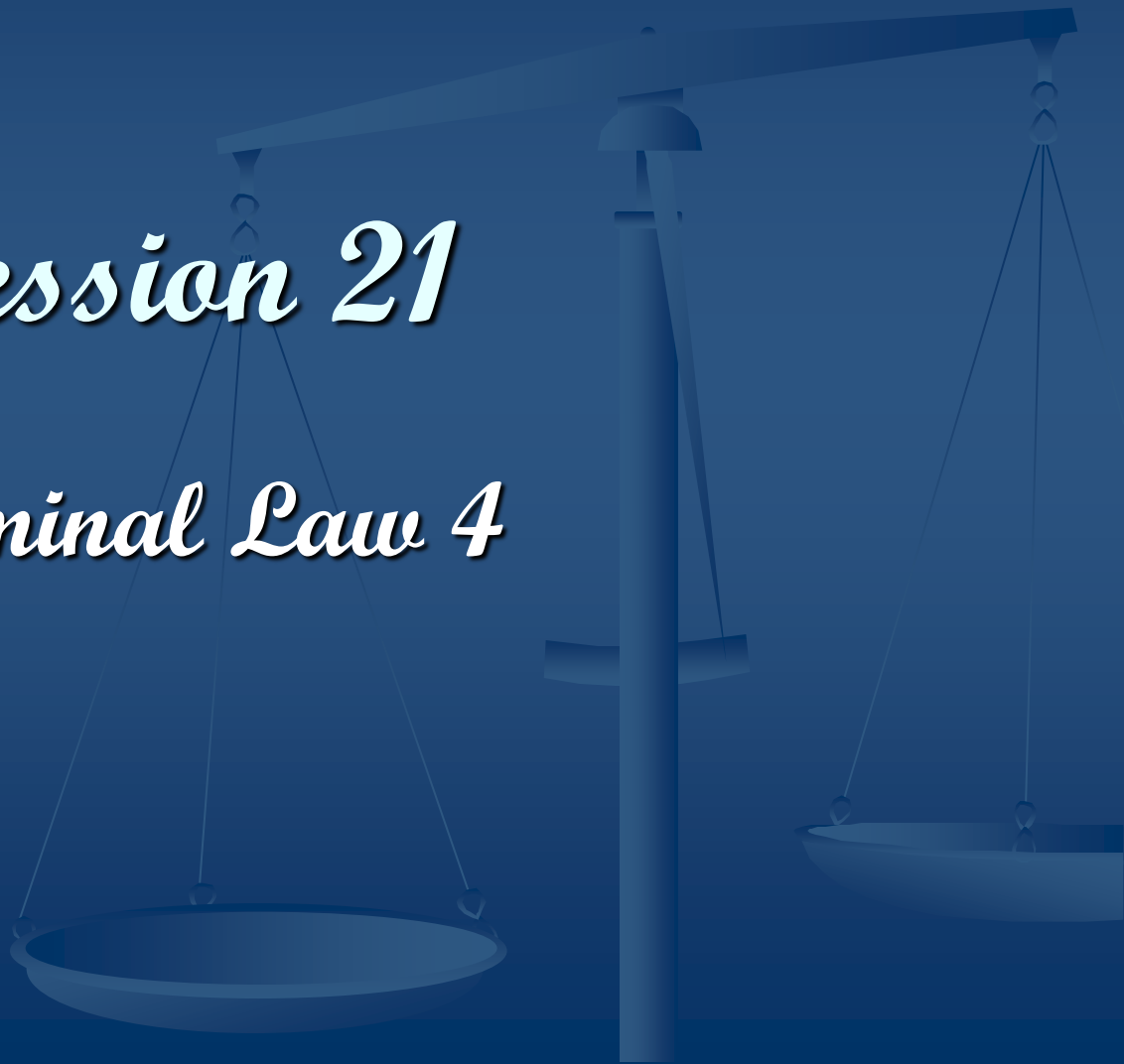
Session 21

Criminal Law 4



Pre-trial

Accused persons charged with indictable offences are entitled to a preliminary inquiry so as to determine whether sufficient evidence exists to commit the accused for trial in a court of superior jurisdiction.

To ensure a fair and expeditious trial, a pre-trial conference is organized and attended by the judge, Crown attorney (i.e. prosecutor), accused and defense lawyer.

Trial

The following principles underlie criminal trials:

- Rule of law: that individuals can be punished only fro breaches of the law; it provides the basis of equality relative to the stated law.

- Specific allegation: the accused are entitled to know exactly which coded offence they are charged with; this information is important to prepare the trial.

Trial (cont.)

- Case to meet: the state presents a plausible case against the accused.
- Presumption of innocence: the state must establish guilt of the accused to a moral certainly before it is appropriate to punish.
- Open and public trial: justice must not only be done but seen to be done so that it is found to be fair by the majority of people.
- Independent and impartial adjudication: judges must have no personal interest in the matter judged.

Trial (cont.)

Procedurally, a criminal trial takes place in the presence of a judge who makes findings of fact to apply the law – where the law is unclear, legal findings are used (i.e. cases) in the following protocol:

1. The presumption of innocent requires the Crown to present its evidence first;
2. The defense can then require – make the motion for a directed verdict of acquittal based on the extent to which the Crown's evidence is sufficient or not;
3. The judge then reaches to a verdict based on the principle that a reasonable person, properly instructed in the law, could find the accused guilty.

Jury

In a jury trial, the jury (12 members) protects the constitutional rights of the accused because it:

- Fosters collective decision making.
- Represents the conscience of the community.
- Acts as the final barricade against oppressive laws or their enforcement.
- Stimulates interest in the public.
- Acts as an impartial fact finder.

Jury (cont.)

The jury is selected through:

- The generation of the jury array where a pool of possible juror is constituted with the exception of some professionals.
- The empanelling of the jury where a selection of possible jurors is made.

Jury (cont.)

A feature of the jury-constitution process is the possibility to challenge potential jurors in two ways:

- Peremptory challenge where the prosecution (i.e. the Crown) or the defense chooses to reject a juror without giving any reason – the number of challenges is equal for both parties.
- Challenge for cause where the prosecution (i.e. the Crown) or the defense reject a juror because the latter may not fulfill the expected responsibilities or is not impartial.

ACTIVITY: read case *R v. Williams* (2004: 295-296) to say whether you agree : with the Supreme Court's decision – justify your answer.

Challenge for cause is an important ingredient to making a trial fair.

Evidence

Evidence is used by the trier of fact (i.e. either judge or jury) to reconstruct relevant facts of the criminal act, and hence only relevant evidence is admissible, whether physical or descriptive.

In the latter case (i.e. descriptive), only direct knowledge of facts is admissible (i.e. hearsay is not), as told by a witness in the examination in chief (i.e. by the lawyer who has summoned the witness) and cross examination (i.e. by the lawyer of the opposite party).

If the admissibility of evidence is questioned a voir dire is held (i.e. hearing without the jury to determine the admissibility of evidence).

Defense

Once the prosecutor (i.e. the Crown) has presented its case, the defense presents its arguments with two ways:

- Negative defense where doubt is raised over the *actus reus* or that there is the necessary *mens rea* to support a conviction.
- Examples: mistake of fact, mental disorder, automatism, intoxication.

- Affirmative defense where there is admission of the *actus reus* but justified in the circumstances.
- Examples: self-defense, compulsion (i.e. duress).

Defense (cont.)

ACTIVITY: read case *R v. Parks* (2004: 305-306) to say whether you agree with the Supreme Court's decision – justify your answer.

With this case there is the actus reus but not the means rea; there is no willful intention and it is difficult to argue for negligence.