Date: September 13, 2000
Docket: S.H. 161754A

2000

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: R. v. Jbeilli, 2000 NSSC 84

BETWEEN:

HER MAJESTY THE QUEEN,

APPELLANT

-and-

ABEL JBEILLI,

RESPONDENT

DECISION

Heard before:	The Honourable Associate Chief Justice Michael MacDonald on July 12, 2000 at Halifax, Nova Scotia
Oral Decision:	July 12, 2000
Written Release of Oral Decision:	September 13, 2000
Counsel:	James Clarke, Public Prosecution Service for the Appellant
	Kent Noseworthy, Thomson Noseworthy DiCostanzo for the Respondent

[1] This is a Crown Appeal from a convenience store operator's acquittal of a charge of selling tobacco products while his license to do so was suspended. Specifically the learned trial judge accepted the Respondent's plea of "due diligence".

BACKGROUND

[2] The Respondent was charged as follows:

> "that Adel Jbeilli, of Dartmouth, in the County of Halifax, Province of Nova Scotia, on the 20th day of April, 1998, at or near 3561 Highway 333, Shad Bay, in the County of Halifax, Nova Scotia, did; being a retail vendor did sell or agree to sell tobacco to a consumer at a retail sale when his retain vendor's permit was not in force at the time of the sale, contrary to Section 37 of the Revenue Act, S.N.S. 1995-96, c.17"

[3] The facts of this case are not complicated. In earlier proceedings before a Justice of the Peace, the Respondent on behalf of an employee, plead guilty to selling tobacco to a minor. He was fined $750.00 in addition to a mandatory seven day suspension of his license to sell tobacco products. The suspension was set for the week of April 20th, 1998.

[4] On the 20th of April, 1998 the Respondent, in fact, sold cigarettes at his store and was charged accordingly. This charge forms the subject matter of the present appeal.

[5] At trial the Respondent was acquitted on the basis that he, on reasonable grounds, honestly believed that the suspension was not in effect at the time of the alleged offence. The reasonableness of this mistaken belief flowed from a dialogue the Respondent had with the Justice of the Peace at the conclusion of the original proceedings.

[6] These initial proceedings were very brief. After pleading guilty, the Respondent was asked for input as to when suspension should begin. Essentially the Justice of the Peace in his discretion allowed the Respondent to pick a convenient time. The week of April 20th, 1998 was settled upon and confirmed by the Court. The exchange went as follows:

> THE COURT: The fine on that will be $750, and your...your license will be suspended for selling tobacco products for the period of a week, starting...
> MR. LENEHAN: That can be somewhat flexible. It can be next week or a week later.
> THE COURT: Do you...do you...have you got a preference?
> MR. JEBAILEY: No.
> THE COURT: When do you want to start?

MR. JEBAILEY: Couple of weeks, I guess.
THE COURT: In a couple of weeks' time?
MR. JEBAILEY: Yeah. Can I pick out the date or something?
THE COURT: Do you want to pick out the date?
MR. JEBAILEY: Yes.
THE COURT: Okay, tell me.
MR. JEBAILEY: I say Monday.
THE COURT: This Monday?
MR. JEBAILEY: This Monday coming, yeah.
THE COURT: This Monday coming? Okay, today's the 17th...from the 20th to the 27th of April?
MR. JEBAILEY: Yeah.

[7] This was followed by a discussion as to when the fine would be payable and about the fact that a second charge against his wife would be dropped.

[8] Then, according to the Respondent, he revisited the timing of the suspension with the Justice of the Peace. This exchange went as follows:

MR. JEBAILEY: Like, Your Honour, can I pick up, like, each...each week, maybe day every week...maybe something like that?
THE COURT: It's up to you. If you wish to, sure.
MR. JEBAILEY: Yeah, I will do it...every week, one day...every week...something like that.
THE COURT: That's fine.

[9] In the subject proceedings before the Honourable Provincial Court Judge Flora Buchan, the Respondent relied on this exchange in his defence of due diligence. Specifically he insisted that, based upon this exchange, he believed he could pick the timing of the suspension and that he, subsequently, decided to have it effective intermittently; namely, every Wednesday when business was slower. The Crown for its part at trial, submitted that the Respondent knew full well when his permit was to be suspended; namely, the week of April 20th, 1998. Any other belief the Crown submitted would have been unreasonable in the circumstances.

[10] After hearing all the evidence the learned trial Judge accepted the Respondent's explanation. At page 131 of the transcript, she concluded:

> ...I would accept that in his mind he could choose the day of the week to refrain from selling tobacco products. I certainly blame no one for the confusion in this matter. However, it is easy to say after the fact that it would have been perhaps prudent for everyone to get back into the court and have it resolved on the record exactly what it really meant. I would find that it was reasonable for Mr. Jebailey (sic) to believe that the justice of the peace had told him, yeah, you know, it is up to you, if you wish, and that Mr. Jebailey

> (sic) believed that meant he could pick a day, one day a week to carry out the suspension and it was an honest mistake on the part of Mr. Jebailey (sic) and that he relied on that and that he was within his right to rely on that...

[11] The Crown in its appeal before me alleges errors of law on the part of the learned trial judge in accepting this defence of due diligence.

THE LAW

The Due Diligence Defence

[12] As a strict liability offence the Crown need not prove *mens rea*. The Crown's *prima facie* case is made out simply by proving beyond a reasonable doubt that the Respondent committed the named offending act. This has been done in the case at bar. The Respondent sold cigarettes while his permit was suspended. The only issue, therefore, before the learned Provincial Court Judge involved the Respondent's defence of "due diligence".

[13] To best appreciate the nature of this defence, it is first important to understand the nature of strict liability offences and where they fit in the "*mens rea*"

continuum. This has been succinctly explained by Dickson J. (as he then was) in *R. v. Sault Ste. Marie (City)*, (1978) 40 C.C.C. (2d) 353 where beginning at page 373 he noted:

> "I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the 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 properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.
>
> Offences which are criminal in the true sense fall in the first category. Public welfare offences would, prima facie, be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly", or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should

> in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category."

[14] Thus, even where the *actus reus* has been established in a strict liability offence an Respondent may still be acquitted, if on the balance of probabilities, he can establish that he made diligent inquiries and based upon the information received, he mistakenly believed that his activities were right and proper.

[15] In other words, the Respondent must establish that all reasonable care was taken and that the *actus reus* was committed without any fault on the part of the Respondent. See *R. v. Sault St. Marie, supra*, *WholesaleTravel Group Inc.* [1991] 3 S.C.R. 154 and *R. v. Sutherland* (1990), 55 C.C.C. (3d) 265; 96 N.S.R. (2d) 271; [1990] N.S.J. No. 301 Action S.C.C. No. 02164.

[16] There are at least two types of mistakes upon which a plea of due diligence may be grounded. They are *mistakes in law* based upon "officially induced error"

and *mistakes of fact* with a reasonably objective basis. The former is much more difficult to establish than the latter.

[17] Mistakes in law involve an Respondent's plea that he or she was unaware that the offending activity was against the law. In other words the Respondent was mistaken as to the applicable law. This invokes the adage "ignorance of the law is no excuse" as incorporated in s. 19 of the *Criminal Code* which provides:

> 19. Ignorance of the law - Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

[18] Thus, in order to be successful with this plea, an accused must have been misled by some government official as to the true state of the law. This defence was recently summarized by Lamer, C.J.C. in *Jorgenson and 913719 Ontario Limited v. The Queen* (1995), 102 c.c.c. (3D) 97 Reversed 86 C.C.C. (3d) 246 where at paragraph 36 he noted:

> 36. In summary, officially induced error of law functions as an excuse rather than a full defence. It can only be raised after the Crown has proven all elements of the offence. In order for an accused to rely on this excuse, she must show, after establishing

> she made an error of law, that she considered her legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in her actions. Accordingly, none of the four justifications for the rule that ignorance of the law does not excuse which Stuart outlined is undermined by this defence. There is no evidentiary problem. The accused, who is the only one capable of bringing this evidence, is solely responsible for it. Ignorance of the law is not encouraged because informing oneself about the law is a necessary element of the excuse. Each person is not a law unto himself because this excuse does not affect culpability. Ignorance of the law remains blameworthy in and of itself. In these specific instances, however, the blame is, in a sense, shared with the state official who gave the erroneous advice.

[19] Whether or not the relevant misinformation is provided by an "official" will vary with the circumstances. I refer again to *Jorgenson, supra* paragraph 30:

> 30. The next step in arguing for this excuse will be to demonstrate that the advice obtained came from an appropriate official. One primary objective of this doctrine is to prevent the obvious injustice which O'Hearn Co. Ct. J. noted – the state approving conduct with one hand and seeking to bring criminal sanction for that conduct with the other. In general, therefore, government officials who are involved in the administration of the law in question will be considered appropriate officials. I do not wish to establish a closed list of officials whose erroneous advice *[page 113]* may be considered exculpatory. The measure proposed by O'Hearn Co. Ct. J. is persuasive. That is, the official must be one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question.

[20] On the other hand if, after exercising due diligence, an Accused is mistaken as to a set of facts that made him believe his activity was perfectly legitimate, then

in the circumstances his honest but mistaken belief may as well justify an acquittal. See *R. v. Sault Ste. Marie*, *supra.*

[21] The key to the appeal at bar involves whether the Respondent's mistake was one of law or one of fact.

ANALYSIS

[22] In the Appeal at bar, the Respondent testified that he thought he could legitimately sell cigarettes on the day in question, because after talking to the Justice of the Peace he mistakenly believed that his permit was not suspended at the time. Thus, the Crown asserts that he was mistaken as to the law. The Crown, therefore, argues that the Respondent could only be acquitted if his error was officially induced. Because the Justice of the Peace was not an official and because there was no such inducement, there was no basis for this defence. Thus, the Crown says it was an error in law for the learned Provincial Court Judge to acquit in these circumstances.

[23] In advancing this argument the Crown relies heavily on the Supreme Court of Canada decision of *R. v. MacDougall*, (1982) 1 C.C.C. (3d) 65. In that case the Accused drove a motor vehicle while his license to do so was suspended. The trial judge accepted the accused's explanation that he mistakenly, but honestly, believed his license was not suspended until he received a letter from the Registrar informing him so. The letter was received but not until after he was charged.

[24] The learned trial judge acquitted on the basis of this honest but mistaken belief. Crown appeals to both the Nova Scotia County Court and the Nova Scotia Supreme Court (Appeal Division) were dismissed. However the Supreme Court of Canada allowed the Crown's appeal and ordered a new trial. The Supreme Court of Canada held that the Accused's license was suspended by law at the time he was found to be driving the motor vehicle. By virtue of s. 19 of the *Criminal Code* his ignorance of that law was no excuse unless he could establish the defence of officially induced error. The facts of that case failed to support such a defence and thus new trial was ordered.

[25] However the facts in the *MacDougall, supra* are significantly different from those in the case at bar. In *MacDougall*, not only was the suspension

mandatory, the timing of the suspension was also prescribed by law. It was to be effective immediately upon his appeal from the original offence being dismissed. I refer to Ritchie J. at page 7:

> It would be difficult to conceive of more clear or imperative language than that contained in s. 250(3) of the *Motor Vehicle Act* whereby the driver's licence shall be automatically "revoked and shall remain revoked" if an appeal is "dismissed".

[26] However in the case at bar, although the suspension was mandatory its timing was not. In fact the Justice of the Peace appeared content to allow the Respondent to select the time. Thus, the timing of the suspension was the essence of the Respondent's mistake.

[27] In the circumstances this was a mistake in fact and not a mistake as to the applicable law. As a mistake in fact, the Respondent is not obliged to establish an officially induced error. The burden is less onerous. This is acknowledged by Ritchie, J. in *MacDougall, supra* at page 3:

> I am in agreement with all of the judges in the courts below, including the dissenting judge in the Court of Appeal, in finding that as the offence here charged is one concerning the public welfare it was properly characterized as "an offence of strict

> liability" within the meaning of the classification stipulated by Mr. Justice Dickson, supra, and that a defence is accordingly available to the accused if he "reasonably believed in a mistaken set of facts which, if true, would render" his act in continuing to drive his motor vehicle without a licence, an innocent one.

[28] In acquitting the Respondent, Judge Buchan accepted the Respondent's evidence on this point and obviously felt his mistake was reasonable, and the result of him misunderstanding the Justice of the Peace's comments. By accepting his plea of due diligence in these circumstances, the learned Provincial Trial Court Judge, therefore, committed no error in law.

[29] Further, I disagree with the Crown's submission that Judge Buchan erred in law by accepting the Respondent's mistake as reasonable. There was plenty of evidence for her to reach that conclusion. One need go no further than the above quoted dialogue between the Respondent and the Justice of the Peace at the end of the transcript (Exhibit #3). I will not interfere with her findings of fact in this regard.

[30] If I am wrong, and if the Respondent's mistake was one of law, then, I would agree with the Crown that his plea would not be justified. On the one hand, I

believe the Justice of the Peace was an official upon which the Respondent could rely. As noted earlier in this decision Lamer, C.J.C. in *Jorgenson, supra* specifically left open the category of potential officials. If a judge (in this case a Justice of the Peace) gave an accused misleading advice, then I cannot think of a stronger source upon which to rely. However in the case at bar the learned trial Judge made it clear that the Justice of the Peace made no error and mislead no one. The mistake although reasonable and understandable, was all the Respondent's. In order for a plea of officially induced error to be valid, there must be an error on the part of the official. I refer again to *Jorgenson, supra* at paragraph 34:

> 34. The advice obtained must also have been erroneous. This fact, however, does not need to be demonstrated by the accused. In proving the elements of the offence, the Crown will have already established what the correct law is, from which the existence of error can be deduced. None the less, it is important to *[page 114]* note that when no erroneous advice has been given, as in *MacDougall, supra,* this excuse cannot operate.

[31] However as stated I find that this was a mistake in fact on the part of the Respondent and I therefore find no error in law on that basis.

[32] The Crown further submits that the learned Provincial Court Judge erroneously placed, upon the Crown, the burden of proving *mens rea*. It relies on the following passage in Judge Buchan's decision:

> So I must be satisfied beyond a doubt, a reasonable doubt, that Mr. Jebailey *intentionally* defied the suspension. I would find all the witnesses were credible and, as I said earlier, there is really no basic disagreement with the facts. It's really with respect to this interpretation of *what was going on in the mind* of Mr. Jebailey.

[33] Examined in isolation, with respect, this statement is erroneous. As stated above the Crown does not have to prove *mens rea* in a strict liability offence. Once the *actus reas* is proved the burden shifts to the defence to establish due diligence.

[34] However, in the context of her entire decision, it is clear to me that Judge Buchan acquitted the Respondent solely because she accepted his plea of due diligence. In other words she believed he was sincerely mistaken as to the timing of the suspension and that this belief had a reasonable basis. In other words she found

that the Respondent met the burden of due diligence. Her words are unfortunate but not dispositive of this Appeal.

[35] The Appeal is dismissed.

Michael MacDonald
Associate Chief Justice