FILE: 1991/92-03
APPEAL

Trial: 1991/92-01

THE UNIVERSITY TRIBUNAL OF THE UNIVERSITY OF TORONTO

TRIBUNAL APPEALS BOARD

BETWEEN: University of Toronto

Complainant (Respondent),

-and-

Ms. R.

Accused (Appellant),

BEFORE: D. S. Affleck, Q. C. (Senior Chair)
Mr. Charles Levi
Professor Ernest Seaquist

Appeals Board

APPEARANCES: Charlene Loui-Ying, for the Appellant

Linda Rothstein, for the University

DATE: January 22nd, 1992

This is an appeal by Ms. R. to the Appeals Board of the University Tribunal from her conviction on September 25th, 1991 by the Trial Division of the University Tribunal or, in the alternative, from the sanctions imposed. The appellant pleaded not guilty but was unanimously found guilty by a jury of the following offences:

1. That on or about March of 1991, she did use an unauthorized aid in an examination or term test or in connection with a term test or examination in that she made additions to her test 1 in PSY202S after the conclusion of the test and then submitted it with a request that it be re-marked, contrary to Section E.1.(a)(i) of the University of Toronto Code of Behaviour on Academic Matters. The test was concluded on or about January 30, 1991, and it was submitted for re-marking with the unauthorized additions on or about March 11, 1991.

2. That on or about March 1991, she made additions to her PSY202S term 1 test after the conclusion of the test with the intent to falsify or alter her academic record, being her course results for PSY202S, contrary to Sections F.2. and E.1.(c) of the University of Toronto Code of Behaviour on Academic Matters. The test was concluded on or about January 30, 1991, and it was submitted for re-marking with unauthorized additions on or about March 11, 1991.

The Trial Division jury ordered the following sanctions: a grade of zero in the course PSY202S; suspension from the University for a period of three years, from September 25th, 1991 to September 24th, 1994; that the suspension and the reason for it be recorded on her academic transcript for the period of five years; and that the decision and sanctions imposed be reported to the Vice-President and Provost for publication in the University newspapers.

The Appellant asks that the finding of guilt and conviction be set aside and that an acquittal be entered or, in the alternative, that a new trial be ordered on the following grounds:

1. That the charge to the jury was such that there was no explanation of reasonable doubt and there was a gross misdirection as to the meaning of reasonable doubt.

2. That the jury's finding of intention to cheat was based in total disregard to and without evidence, so as to render the verdict a perverse verdict.

Counsel for the Appellant cited the case of Regina v. Gavrilovic. ([1974] 18 C.C.C. (2d) 287 {B.C.C.A.}) in which it was held that "...it does not matter that the tribunal is not convinced that the accused's explanation is true. The proper test is whether the explanation given by the accused is one that might reasonably be true, and if it is the accused must be acquitted. If the trial judge does not appear to have proceeded in this manner in deciding the matter, the conviction must be quashed." Counsel believed that the jury had been misdirected as to the proper test to apply, resulting in their disregard of the Appellant's explanation of her actions.

Counsel for the Appellant drew attention to the jury's reasoning for the sanctions: "...it was a knowing attempt to cheat. Very careful insertions on the paper, such that it was obvious that they had been added." She said that the

conclusion arrived at by the jury was inconsistent with the evidence. The Appellant believed that she had done nothing wrong because she had requested the professor to review parts of the paper that she believed that he had missed; she did not ask that he remark the additions to the paper. The Appellant had not had the foresight to realize that her act would result in such disastrous consequences. Such mistakes of fact should not be judged as intent to cheat.

Counsel for the Appellant said that if the Appeals Board decided not to set aside the conviction or to order a new trial, she wished to make submissions concerning the sanctions. She asked that the suspension be reduced to a one-year term from the date of the offence, i.e. March 11th, 1991 to March 11th, 1992; and that the notation be placed on the transcript for the duration of the suspension. In the alternative, she asked that the undergraduate transcript be separated from the sanctions, in other words, that the Appellant's Bachelor of Education transcript bear the notation of an academic offence. This would enable the Appellant to graduate with a four-year Bachelor of Science degree and continue in the Bachelor of Education program. She could not graduate at the present time, although she had completed the requirements of the undergraduate degree, because she was not "in good standing". The Appellant asked that the sanctions be varied on the following grounds:

1. That the sanctions were harsh and excessive.
2. That the matter was treated as a second conviction when in fact it was a first conviction.

Counsel for the Appellant said that if the Appellant were unable to attend school for an extended period of time, she would suffer unreasonably harsh consequences. She would be forced into an arranged marriage by her parents or she would have to separate from and disown her family. The Appellant had been unrepresented at the Trial Division and had been unable to articulate all of the circumstances, given her highly emotional state.

Counsel for the Appellant submitted that under the University of Toronto Code of Behaviour on Academic Matters, there was a catagorical difference between admitted offences and convictions. The Appellant had been sanctioned such

that it was her second conviction when, in fact, it had been her first. In the matter of her first offence she had admitted to her mistake and received the consequences. She was never charged and convicted.

Counsel for the Appellant made reference to the case of Mr. L. , who in 1989-90 "admitted to having used an unauthorized aid during a final examination. Because it was a second offence, he received an immediate suspension from the University for one year, a grade of zero in the course and a notation on his transcript for a period of one year." This was a case of a second offence yet the suspension was for one year rather than the three that the Appellant had received.

Counsel for the Appellant noted that one of the reasons for imposing santions was specific deterrence. It was Counsel's submission that the Appellant would not be deterred further by receiving harsh sanctions; what she had gone through because of her mistake was deterrence enough.

Counsel for the Appellant pointed out that because the date of the suspension began on the date of the Trial hearing (September 25th, 1991), instead of the date of the offence (March 11th, 1991), in effect it was a four-year suspension from the University.

Counsel for the Respondent said that the conviction ought to be upheld unless it could be shown that when the charge had been read as a whole, the jury had been mislead, with the result that there had been a miscarriage of justice. In addition, based on the evidence, there had to be a reasonable basis to believe the story that had been put forward by the Appellant. Counsel believed that the Appellant could not meet either of those tests. The jury had been clearly told to weigh the evidence, and clearly told that any reasonable doubt had to be resolved in favour of the accused. She noted that she herself had told the jury, and it appeared in the transcription, that the jury had to weigh the Appellant's story on the basis of reasonable doubt. The Chair had directed the jury that the standard was reasonable doubt and said: "...so that if you have a reasonable doubt as to the facts here, then they must be exercised in favour of the accused." Counsel noted that the Appellant had not put forward her story in a very clear manner but that the Chair had gone out of his way to ensure that the jury had understood it, and that if they believed it, they must acquit her. Counsel

maintained that it was clear that after hearing all of the evidence, the jury had not believed the Appellant, and that they had been entitled to convict if they did not believe her. Therefore, Counsel submitted that there was no evidence that the jury had been mislead, indeed, their reasoning suggested that they had understood perfectly well what they had had to find, i.e. a knowing attempt to cheat. It was not enough to just accept the admission that had been made by the Appellant, that she had made additions to the paper. They clearly had to direct their minds as to whether or not those additions had been made with any sort of wrongful intent. In their verdict they had said that they saw it as a knowing, deliberate attempt to gain greater credit.

Counsel for the Respondant addressed whether there could have been reasonable doubt found in the Appellant's story by reviewing the evidence adduced at trial. Important things to note were that the examination paper had been photocopied by the marker before returning it, unbeknownst to the Appellant; that the additions to the paper were made in pencil in a manner resembling the original answers; that the very matters the Appellant had requested be reviewed were the very matters specifically noted by the teaching assistant that were missing from the examination answers; that testimony from the teaching assistant was such that she always gave marks for answers even if they appeared in the wrong section of the paper, and that it was common that students put answers in different places; that when the professor and teaching assistant subsequently reviewed the answers without taking the additions into consideration, there was nothing to the Appellant's claims that those matters had been covered in the original test but were not included in the correct place; that as a result of seeing a friend's paper and being present at the tutorial when the answers were taken up, the Appellant had told the Tribunal: '"I knew the things that I had missed so that's why I added them on."; that she had conceded in her evidence that she had made those additions in a way that someone, who did not have the original paper photocopied, would have difficulty in detecting; and that she admitted to the Tribunal under cross-examination that had she known that her original test had been photocopied, she would have clearly indicated the additions she had made to the paper. Counsel said that there had been an acknowledgement that what had been done had the potential to mislead, and that the Appellant knew it. This was sufficient *mens rea* for the purposes of the Code, and indeed for the purposes of the criminal law. She

had known that what she was doing was reckless and had the potential to mislead and she had done it anyway. The jury had been entitled to so find, they had been clearly instructed and they had had no reasonable doubt nor ought they to have had.

Counsel for the Respondant next addressed the sanctions. She noted that Counsel for the Appellant had made a distinction between offences and convictions. Counsel pointed out that the Code of Behaviour set out the sanctions and how they could be levied in different circumstances. The Code distinguished between the powers of the Tribunal and the powers of the dean in matters of penalty. A jury had much more extensive powers with respect to penalty, for example it could suspend for more than one year, which was the limit of a dean's power. The Code did not, however, distinguish between offences that were admitted and those that were not. In this case, the jury had properly characterized the situation as a second offence. The jury's conclusion that the Appellant had not been deterred by the penalty imposed for her first offence, and that the penalty in this instance ought, therefore, to be more severe, had not been in errror.

Counsel for the Respondant said that it was clear that the jury had taken the mitigating factors into consideration because when they had rendered their decision on sanctions they had noted that they would have imposed, apart from the mitigating factors, a five-year suspension. They effectively had reduced the penalty by almost half. Counsel listed the factors that the jury had been apprised of: the Appellant's personal situation including family pressures and that any suspension would result in an arranged marriage.

Counsel for the Respondant turned to other cases. First of all, the case that had been cited by Counsel for the Appellant involving Mr. L. was a divisional case. The dean had imposed a one-year suspension because the Code of Behaviour limited his power to award more. She believed that the Board could not be asked to compare the sorts of sanctions imposed at the decanal level with those imposed by the Tribunal. She cited the case of Mr. D. (1988/89-02) 1988, which contained similar circumstances. In that case the jury had awarded a sanction of, among other things, a five-year suspension. The jury in the present case, therefore, had been right in saying that, but for the

mitigating circumstances, this was a five-year suspension case. Counsel noted that there had been many Tribunal cases where expulsion had been recommended, even for first offences. In the case of a knowing attempt and a second offence, it could not be that a one-year suspension was adequate, either from the point of view of specific or general deterrence.

Counsel for the Respondant said that the submission of Counsel for the Appellant for continuing a one-year suspension on the Bachelor of Education program but to remove the notation from the Bachelor of Science record would be to effectively undo the suspension altogether. Part of being suspended meant that the record would bear the notation for whatever reason the transcript was put to use.

Counsel for the Respondant drew the Board's attention to the Tribunal Appeal of Ms. B. (1989/90-06) 1990, where the Appeals Board stated that "We are of the view that the Tribunal Appeals Board cannot be put in the position, in this case in particular, of substituting its view of the appropriate sentence for that of the jury at the Trial Division." The Board in 1980/81-08 , 1980, stated that "Here too we are guided as an appellant tribunal by a reluctance to interfere with the trial process by substituting our discretion for that of the jury, in the absence of any evidence of a miscarriage of justice." Also in that case, she noted that the Board had set out the key principles that should be adopted in assessing the appropriateness of the charge.

Counsel for the Respondant concluded that it could not be said, either with respect to conviction or sanctions, that there had been any misscarriage of justice, any palpable error. She remarked that, based on her submissions to the Board, the appeal ought to be dismissed.

Reasons for Decision of the Tribunal Appeals Board (Delivered orally by D. S. Affleck):

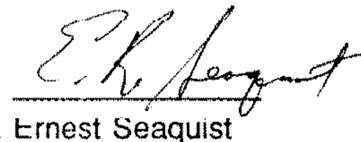
First of all, we would like to thank both counsel for their careful and thoughtful submissions and review of the evidence and law with us. Having reviewed the entire transcript and the exhibits before the Trial Division, we do not feel that there was any "wrongful conviction" in this case, to use Counsel for the

Appellant's words. The jury was carefully instructed and, by way of example, I would cite page 55 of the transcript where the Chair, in the middle paragraph on that page, states that "Ms R says that the letter averted to, other than the additions - the letter that she submitted, the exhibit you have - averted to portions of the test paper other than the additions. That she was seeking to draw to the marker's attention, portions of the test paper other than what she added and what she has admitted she added. It is for you to determine whether you believe that in these circumstances. You are the determiner of that question." As I say, that is just by way of example.

We do not believe, as other panels of this Board have previously stated, that we should 'second guess' the jury, composed as it is by students and faculty members of the University. It would appear to us that the jury took into account the mitigating circumstances that have been argued before us tonight and stated in their decision that in coming to the sanctions that they set out, they considered those mitigating circumstances and referred to them as "extenuating circumstances". So, we are of the unanimous view the Appeal must be dismissed. Nevertheless, we feel that the suspension, through inadvertance perhaps, extends beyond the period intended it by the jury. And therefore we would alter the period of suspension to run from March 11th, 1991, the date it would appear that the test was submitted for re-marking, to March 11th, 1994. [Our only intent in making this alteration in the dates respecting the period of suspension being to avoid depriving the Appellant from an ability to enrol at the University of Toronto for the fall term, 1994. Any credits/grades obtained by the Appellant between March 11th, 1991 and September 25th, 1991 (the date of the proceedings before the Trial Division) in courses other than PSY 202S to be unaffected by the suspension and other sanctions imposed.]

Donald Affleck

Charles Levi


Ernest Seaquist

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