept the guilty pleas because of the appellant's professed inability to remember all of the facts referred to in the victim's statement, and because of the references in that statement to the appellant's drunken condition when he assaulted Ms. L. He submitted that the references to the appellant's intoxication should have caused the trial judge to doubt whether the appellant had the requisite culpable mental state to commit the crimes charged.

I have already indicated that the appellant's alleged inability to recall all of the relevant events was no reason to doubt the validity of the plea. It equally was no reason to decline to enter convictions based upon those pleas.

Self-induced intoxication may afford a "defence" to the charges faced by the appellant: *R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833, 45 C.C.C. (3d) 1. If it does provide a "defence", it will do so only in cases of extreme intoxication "involving an absence of awareness akin to a state of insanity or automatism": per Wilson J. in *R. v. Bernard*, at p. 887 S.C.R., p. 42 C.C.C. Evidence that an accused was "very drunk" will not suffice to raise the "defence" of "drunkenness" to assault and related crimes: *R. v. Quin*, 1988 CanLII 21 (SCC), [1988] 2 S.C.R. 825 at p. 831, 44 C.C.C. (3d) 570 at p. 575.

Nothing put before the trial judge suggested the extreme level of intoxication necessary to put the appellant's state of mind, as it related to the intention to apply force to Ms. L., in issue.

In any event, the additional material placed before this court establishes beyond peradventure that the appellant had the intention to apply force to Ms. L. His statement of October 6 demonstrates a detailed recollection of the events and a clear intention to apply force to the victim. His statement to the newspaper reporter confirms the accuracy of the victim's statement as read to the court and does not advance any suggestion of any inability to form the necessary intent. Finally, in his own affidavit the appellant does not suggest that his consumption of alcohol rendered him so drunk that he did not intend to apply force to the victim.

If the trial judge had conducted a further inquiry into the state of the appellant's intoxication, that inquiry would have confirmed that no "defence" of intoxication was available to the appellant.

(iv) Was the appellant denied his constitutional rights during the proceedings? Even if a guilty plea is valid and the factual inquiry into the charge reveals no basis for refusing to enter a conviction, the proceedings may be so flawed as to result in a reversible error of law or a miscarriage of justice. For example, a denial of an accused's constitutional rights during the proceedings could require reversal even when the pleas and convictions were otherwise valid and appropriate.

I say at once, that while further inquiry of the appellant at the time he entered his plea may have been warranted, I do not regard the procedure followed as so lacking in fairness or the appearance of fairness that the proceedings could be said to have constituted a miscarriage of justice. Any failings in these proceedings do not even remotely approach that level. In addition, while the trial judge may, in all of the circumstances, have adjourned the proceedings for a short time despite the appellant's protestations,

his decision to proceed in accordance with the appellant's wishes did not produce a miscarriage of justice.

Turning to the alleged constitutional violations, counsel for the appellant advanced two specific submissions. First, he submitted that the trial judge was obligated to ensure that the appellant had the effective assistance of counsel when he entered his plea. Counsel maintains that, absent that assistance, the appellant was denied his right to counsel, his right to a fair trial, and his right not to be denied his liberty except in accordance with the principles of fundamental justice.

This submission comes down to this -- the appellant could not enter valid guilty pleas and be convicted on those pleas without the assistance of counsel, regardless of the appellant's insistence that he wished to proceed without a lawyer. Counsel's submission would convert the accused's right to retain and instruct counsel into an obligation on the court to insist that an accused have counsel, regardless of the accused's wishes. I cannot accept that the *Canadian Charter of Rights and Freedoms*, founded on the recognition of individual liberties and rights can have that effect. As Wilson J. observed in *R. v. Clarkson*, 1986 CanLII 61 (SCC), [1986] 1 S.C.R. 383 at p. 396, 25 C.C.C. (3d) 207 at p. 219, the constitutional right to retain and instruct counsel "cannot be forced on an unwilling accused".

The appellant was aware that he had a right to counsel and that the proceedings would be adjourned to facilitate the exercise of that right. He was aware that duty counsel, and indeed Crown counsel, thought it advisable that he retain counsel. He knew that duty counsel could be of only limited assistance to him. The appellant was familiar with the criminal process and was aware of the nature of the charges and the effect and consequences of the course of conduct he chose. The appellant was also capable of making that choice. There was a clear and effective waiver of the right to counsel.

Nor did proceeding without counsel in these circumstances result in an unfair hearing or a denial of fundamental justice. The appellant wanted the matter disposed of on that day and without counsel. He was given the opportunity to comment on the facts alleged by the Crown and to speak to sentence. Nothing occurred in the course of the proceedings which could support the assertion that legal representation for the appellant was essential to ensure adjudicative fairness. I also note that duty counsel remained in attendance throughout the proceedings to provide assistance to the appellant. He sought no such help.

There is also nothing in the material placed before us to support the submission that the presence of counsel for the appellant was essential to the fair treatment of the appellant. The appellant does not say so in his affidavit. More to the point, he does not even say that the wanted or needed counsel. He merely observes that he did not have the benefit of counsel.

The appellant's rights under ss. 10(b), 11(d) and 7 of the *Charter* were not violated by the absence of counsel.

Counsel for the appellant next maintains that the appellant's right to make full answer and defence was infringed because the Crown failed to make full disclosure to the appellant of all relevant material in its possession before the appellant pleaded guilty. Counsel refers specifically to the tape or transcript of the appellant's statement to the police on October 6 and four statements given to the police by the victim. None of this material was provided to the appellant before he pleaded guilty, and he was not advised of

his right to obtain the material before pleading to the charges. The last statement given by the victim was read almost verbatim into the record in support of the guilty pleas.

In making this submission, counsel relies on the passage from *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326 at p. 343, 68 C.C.C. (3d) 1 at 14, which refers to the Crown's obligation to advise an unrepresented accused of his or her right to disclosure before being required to enter a plea. In *Stinchcombe*, the court placed an obligation on the Crown to make full disclosure of all relevant material prior to trial. That obligation flowed from a request for disclosure made on behalf of the accused. The court also held (at p. 348 S.C.R., pp. 17-18 C.C.C.) that where full disclosure was not made at trial, an appellate court must order a new trial if the non- disclosure impaired the accused's ability to make full answer and defence. Impairment of that right would be assumed if disclosure of the information could have affected the outcome at trial.

Stinchcombe did not address the Crown's disclosure obligation where an accused insists on pleading guilty on his first appearance. There are obvious difficulties in adapting disclosure requirements which are directed to providing an opportunity to make full answer and defence, to a situation where an accused insists he or she does not want to make any defence. I prefer not to address the application of disclosure requirements referred to in *Stinchcombe* to this situation because I am satisfied that, in any event, the alleged non-disclosure did not impair the appellant's right to make full answer and defence.

Assuming *Stinchcombe* required the disclosure argued for by the appellant, the non-disclosure could impact on the appellant's right to make full answer and defence if the material that was not disclosed could have had some effect on the appellant's decision to plead guilty, or if the undisclosed material undermined the validity of the pleas or the propriety of the convictions.

The appellant does not say in his affidavit that the contents of the material, he now alleges should have been disclosed, would have influenced his decision to plead guilty. Nothing in the material suggests that possibility. The appellant's statement to the police was, as I have indicated above, a confession. Three of the statements given by the victim, while inconsistent with each other in some respects, implicated the appellant. The other provided only background information. To the extent that there were inconsistencies, these could have impacted only on the potential reliability of the victim as a witness. The appellant has, however, consistently acknowledged the accuracy of the victim's versions of events read into the record at trial. He did so before the trial judge and in the interview on October 12, 1989. He has not resiled from that position in his affidavit. The appellant has never put the reliability of the victim's version of the relevant events in issue.

The undisclosed material gives no cause to doubt the validity of the plea. For the reasons expressed above, the appellant's statement of October 6 tends to support the validity of the pleas. The victim's statements have no bearing on this issue.

Counsel for the appellant submitted that the undisclosed material undermined the propriety of the convictions in that it provided an evidentiary basis for the "defences" of lack of intent to inflict force, belief in consent, and necessity. In my opinion, none of these "defences" are given any validity by the undisclosed material.

That material confirms that the appellant intentionally inflicted force on the victim. A belief, no doubt induced by alcohol consumption, that the infliction of force was for the good of the victim does not

provide a defence. As consent is irrelevant to the charges, an honest belief in consent is equally irrelevant: *R. v. Jobidon*, 1991 CanLII 77 (SCC), [1991] 2 S.C.R. 714, 66 C.C.C. (3d) 454. As to the defence of necessity, it is ludicrous to suggest that the brutal, barbaric, alcohol-induced acts of the appellant could meet the narrow criteria for the defence of necessity laid down in *Perka v. R.*, 1984 CanLII 23 (SCC), [1984] 2 S.C.R. 232, 14 C.C.C. (3d) 385.

Assuming the Crown had an obligation to disclose the material referred to by counsel for the appellant before the appellant pleaded guilty, the non-disclosure of that material was of no consequence to the appellant's decision to plead guilty, and in no way affected the validity of those pleas or the propriety of the subsequent convictions.

III. THE APPEAL AGAINST THE SENTENCES

The crimes committed by the appellant reveal shocking brutality and cruelty. They also demonstrate a persistent course of conduct involving the domination and terrorization of a weaker and apparently psychologically dependent person.

The appellant has a record for violence consisting of some five prior assault-related offences. He received a sentence of two years less a day in 1982. He is addicted to alcohol and clearly poses a danger to those around him when he drinks excessively.

The court received a post-sentence report from the institution where the appellant is presently incarcerated. In many ways the appellant is a model prisoner, but he continues to experience difficulty controlling his abuse of alcohol. Although the appellant appears to recognize his addiction, his efforts to come to grips with that problem have been minimal.

The appellant is entitled to considerable credit for pleading guilty at the first opportunity. His plea and his comments before, during and after his court appearance show genuine remorse and concern for the victim.

The submissions of very experienced and able Crown counsel at trial also warrant considerable weight. Crown counsel suggested that a sentence of seven to ten years was appropriate. As indicated earlier, the appellant was made aware of this position before he chose to plead guilty.

Weighing these factors, I cannot say that 12 years was an inappropriate sentence. Equally, I would not regard 10 years as inappropriate. In my opinion, the position taken by the Crown, the appellant's obvious remorse and his genuine desire to avoid further trauma to the victim render 10 years a fit total sentence in this case. I would reduce the totality of the sentence imposed from 12 years to 10 years.

IV. CONCLUSION

I would dismiss the appeal against the convictions. I would grant leave to appeal the sentences, allow the appeal against the sentence of 10 years consecutive on count 2, and reduce that sentence to eight years consecutive. Otherwise, I would dismiss the appeals against the sentences. In the result, the appellant's total sentence should be reduced from 12 to 10 years.

V. THE NON-PUBLICATION ORDER

At the hearing of the appeal, both counsel advised the court that there were other ongoing criminal proceedings against the appellant and that the publication of the facts involved in this case could prejudice the appellant's right to a fair trial on the outstanding charges. In light of those submissions, this court made a non-publication order with respect to the matters under appeal, pending resolution of the outstanding charges. I am unaware as to whether there is any need to continue that order. I would continue the non-publication order and extend it to these reasons, but only for the period of 30 days from the release of these reasons. If a further order is needed, or if it is appropriate to discontinue the non-publication order before the expiration of the 30 days, the necessary application may be made.

Appeal from conviction dismissed; sentence appeal allowed.