

R. v. Aho

**Between
Rex, and Aho**

[1904] B.C.J. No. 14

11 B.C.R. 114

British Columbia Court of Criminal Appeal
Victoria, British Columbia

Hunter C.J., Irving, Martin and Duff JJ.

November 18, 1904.

1 HUNTER C.J.:-- The Court finds it unnecessary to call upon the learned counsel for the Crown.

2 The only point on which any stress is really laid by the learned counsel for the accused, is the question as to whether there was what amounted to a comment on the part of the learned trial Judge, on the failure of the accused to testify. For my part, I am clearly of the opinion there was not. In my opinion, to hold that a direction to the jury that the accused [11 BCR Page117] has failed to account for a particular occurrence, when the onus has been cast upon him to do so, amounts to a comment on the failure to testify, would paralyze the action of the Court in the discharge of its most essential function, viz.: to charge the jury on all questions of law which have any relevant bearing on the case including the question as to when the onus shifts.

3 As to the other point, the learned counsel for the accused succeeded in shewing that the so-called dying declaration never had any existence; and as it was explicitly withdrawn from the jury there is no room for complaint on that ground.

4 With regard to the general question as to whether the jury should be excluded or not from a preliminary inquiry - as to whether or not certain evidence tendered would be admissible, I am of the opinion that it is not incumbent on the Judge to exclude the jury during any part of a criminal trial. To my mind the jury in a criminal case, if not the most essential component of the tribunal, is just as essential as the Judge himself, and to have any evidence given in the absence of the jury might cause a mis-trial.

5 IRVING J.:-- I concur.

6 MARTIN J.:-- I have nothing to add.

7 DUFF J.:-- I concur.

