SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Volodtchenko,* 2015 NSSC 211

Date: 20150610
Docket: Hfx No. 436156A
Registry: Halifax

Between:

Maksym Volodtchenko

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice M. Heather Robertson

Heard: June 10, 2015, in Halifax, Nova Scotia

Written Release of Decision: July 23, 2015 (**Orally: June 10, 2015**)

Counsel: Philip J. Star, Q.C., for the appellant
Scott Morrison, for the respondent

Robertson, J.: (Orally)

[1] Alright, well thank you very much. Look I have had the benefit of your very good briefs and discussion of the law on this subject as well as Mr. Morrison's analysis of what happened in the courtroom that day. I realize in Provincial Court all kinds of oral decisions are done in speedy fashion, relying a lot on the way things get presented by the Crown. So, Mr. Morrison I thank you for being so candid to say, "Look I went off the rails a little bit here, I was making a reasonable excuse case." I hope I do not fall into any error here as I provide you with an oral decision this morning. I have had the benefit of being able to read all of the law and write very extensive notes and I will have this typed up for you.

[2] The appellant was convicted of a charge pursuant to s. 254(5) of the *Criminal Code* (failing or refusing to provide a proper sample of his breath into an Approved Screening Device ("ASD").

[3] This is an appeal from that conviction.

[4] The facts are as follows:

> The RCMP were called to the scene of a single vehicle motor accident in the early evening of May 17, 2013. After speaking with various witnesses, the Appellant was identified as the driver of the said vehicle. Grounds were established to justify the reading of an Approved Screen Device Demand which the investigating RCMP officer did.
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> The Appellant was asked to sit in the backseat of the RCMP vehicle and was given some 17 attempts to provide a proper sample of his breath into the Approved Screening Device (ASD). In the opinion of the Officer, the Appellant failed to provide a suitable sample for analysis on any of the 17 attempts.
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> As a result of this incident, the Appellant was charged with an offence contrary to Section 254(5) of the **Criminal Code**.

[5] The matter was heard in Provincial Court before Judge John MacDougall. He heard testimony of Constable Samuel Bromley who administered the ASD and the appellant Mr. Volodtchenko and his expert witness, Dr. Gregg Branscombe.

[6] Dr. Branscombe testified that five days after the accident he treated the appellant for a severely abscessed tooth which ultimately required a root canal. In addition, he provided evidence that such an ailment could have an adverse effect

on one's ability to provide a sample of breath into an ASD instrument or "blowing up a balloon."

[7] The appellant testified about the 17 attempts to provide a breath sample. He stated "I did my best. I blow it very hard many times." He testified that the pain in his tooth on the day of the alleged offence was "not very big pain but it was painful" and described the worsening condition over the weekend. His counsel argued that this evidence demonstrated that he had done his best to provide a proper sample of his breath and did not intentionally fail or refuse to provide a proper sample.

[8] The issues before me are:

> 1. That the Learned Trial Judge erred by law by misapplying the burden of proof and by holding that the onus was on the Accused to show that he had a reasonable excuse within the meaning of Section 254(5) of the **Criminal Code** as opposed to ruling that the Crown must prove *mens rea* beyond a reasonable doubt; and
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> 2. That the Learned Trial Judge erred in law in not properly interpreting and applying the doctrine of reasonable doubt included his *R v WD* analysis of the evidence.

[9] The standard of review under s. 686(1)(a)(ii) of the *Criminal Code,* a summary conviction appellate court can review a trial judge's decision based on an error of law. Section 686(1)(a)(ii) states:

> Powers
>
> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
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> (a) may allow the appeal where it is of the opinion that
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> …
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law …

[10] Counsel for both the appellant and the respondent agree that the standard of review for this appeal is the "correctness standard." The appellant cites *R. v. McInnis,* 2014 NSSC 262, Gogan J. said at paras. 33-34:

[33] It is well settled that the standard of review for questions of law under Section 686(1)(a)(ii) is correctness. In *Housen v. Nikolaisen*, 2002 SCC 33, Justices Iacobucci and Major revisited and perhaps clarified the standards of review. As to the standard of review for questions of law, they confirmed:

> 8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus, the standard of review on a question of law is that of correctness: *Kerans, supra,* at p. 90.
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> 9 …Thus, while the primary role of the trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of the appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

[34] For questions of mixed fact and law, the standard of review is more difficult to articulate and apply. In *Housen, supra,* the standard of review for these questions was described, in part, as follows:

> 27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam, supra,* at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:
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>> …if a decision maker says that the correct test requires him or her to consider A, B, C and D, but in fact, the decision maker considers only A, B and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.
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> Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

> 28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all of the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed fact and law and is subject to a more stringent standard of review: *Southam, supra*, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed fact and law fall along a spectrum of particularity. This difficulty was pointed out in *Southam, supra*, at para. 37:
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> > …the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain rate of speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed fact and law. See R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over the general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

Issue No. 1 – Did the trial judge misapply the burden of proof?

[11] Crown counsel urges the court to evaluate the judge's reasons as a whole relying on *R. v. Sellars,* 2013 NSCA 129, at para. 23:

> [23] I do not doubt that there may be cases where a trial judge may stray from the exact words of a legal test, but the slip may be harmless. This could be because an appellate court is satisfied, when the reasons are read as a whole, the trial judge did apply the correct test, or where the inexact words do not cloud the legal accuracy of the test applied. …

[12] The Crown also points out that since this decision was rendered the Supreme Court released its decision *R. v. Goleski,* 2015 SCC 6, which upheld the reasoning of the British Columbia Court of Appeal in *R. v. Goleski,* 2014 BCCA 80, upon which they rely and also emphasizing the interpretations of s. 794(2) of the

Criminal Code. And in British Columbia Court of Appeal in *Goleski, supra,* they outline the elements of refusal at para. 71:

> 71 … the elements of the offence that the Crown must prove are: (i) a proper demand; (ii) a failure or refusal to provide the required breath sample; and (iii) an intention to fail or refuse to provide the required sample.

[13] The court cites the following passage with approval at para 72:

> 72 Also germane is the following from the reasons of Judge Gorman in *R. v. Sheehan* (2003), 35 M.V.R. (4th) 61 (N.L. Prov. Ct.):
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> > [42] In my view, the *actus reus* of this offence is the failure or refusal to comply with the demand. The *mens rea* element requires that the failure or refusal to comply be intentional. Therefore, a person who fails to provide an appropriate sample despite genuinely attempting to do so, will not have committed the *mens rea* of this offence. It is important to keep in mind that this has nothing to do with whether or not the accused had a reasonable excuse.

[14] The appellant has extensively canvassed the case law with respect to the separate issues of *mens rea* and the *mens rea* component of refusal to comply and the separate defence of "reasonable excuse."

[15] I have reviewed all of those cases: *R. v. Mercado*, 2013 ABPC 330, where the court found the *mens rea* component of refusal to comply is the one of a general intent. The Crown must prove beyond a reasonable doubt that the accused had a record of mental state. Paragraph 62 a proving of *mens rea* under s. 254(5) and establishing a defence of "reasonable excuse" are two separate analysis.

[16] Defence counsel canvassed *R. v. Tikhonov*, 2014 ONCJ 347, which also supports the view that there are two separate analysis to be conducted, the mental element of proving failure or refusal and the defence of reasonable excuse.

[17] *R. v. Bain*, [1985] N.S.J. No. 215, para. 7, also agreed *mens rea* and the defence of reasonable excuse were separate issues and reaffirmed by Laskin, C.J. in a later case – *Taraschuk v. The Queen,* (1975), 25 C.C.C. (2d) 108.

[18] Counsel cited *R. v. Westerman*, 2012 ONCJ 9. Counsel also discussed the dissent of Freeman, J.A. in *R. v. Peck,* [1994] N.S.J. No. 39, whose reasoning was followed by Crawford, J. in *R. v. Barkhouse,* 2008 NSPC 2.

[19] And I also recognize the additional cases Mr. Star forwarded to the court on June 1, 2015 and May 27, 2015.

[20] It is the appellant's position that the trial judge's assessment of the burden of proof under s. 254(5) of the *Criminal Code* was an error in law – pointing out that the issue of the accused forming the necessary intent or *mens rea* for refusing to comply with the demand is a separate issue from the accused establishing the defence of "reasonable excuse" for failing to comply with the demand. Each issue carries a different burden of proof. For each issue the burden of proof is borne by a different party.

[21] The trial judge gave an oral decision. At p. 80, lines 5 to 10 of the trial transcript the learned trial judge explains conception of the various burdens of proof allocated under s. 245(5) of the *Criminal Code*:

> With respect to the burden and the facts as they apply. In my understanding of the law in Nova Scotia, there is a reasonable excuse that has to be provided, and that reasonable excuse has to be an objective one. In many respects, and in many cases, whether it happens to be reasonable excuse or the proof of *mens rea* is a question of splitting hairs and not too much rests when one looks at the evidence as to who bears the burden when applying the facts, the result quite often is the same.

[22] And at p. 82, lines 14 to 19 of the transcript:

> In other words, if I read correctly, and understanding correctly, there was no air being provided by Mr. Volochenko [sic], not just a question of whether it was sufficient. Mr. Volochenko [sic] did not comply with the demand by providing the required breath sample. Whether he intended to or not, or whether he can offer a reasonable excuse falls to his testimony because of the face of it, if no response was given then I would have to concluded the *mens rea* had been made out.

[23] Crown counsel concedes a problem with this statement of the law, calling it an error in articulation. Crown counsel says and I quote from your brief Mr. Morrison:

> This is clearly an incomplete description of the law.
>
> The Judge does not enunciate the elements of refusing to provide a breathalyzer sample. he does not describe the burden and standard related to those elements.

> The Judge also does not enunciate the standard or onus related to reasonable excuse. He does not explain the relationship between proof of the elements of refusal and reasonable excuse.
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> He also does not say whether it is the Crown or the Defendant who needs to provide a reasonable excuse.
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> Certainly, this statement is confusing and incomplete. While it approaches error in articulation, the Crown says the proper approach is to review the Judge's reasons as a whole to determine the Judge's understanding of the law.

[24] I do not share Crown's confidence after I have read the decision as a whole. The trial judge does seem to find that "no air being provided" the *actus reas* of the offence was established and that "if no response was given then I would conclude that the *mens rea* has been made out."

[25] He does not appear to analyze the appellant's evidence that he did not intentionally fail to provide a proper breath sample and could not because of tooth pain, as evidence that could negate *mens rea*. He only seems to reflect on this evidence as raising the defence of "reasonable excuse" ruling that he had not done so.

[26] I agree with appellant counsel that this is not "a question of splitting hairs" but a matter of two separate legal issues that required discrete analysis. Failure to do so amount to an error in law.

Issue No. 2 – The application of *W.(D.)*

[27] In many decisions of the courts at all levels it is acknowledged that the recital of three principles articulated by Cory, J. in *R. v. W.(D)*, [1991] 1 S.C.R. 742, is not a *mantra* that must slavishly be recited particularly in a judge alone trial. However, "What is important is that the judge correctly apply the burden of proof in a way that makes it clear the trial judge has analyzed the evidence properly. A failure to do so amounts to an error of law and will necessitate a new trial." This is a quote from *R. v. D.D.S.,* 2006 NSCA 34.

[28] The trial judge in this case stated:

> With a W.D. analysis I look at the testimony of Mr Volochenko [sic] and I don't accept that the reason for him to fail to provide even the sufficient air that would cause an audible tone in the machine to be credible. I don't accept that the conduct on the night in question as it relates to these charges was something that was as a consequence of a toothache, but was the result of an intent not to comply

> with the demand. I look at his evidence and I don't find it credible. I look at the other evidence, and there's nothing to suggest, beyond a reasonable doubt or otherwise, that the Crown has failed to prove its case.

[29] Reading these words I cannot say as the appellant suggests that the trial judge merely accepted the Crown's evidence over that of the appellant, but I do agree with the appellant counsel that he misapplied the burden of proof by not evaluating the *mens rea* element of s. 254(5) on reasonable doubt standard and that in doing so he did not deal with the evidence of the appellant's tooth pain as raising reasonable doubt as to *mens rea*, using this evidence instead to ask whether "the defence of reasonable excuse had been made out." This gave the appearance that the trial judge ignored the second and third branches of the *R. v. W.(D.)* test, thus falling into error.

[30] The learned trial judge at best collapsed the three-part analysis of *W.(D.)*. so that his reasoning is unclear with respect to his consideration of all of the evidence. This is the risk inherent in an oral decision rendered from the bench in a circumstance where the Crown counsel has candidly said that they may have misled the trial judge into believing it was an reasonable excuse case. *R. v. Carter,* [2002] M.J. No. 270 at para. 34.

[31] And as we said the trial judge did not really have the opportunity to consider at length all of the cases that were presented to him that might have provided more clarity in his explanation.

[32] In the result, the learned trial judge's decision is overturned and the appellant's conviction is quashed and I would order a new trial in the matter.

Justice M. Heather Robertson