

MOCK TRIAL

REGINA vs. BROGUE

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THE CASE OUTLINE

In this trial, the Crown will allege that Wally Brogue, a high school teacher, went to the apartment of David Benning, a former friend of Wally's teenage brother Tom Brogue, with the intention of committing the **FIRST DEGREE MURDER** of David.

To present its case the Crown will call three witnesses: Officer Low, the police officer who attended the scene, Sandra Volsky, David's live in – girlfriend, and Peter Pomas, an inmate at a local Penitentiary.

Officer Low will swear that he found Wally Brogue on the balcony of David's apartment; that a broken radio was beside Wally and that this radio, upon examination, contained both Wally's and David's fingerprints. Further, he will swear that he found evidence of recent drinking and smoking in David's apartment – an empty beer bottle and some marijuana ash. He will also attest to Wally's blood – alcohol reading at the time - .06.

Sandra Volsky will testify as to the events that occurred in the apartment up until the time that David disappeared over the balcony railing. She will also testify as to the physical state of David Benning at the time

Peter Pomas will swear that he heard Wally threaten the life of David on the day before David was killed and he heard Wally state to his brother that he felt that David was responsible for Tom's apartment. He will state also that Tom was very upset after this conversation.

Given these facts, explained in more detail, the Crown will allege that Wally Brogue caused the death of David Benning intentionally and with premeditation by Wally Brogue; the railing; and that Wally was not so impaired at the time that his previous drinking affected his ability to form the necessary intent to commit first degree murder.

THE DEFENCE'S THEORY

The Defence will call three witnesses; Wally Brogue, the accused; Bonnie Brager, Wally's girlfriend; and Tom Brogue, Wally's brother.

The defence will allege that Wally was very upset at the fact that his brother Tom was incarcerated for a crime that he did not commit; further, that Wally believed that David was responsible for setting up his brother. The defence will allege that on the day in question, Wally went to David Benning's apartment with the intention of pleading with David to tell the truth. Once inside the apartment, Wally tried to plead with David, who only laughed at him. Wally then went to turn down the portable radio, which was playing very loudly. He knocked it over in his haste. Wally will swear that David then rushed at him as he was picking up the radio and he stepped out onto the balcony in defence. David continued to rush him, causing him to drop the radio, and then fall over the balcony railing when Wally stepped out of his way. Wally also will swear that David was stoned at the time and his movements were uncoordinated.

Bonnie Brager will corroborate Wally's story by describing the events which she saw take place on the balcony. She was outside the building beside Wally's parked car waiting for him to return.

Tom Brogue will testify as to Wally's state of mind on the day before and question Peter Pomas' motives for being a Crown witness.

In summary, the defence will allege that David's death was an accident caused by David's lunging at Wally while he was obviously stoned and thereby misjudging a situation that ultimately led to his death.

FACT SHEET

Crown witness – Officer Low

Officer Low has been on the local police force for eight and a half years and on the night in question (July 14th) was on general squad car patrol duty with his partner, Officer Sandhu.

Your Story:

- You got a call at 9:07 pm., on the car radio that a man was reported to have fallen off a balcony at 509 Industrial Street.
- You immediately proceed to this address, and notice a small crowd gathered around a body, which was later identified as David Benning. Crouched over the body was a girl later identified as Benning's girlfriend, Sandra Volsky.
- When you get to the apartment, Volsky starts screaming, "He killed David! He killed David!"
- When you start questioning Volsky, you are told that Benning had been pushed from the balcony of the apartment 405.
- You understand that the assailant might be still in the building.
- You leave Officer Sandhu with the body and Sandra Volsky, and you go up to the apartment.
- You found the door of the apartment open. You go into the living room and notice the smell of marijuana, you also notice some marijuana ash in an ashtray, as well as an empty beer bottle.
- Out on the balcony, you discover a man looking over the edge of the balcony. You later, discover that it is Wally Brogue. He is looking at the crowd gathered around Benning's body.
- You notice that there is an expensive – looking, but smashed, portable stereo radio – cassette tape player.
- When Brogue notices that you are there, he starts yelling "It was an accident! It was an accident!"
- You see that Brogue is nervous and somewhat agitated. His eyes were red and there was a smell of alcohol on his breath.
- You also notice, that Brogue and Benning are about the same height and weight.
- You start asking Brogue questions about the incident. Brogue refuses to answer any questions until his lawyer is present.
- You escort Brogue to the police station for questioning and for a breathalyser test. The test showed a level of .06 alcohol in his blood.
- Later, the police investigation showed that fingerprints found on the radio included not only those of Volsky and Benning, but also of Brogue's. also the ash in the ashtray proved to be marijuana ash.

NOTE: In a real trial, a police officer is not allowed to testify as to the statements of the accused without the Crown counsel asking the court to hold a trial within a trial. This is called a “voir dire”. The voir dire takes place without the jury. The purpose of the voir dire is for the judge to decide if the statements of the accused were made voluntarily, for example, without threats or promise of benefit.

To save time, we have eliminated the voir dire in this mock trial.

FACT SHEET

Crown witness – Sandra Volsky

Sandra Volsky will that on the evening of July 14th she was with David Benning at their apartment, #405 – 509 Industrial Street. They were listening to music on their portable stereo radio – cassette tape player. Both were mildly stoned. Sandra had smoked a joint of marijuana with David, who had also been drinking beer.

Your story:

- At about 9:00pm there was a knock on the door, and you answer it. There is no peephole, you open it and saw that it was Wally Brogue.
- He pushed you out of the way, and stormed into the apartment living room. Wally saw David in the living room and went over to him and said “You creep! You should pay for what you did to my brother!”
- David just laughed and said “You Fool! Your brother’s a druggie!” and demanded that Wally leave.
- Wally turned around, and turned off the radio and then picked it up. Taking it out to the balcony, Wally made a gesture as if he was going to throw it over the railing.
- David screamed “Don’t”, and ran after Wally onto the balcony and grabbed for the radio.
- At that point Wally pushed David over the railing and the radio fell to the floor of the balcony and broke.
- You screamed “David!” then turned towards Wally, screaming, “You killed him! You killed David!”
- You then ran out of the apartment to where David was lying on the ground outside.
- The police found you both, shortly afterwards.

Sandra is 18 years old, and has not been in school since grade 10. she had been going out with David Benning for about two years and had moved in with him the January before this incident.

FACT SHEET

Crown witness – Peter Pomas

Peter Pomas is 24 years old. He has been serving a jail sentence at the local detention facility.

Your story:

- You will testify that on July 7th, you were sitting in the interview room with your sister. Tom Brogue was beside you talking to his brother, Wally.
- You know that Wally has visited before and Tom and yourself have discussed about him several times.
- Wally was visibly upset and seemed to be very angry about Tom's being in jail. He blamed David Benning for this.
- You will testify that you heard Wally say that he'd like to kill Benning because "that creep does not deserve to live!"
- Afterwards, you talked to Tom about this in the exercise yard and Tom seemed to be quiet upset and worried.
- You didn't know whether you should come forward with this information but your parole officer urged you to co – operate and reminded you that your parole hearing was coming up

Peter's criminal record is as follows:

1. when he was 18 years old, he was found guilty of Breaking and Entering; Possession of Stolen Property and was sentenced to six months probation.
2. when he was 19 years old, he was found guilty of Breaking and Entering and was sentenced to 30 days in jail and six months probation.
3. when he was 23 years old, he was found guilty of Breaking and Entering and Possession of Stolen Property and sentenced to two years less a day, which he was serving at the time that the conversation with Tom Brogue took place.

FACT SHEET

Defence witness – Tom Brogue

Tom Brogue is 19 years old. He lives with his parents at 3848 Belmont Avenue. He is an ex – convict, having served time for trafficking in narcotics. He had served two months of his sentence when the alleged murder of David Benning took place. His brother, Wally Brogue, has been charged with murdering David Benning. Tom was in prison for seven more months after David’s death. He is now on parole and unemployed.

Your story:

- your testimony at the trial will centre on your last meeting with Wally before Benning’s death. At that meeting Wally was angry and despondent about Tom’s being in prison.
- Wally knew that you were innocent and he was afraid of what might happened to you while in prison.
- At your meeting, you and Wally agreed that the drugs found in your apartment were David’s and that you were taking the rap for David. You are certain that Wally believes your claim that you are innocent for the crime.
- You remember that your meeting with Wally ended with the following exchange:

Wally: “A creep like that doesn’t deserve to be alive”

Tom: “Don’t do anything stupid.”

Wally: “Look, I’m just interested in justice being don,”

- Afterwards, you weren’t worried that Wally might act violently, he was simply concerned that Wally might do something that would anger Benning. Regarding his later conversation with Peter Pomas, a fellow inmate, Tom recalls saying that Wally hated David for framing him and that he was afraid that Wally might do something stupid as he had never seen his brother so upset or angry.

FACT SHEET

Defence witness – Bonnie Brager

Bonnie Brager is 28 years old and single. She is a real estate agent and lives at 4119 Hadden Place, apartment 1509. she met Wally Brogue through mutual friends and has been going out with him for about one year. She and Wally are engaged to be married.

Your story:

- You were at Wally's apartment the night of David Benning's death.
- You and Wally had dinner together and consumed part of a bottle of wine.
- During dinner your discussion turned to Wally's brother Tom, whom was in prison serving time fro drug trafficking.
- Wally told you he was very worried about Tom's depressed state of mind and was convinced that Benning had framed Tom and was responsible for Tom's being in prison.
- You remember that it was at this point in your conversation that Wally suddenly decided he should drive over to Benning's apartment and try to convince him to admit that he had framed Tom.
- You decided to accompany Wally because she could see he was quiet agitated and she hoped to persuade him to change his mind about seeing David.
- On the drive over, Wally admitted to you that there was little chance of his visit succeeding but he told you he owed it to Tom to try anything.
- When you got to Benning's apartment building, you stayed near the car. You had a clear view of the scuffle between Tom and David. David's apartment was on the fourth floor. It faces the street where Wally's car was parked.
- You swear that she did not see Wally holding a radio during the scuffle with Benning. You will admit to being a little light headed from the wine you consumed at dinner but you will say that you were not intoxicated.
- The police did not test your blood alcohol level the night Benning died.

FACT SHEET

Defence witness – Wally Brogue

Wally Brogue is 28 years old and is a teacher and counsellor at a local high school. He has been charged with murdering David Benning, a man who he believes framed his brother Tom in a drug trafficking case. Wally is very close to Tom and is convinced his brother is innocent of any wrongdoing. He has never been in trouble with the law before and claims to hate violence.

Shortly before David Benning's death, Wally visited Tom in prison. Wally felt frustrated and angry during this meeting. He was very concerned about Tom's mental state and decided he should do everything he could to help Tom. However, at the time he had no clear idea of what he might do to help.

Your story:

- on the night David Benning's death you had dinner with your fiancée, Bonnie Brager, at your apartment.
- During dinner you and Bonnie were discussing Tom's plight. Acting on impulse, you decided to go to Benning's apartment to plead with him to clear Tom's name. You remembered Bonnie trying to dissuade you but you were too upset and desperate and willing to try anything to plea for your brother's case.
- Upon reaching Benning's apartment building, you park out front. You leave Bonnie in the car and walked up the stairs to Benning's apartment on the fourth floor.
- When Sandra Volsky, Benning's girlfriend, answered the door, you told her you had to talk to David and pushed her out of the way and continued to go into the apartment.
- You found David sitting on a chesterfield drinking beer. Loud music was blaring from a radio.
- It was your impression that David was very stoned. You shouted to make yourself heard.
- You said, "It's your fault that my brother's in jail. You've got to tell the truth about the drugs being your!"
- You remembered that David laughed at you saying, "Your brother's a druggie! Get lost!"
- You went over to the radio to turn off the music. In your haste, you knocked the radio off the table onto the floor just inside the door to the balcony.
- You bent down to pick up the radio but at this point Benning seemed to lose his temper and rushed at you.
- You backed through the open door to the balcony and dropped the radio as you tried to get out of harms way.

- Benning seemed to lunge past you, and then hit the balcony railing and fell into space.
- You remember Volsky screaming “You killed him!” and ran out of the apartment.
- You phoned the police and an ambulance and waited for them to arrive.
- You did not leave the apartment because you were too stunned and was probably in shock.
- You felt certain that Benning’s fall had killed him and you didn’t want to go anywhere near Volsky, who was standing beside Benning and crying hysterically.
- You remembered that when a police officer arrived at the apartment he was still feeling shaken and stunned. You said to the officer that “It was an accident! It was an accident!”
- You decided not to answer any of the officer’s questions because you knew you were in an agitated state and didn’t want to say anything that might falsely incriminate yourself.
- You will swear that you were too upset when you arrived at Benning’s apartment but you never intended to break anything or hurt anyone. You are convinced Benning fell because he was too stoned and uncoordinated and lost his balance.

INDICTMENT

**File number
3270527098**

**Canada
Province of Ontario
Judicial District of York**

HER MAJESTY THE QUEEN

Against

WALLY BROGUE

INDICTMENT

**Name of
Accused**

Wally Brogue stands charged:

**State of
Offence**

**That, in the City of Toronto, in the Judicial District of York,
Ontario, on or about the 14th day of July, he did unlawfully commit
murder in the first degree of David Benning contrary to the provisions of
s. 214 of the Criminal Code of Canada.**

DATED this _____ day of _____, at _____.

**Agent for the Attorney
General of Canada**

APPLICABLE LAW

CANADA CRIMINAL CODE

Murder and Manslaughter

In order to convict anyone of a criminal offence, there must be a law, which specifically covers the matter at hand.

Here are the relevant sections of the Criminal Code under which, Wally Brogue is charged:

Section 212 defines murder:

MURDER.

212. Culpable homicide is murder

- a. Where the person who causes the death of a human being
 - i. Means to cause his death, or
 - ii. Means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
- b. Where a person, meaning to cause death to a human being or meaning to cause him/her bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
- c. Where a person, for a lawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to affect his object without causing death or bodily harm to any human being.

Section 214 defines the difference between first and second-degree murder:

213. (1) Murder is first-degree murder and second-degree murder.
(2) Murder is first-degree murder when it is planned and deliberate.
(7) All murder that is not first-degree murder is second-degree murder.

Murder becomes manslaughter if the evidence meets the requirements of Section 215 (1):

214. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
- (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self – control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

The judge will have to instruct the jury on the differences in law between first-degree murder, second-degree murder and manslaughter. The important element of difference is the intent involved. First-degree murder is premeditated that is planned and deliberate. Second-degree murder is not planned. Manslaughter is simply the killing of another person by an unlawful act such as an assault. It is not necessary to prove intent to kill another person or intent to inflict an injury likely to cause death in order to establish manslaughter. For manslaughter to be proved it is necessary only to prove that death resulted from an act of the accused person and that this act was unlawful. A shot or blow delivered in self – defence may, of course, be lawful if it is delivered in circumstances which justified the use of such force.

Section 218 and 219 set out the minimum punishments for a conviction of murder or manslaughter:

Punishment for Murder – Minimum Punishment

218. (1) every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) For the purposes of Part XX, the sentence of imprisonment for life prescribed by this section is a minimum punishment. 1973 – 74, c. 38, s. 3; 1974 – 75 – 76, c. 105, s. 5.

Punishment for Manslaughter.

219. Every one who commits manslaughter is guilty of an indictable offence and is liable to imprisonment for life. 1953 – 54, c. 51, s. 207.

Section 669 interprets what imprisonment for life means.

Section 669(a) sets out the mandatory term for a verdict of first-degree murder.

Section 669 (b) describes the range open to the judge in setting when someone convicted of second degree murder will be eligible for parole.

Section 669(c) refers to a guilty verdict of manslaughter and leaves the question of the sentence term to the judge. The matter of the convicted person’s parole is left to the parole authorities.

Sentence of Life Imprisonment.

669. The sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be,
- a) In respect of a person who has been convicted of high treason or first degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served twenty – five years of his sentence.
 - b) In respect of a person who has been convicted of second – degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served at least ten years of his sentence or such greater number of years, not being more than twenty – five years, as has been substituted therefore pursuant to section 671; and
 - c) In respect of a person who has been convicted of any other offence, that he be sentenced to imprisonment for life with normal eligibility for parole.

Conclusion

The sections of the Criminal Code, which define murder and manslaughter and the sentencing guidelines for each, are complicated. In the case of Ontario vs. Brogue they can be summarised as follows:

- a) If it can be proven beyond a reasonable doubt that Wally Brogue went to David Benning's apartment with the intention of killing him, when Wally is guilty of first-degree murder. He must be sentenced to life in prison with no eligibility for parole for twenty – five years.
- b) If it can be proven beyond a reasonable doubt that, even though he had not planned it, Wally Brogue pushed David Benning over the balcony with the intention of causing death or bodily harm, which could result in death, then Wally is guilty of second-degree murder. Again, the required sentence is life imprisonment, but in this case the judge can decide when Wally will be eligible for parole. (Wally would have to serve at least ten years but not more than twenty-five before being eligible.)
- c) If it can be proven beyond a reasonable doubt that Wally was provoked into committing some act in the heat of passion that resulted in the death of David Benning, then Wally is guilty of manslaughter. In this case the judge will decide the term of sentence.
- d) If none of the above can be proven beyond a reasonable doubt then Wally Brogue is not guilty and the judge must let Wally go free.

**Health and Welfare Canada
Health Protection Branch
santé**

**Santé et Bien - être social Canada
Direction générale de la protection de la
santé**

CERTIFICATE OF ANALYST

CERTIFICAT D'ANALYSTE

I, **LINDA BARTLET**, being a person on the staff of the Department of National Health and Welfare duly designated as an Analyst under the Food and Drugs Act, and thereby also an Analyst within the meaning of and as defined by the Narcotic Control Act do hereby certify:

That at **VANCOUVER** in the Province of **BRITISH COLUMBIA**

On or about the day of **15** day of **JULY 1986**, there was submitted to me

By **DEPOSITORY BOX** by **POLICE CONSTABLE LOW**

A member of the **VANCOUVER POLICE DEPARTMENT**.

A sealed and unopened package, which bore the following identification marks, initials, or numbers:

C.C. 584 - AB - DAVID BANNING

Je soussigné **LINDA BARTLET**, faisant partie du personnel du ministère de la Santé nationale et du Bien - être social étant dûment nommé analyste en vertu de la Loi des aliments et drogues et par ce fait, agissant aussi à ce titre aux termes de la Loi sur les stupéfiants atteste par les présentes :

Que, a **VANCOUVER** dans la Province de **BRITISH COLUMBIA**

Le ou vers le **15** jour de **JUILLET 1986**, il m'a été soumis

Par **DEPOSITORY BOX** par **POLICE CONSTABLE LOW**

Membre de **VANCOUVER POLICE DEPARTMENT**.

Un paquet scelle et non ouvert qui portait e'estampille, ou les nombres suivants :

C.C. 584 - AB - DAVID BANNING

That I did open the said package and did remove there from a
Que j'ai ouvert ledit paquet et y ai enlevé

GREY ASH LIKE SUBSTANCE

From which I obtained a sample of a substance.
Dont j'ai obtenu un échantillon d'une substance:

That I duly analyzed and examined the said substance and I found it to contain a:
Que j'ai dûment analyse et examine ladite substance et que j'ai constate qu'elle contenait un :

NARCOTIC

Within the meaning of the
Aux termes de la Loi

NARCOTIC CONTROL ACT
CANNIABIS (MARIJUANA)

to wit
A savoir

That this certificate is true to the best of my knowledge and skill
Que le présent certificat est fidèle au mieux de mes connaissances et de ma compétence.

Dated at **VANCOUVER, B.C.** this **17TH** day of **JULY 1986.**
Fait à **VANCOUVER, B.C.** en ce **17 e** jour de **JUILLET 1986.**

Analyst – Department of National Health
Analyste – Ministre de la Santé nationale et du Bien – être social

Vancouver Police Department
Certificate of Analyses

I, Officer Low being a person designated as a qualified technician by the Attorney General of British Columbia, pursuant to Section 237 (b) of the Criminal Code of Canada.

DO HEREBY CERTIFY:

THAT, at the city of Vancouver, in the Province of British Columbia, pursuant to a demand under Section 235 (1) of the Criminal Code of Canada, I did take two samples of the breath of a person identified to be as WALLY BROGUE.

THAT I did perform a chemical analysis of each of the said samples by means of the said instrument in which a solution suitable for use in the said instrument and identified as Potassium Dichromate Solution, Lot 023851 was used;

THAT I performed the said chemical analyses at the City of Vancouver in the province of British Columbia.

THAT the taking of one of the said samples was commenced at 21hr. 06 min. 08 sec and completed at 21hr 06 min 15sec. On the 14th day of JULY 1986, and the result of the proper chemical analysis of this sample was 170 milligrams of alcohol per 100 millilitres of blood;

THAT the taking of another of the said samples was commenced at 21 hr. 26 min. 38 sec and completed at 21 hr. 26 min. 45 sec on the 14th day of JULY, 1986, and the result of the proper chemical analysis of this sample was 60 milligrams of alcohol per 100 millilitres of blood;

I FURTHER CERTIFY:

THAT this Certificate of Analyses is true to the best of my skill and knowledge.

DATED the 14th of July, 1986, at the City of Vancouver, in the Province of British Columbia.

NOTICE OF INTENTION TO PRODUCE CERTIFICATE

To WALLY BROGUE of 1509 MAIN ST., British Columbia. Take notice that pursuant to Section 237 (5) of the Criminal Code of Canada, it is intended to produce the above Certificate in evidence.

Dated this 14th day of JULY 1986.

This is a diagram of David Benning's and Sara Volsky's apartment which officer Low drew from memory as soon as he got back to the Police Station.

