Date: 20001124
Docket: CAC 162085

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Murphy, 2000 NSCA 135]
Bateman, Hallett and Chipman, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and

WILLIAM LAWRENCE MURPHY

Respondent

REASONS FOR JUDGMENT

Counsel: David R. Hirtle for the appellant
Respondent not appearing
Appeal Heard: November 16, 2000
Judgment Delivered: November 24, 2000

THE COURT: Leave to appeal is granted and the appeal is allowed, the acquittal is set aside and a new trial is ordered per reasons for judgment of Hallett, J.A.; Chipman and Bateman, JJ.A. concurring.

HALLETT, J.A.:

[1] The defendant was charged with supplying liquor to a person under 19 years of age contrary to s. 89(1) of the **Liquor Control Act,**, R.S.N.S. 1989, c. 33, as amended. He was acquitted by a provincial court judge. The Crown appealed to the summary conviction appeal court. The appeal was dismissed. The summary conviction appeal court judge held:

> In the case at bar, even though the charging section listed is s. 89(1), in essence the charging section is s. 89(2). Even though the section listed in the offence

may be incorrect, the charge in itself is valid. In reading s. 89(2), the section uses the word "knowingly" where it says:

> "Every person who knowingly sells or supplies liquor to any person under the age of 19 ..."

I find the offence here is a full mens rea and the burden is upon the Crown to prove all elements of the offence beyond a reasonable doubt. On the factual situation, the trial judge found the Crown had not proven the accused knew or should have known Mr. Tanner was under the age of 19 years. The trial judge made a finding of fact and great latitude need be given to the trial judge by an appeal court. In entering an acquittal, I find she did not err.

I therefore sustain the acquittal as entered.

[2] The Crown has appealed to this Court pursuant to s. 839 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

[3] The relevant sections of the **Liquor Control Act** are:

> **89 (1)** Liquor shall not be sold, supplied or given to or procured for or by any person under the age of nineteen years, except for medicinal purposes only as provided for by this Act.
>
> **(2)** Every person who knowingly sells or supplies liquor to any person under the age of nineteen years or knowingly gives liquor to or procures liquor for any person under the age of nineteen years, except for medicinal purposes only as provided by the Act, shall be liable to the penalties mentioned in Section 104.
>
> .....
>
> **99** Every person who unlawfully sells or supplies liquor to a person, other than a person who is not of the age of majority, is guilty of an offence and liable upon summary conviction to a fine of not less than three hundred dollars and not more than one thousand dollars or, in default, to imprisonment for not less than one nor more than two months for a first offence, and a fine of not less than seven hundred and fifty dollars and not more than fifteen hundred dollars or, in default, to imprisonment for not less than one and not more than four months for a second or subsequent offence.
>
> .....
>
> **104** Every person who knowingly violates subsection (2) of Section 89, shall for the first offence be imprisoned for not less than one month, or more

> than three months, and for a second or subsequent offence, be imprisoned for not less than four months, or more than twelve months.
>
> **139** The doctrine of *mens rea* is not applicable to offences under this Act.
>
> (emphasis added)

[4] In **R. v. Mainfroid**, 45 Can. C.C. 204, [1926] 1 D.L.R. 1013, similar offences to those created by s. 89(1) and (2) of the **Liquor Control Act** were held by the Appeal Division of the Supreme Court of Alberta to be two distinct offences on the basis that "knowingly" violating the prohibition carried a special penalty similar to that created by s. 89(2) of the **Liquor Control Act** when read in conjunction with s. 104. Harvery, C.J. stated at p. 207 of 45 Can. C.C.:

> ..... The prohibition is not of the sale to one who is not on reasonable grounds believed to be over 21 but simply to one who is in fact a minor. Knowledge, therefore, on the part of the person actually supplying the liquor would if that view is applicable be immaterial to constitute an offence under s. 90 and the severe penalty prescribed by s. 107 for knowingly doing it is for something more aggravated by the addition of the fact that it is knowingly done.

[5] And further at p. 211:

> It seems to me most unreasonable to suppose that by the use of the word "knowingly" in s. 107 it was intended to incorporate it in ss. 90 and 92 so as to provide that there could be no conviction of selling to a minor or interdicted person without proving knowledge in the seller ....

[6] His opinion was concurred in by Hyndman and Clarke, JJ.A.

[7] The opinion of the Appeal Division of the Alberta Supreme Court accords with my view of s. 89(1) and (2) of the **Liquor Control Act**.

[8] By enacting s. 89(1) and (2), the Legislature created two distinct offences. Knowledge that the person to whom liquor is sold or supplied is under 19 is not, on the clear wording of s. 89(1), an essential element of the offence.

[9] *Mens rea* would appear to be an element of a s. 89 (2) offence. However, I do note that s. 139 of the **Act** provides that the doctrine of *mens rea* is not applicable to offences under the **Act**. I make no comment on the constitutionality of that section nor on what it means given the express provision of s. 89(2) of the **Act** the effect of which is that for a person to be found guilty of a s. 89(2) offence, the Crown would have to prove that the defendant knowingly sold or supplied liquor to a person under the age of 19 years.

[10] Every person who is charged with and found guilty of a s. 89(2) offence is subject to a special mandatory punishment of a minimum term of imprisonment as provided for in s. 104. There is no fine option.

[11] There is no special provision for punishment for a s. 89(1) offence as is the case with respect to a s. 89(2) offence. As there is no express punishment provision in the **Act** for a person convicted of a s. 89(1) offence, such a person would be punished in accordance with s. 4 of the **Summary Proceedings Act**, R.S.N.S. 1989, c. 450, as amended.

[12] The summary conviction appeal court erred in determining that: (i) the real charging section was 89(2) rather than 89(1); and, (ii) that the defendant was charged with a full *mens rea* offence. These were errors in law as there is nothing in the **Act**, and in particular s. 89(1), to support such a conclusion. The Information laid against the defendant made no reference to s. 89(2) or to the ingredient of knowledge required for a s. 89(2) offence. The defendant was charged with violating s. 89(1).

[13] At trial, the provincial court judge held that the Crown had failed to prove beyond a reasonable doubt that the defendant "knew or should have known that T was under the age of 19 years." On this basis she acquitted the defendant.

[14] The provincial court judge erred in imposing on the Crown the burden of proving that the defendant knew or ought to have known that T was under the age of 19 years. T testified he was 15. There is no such burden on the Crown with respect to a s. 89(1) offence. The s. 89(1) offence is made out without proving that the defendant knew or ought to have known that T was under age (**R. v. Mainfroid, supra**).

[15] The Crown, on this appeal, takes the position that the s. 89(1) offence is one of "strict liability" not "absolute liability". Therefore it is not necessary for us to

decide that issue. It is clearly not an offence to which the doctrine of *mens rea* has any application.

[16] With respect to strict liability offences, Dickson, J. in **R. v. City of Sault Ste. Marie** (1978), 40 C.C.C. (2d) 353, stated:

> 2. Offences in which there is no necessity for prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may property be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.

[17] The defendant did not testify. In the absence of testimony from the defendant (assuming s. 89(1) is a strict liability offence), the defence that the defendant took all reasonable care to avoid liability is not made out.

[18] The defendant, who was under 19 himself at the time of the trial, was not represented at trial by counsel nor on the appeal to the summary conviction appeal court or on the appeal to this Court. On the appeal to this Court the Crown has stated that if the appeal is allowed he will ask the Court to order a new trial and that it is the intention of the Crown at the time of the new trial not to offer any evidence.

[19] I would grant leave to appeal, allow the appeal, set aside the acquittal and order a new trial (**Criminal Code of Canada**, R.S.C. 1985, c. C-46, s. 684(4), s. 839(1) and (2)).

Hallett, J.A.

Concurred in:

Chipman, J.A.

Bateman, J.A.