IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Brooks & Safatli 2003NSSC149

Date: January 14, 2003
Docket: ST 181474 & ST 181475
Registry: Truro, NS

Between:

Her Majesty the Queen,

Appellant

v.

Jason Brooks and Elson Safatli,

Respondents

DECISION
APPEAL FROM THE PROVINCIAL COURT

Judge:	**The Honourable Chief Justice Joseph P. Kennedy**
Heard:	**January 14, 2003 in Truro, Nova Scotia**
Decision Released:	**July 15, 2003**
Counsel:	**John P. Nisbet,** ***Public Prosecution Service (NS)*** ***for the Crown - Appellant***
	Peter R. Lederman, ***Archibald & Lederman*** ***for the Respondents***

[1] This is a Crown Appeal against the sentences imposed by Judge Robert Stroud of the Provincial Court at a sentence hearing dated May 15th , 2002 at Truro.

[2] The Crown alleges that the sentencing judge misinterpreted the sentencing provisions of the *Revenue Act,* R.S.N.S. 1995-96 c.17, specifically in finding that s. 89(1) applied to the two accused rather than s. 89(2) which the Crown says is the section that should have directed his sentencing.

BACKGROUND

[3] The facts before the sentencing judge are not in dispute: On the 6th of February, 2001 Jason Brooks was under surveillance by members of the Truro Custom and Excise unit of the RCMP. Mr. Brooks is a tobacco retailer who operates a store in Millbrook a Native community. Mr. Brooks had status as a tobacco retailer and therefore could purchase HST exempt tobacco products from wholesalers in Nova Scotia. These products had to be delivered directly to his store in Millbrook, for sale from that location.

[4] At 3:40 p.m. on that date Mr. Brooks was observed meeting a man, later identified as Elson Safatli, of Waverley, Nova Scotia, in the "car pool" parking lot on the Abernaki Road, near Truro.

[5] At 4:05 p.m. a blue ford pickup with a white cap driven by Mr. Safatli and Mr. Brooks' vehicle, a black chevrolet pickup with a black cap, left the "car pool" parking lot and drove to the Atlantic Wholesalers' Cash and Carry store on Queen Street in Truro.

[6] At 4:40 p.m., Mr. Brooks was observed loading 13 cases of cigarettes from the Cash and Carry store into the back of his truck. Mr. Brooks was then observed driving on Queen Street towards Salmon River (away from the location of his store) being followed by Mr. Safatli.

[7] Mr. Safatli and Mr. Brooks pulled in behind a vacant house on Salmon River Road where together they transferred the cigarettes from Brooks' vehicle to Safatli's. Both vehicles then headed back towards Truro and on route they were stopped by the RCMP.

[8] From Mr. Safatli's vehicle 13 cases of cigarettes were seized. Mr. Brooks turned over a receipt for $21,018.77 for the 13 cases of cigarettes.

[9] Mr. Brooks was charged under the *Revenue Act,* R.S.N.S. C. 17, (herein after referred to as the *Act*) and it's *Regulations* with three offenses.

[10] Specifically he was charged that he:

> i) contrary to s. 39(3), did distribute tobacco except as permitted by the *Act;*
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> ii) contrary to s. 79(1)(b) of the *Regulations* made pursuant to the *Revenue Act*, not being a holder of a valid wholesale vendor's permit, did hold tobacco for sale in the Province; and
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> iii) contrary to s. 78(3)(a)(ii) of the *Regulations* made pursuant to the *Revenue Act*, being a holder of a retail vendor's permit did sell tobacco to a consumer in a quantity equal to or greater than 5 cartons of cigarettes.

[11] Mr. Safatli was charged under the *Act* and it's *Regulations* with three offences.

[12] Specifically he was charged that he:

> i) contrary to s. 39(1)(a) of the *Act*, unlawfully had in his possession tobacco on which tax had not been paid;
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> ii) contrary to s. 40 of the *Act,* transported tobacco, without being in possession of a bill lading, waybill, or other document showing the origin and destination of the tobacco;
>
> and
>
> iii) contrary to s. 78(3)(a)(ii) of the *Regulations,* held a quantity of tobacco equal to or greater than 5 cartons of cigarettes.

[13] Mr. Brooks and Mr. Safatli were charged on separate Informations. Both appeared in Truro Provincial Court in the spring of 2001and plead not guilty.

Crown and the Defence Counsel consented to having one trial which took place on the 26th of February, 2002.

[14] At trial, Crown counsel made a motion for a directed verdict on count one against Mr. Safatli, as the definition of tax under the *Act* referred to tax paid to the Province and the cigarettes that were the subject matter of these charges were ones for whom the Provincial tax had been paid. That charge was dismissed. The Trial Judge found Mr. Safatli guilty of both remaining offences but entered a stay according to the Kienapple Principle on count three, the s. 78(1)(a)(ii) Regulation "holding" offence. That left Mr. Safatli to be sentenced on the "transporting" section 40 offence.

[15] Mr. Brooks was found guilty of all three counts he faced. In accordance with the "Kienapple Principle" the Court directed stays on the first and second counts, the "distribution" and "holding out" offences. That left him to be sentenced on the "selling" s. 78(3)(a)(ii) *Regulation* offence. Both s. 40 and s. 78(3)(a)(ii) of the *Regulations* are contained within Part III the tobacco tax portion of the *Revenue Act.*

[16] Sentencing for both took place 15th May, 2002. Mr. Safatli was ordered to pay a fine of $1000.00 and Mr. Brooks ordered to pay a fine of $2000.00. Default time and a fine surcharge were imposed for both men as well. The seized tobacco was forfeited.

[17] As of February 6th , 2001, the date of these offences, sentencing for offences under Part III of the *Revenue Act* was governed by s. 89(1) of that *Act.* It read:

> **Penalty for contravention of Part III**
>
> 89(1) A person who contravenes Part III of this Act is liable, on summary conviction, to a fine of not less than ten thousand dollars and not more than fifty thousand dollars and, in default of payment, to imprisonment for a term not exceeding one year except that, where that person is a manufacturer of tobacco, a wholesale vendor or employee of a manufacturer of tobacco or a wholesale vendor, that person is liable to a fine of not less than ten thousand dollars and not more than one hundred thousand dollars and, in default of payment, to imprisonment for a term not exceeding two years and in any event, in addition, shall be ordered by the judge to pay the amount of the tax that is owing, including any arrears, penalties and interest on or before such date as is fixed by the judge.

[18] Therefore, the offences in question on the date that they were committed carried a minimum penalty of a $10,000.00 fine. However on June 1st, 2001, between the time of the commission of the offences by the two accused and the sentencing date the penalty for the offences was altered by the *Financial Measures (2001) Act* (2001) Chap 3 of the *Acts of 2001.* S. 31 of that *Act* reads:

> 31 Section 89 of Chapter 17 is repealed and the following Section substituted:
>
> 89 (1) Every person who contravenes Part III of this Act where no fine is otherwise specifically provided is liable on summary conviction to a fine of not less than two hundred and fifty dollars not more than five thousand dollars.
>
> (2) Subject to subsection (3), a person who unlawfully possesses, purchases, acquires or stores tobacco, in contravention of this Act, commits an offence and is liable
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> (a) for a first conviction, if the quantity of tobacco is fifty cartons of cigarettes or less or capable of making cigarettes in this quantity, to
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> (i) a fine of not less than five hundred dollars and not more than twenty-five hundred dollars, and
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> (ii) a fine equal to three times the tax that would have been due had the tobacco been sold to taxable consumers.
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> and, in default of payment, to imprisonment for a term not exceeding ninety days;
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> (b) for a first conviction, if the quantity of tobacco is greater than fifty cartons of cigarettes or capable of making cigarettes in this quantity, to
>
> (i) a fine of notless than twenty-five hundred dollars and not more than twenty-five thousand dollars, and
>
> (ii) a fine equal to three times the tax that would have been due had the tobacco been sold to a taxable consumers,
>
> and, in default of payment, to imprisonment for a term not exceeding one hundred and eighty days;

[19] It is settled law and at sentencing both Crown and Defence agreed that in these circumstances, when the penalty for the offence has changed between the date of the offence and the date of sentence that the offenders will receive the benefit of the lesser punishment.

[20] What then is the lesser punishment? That depends on whether the newer s. 89(1) or s. 89(2) would apply to these offences. If the new s. 89(1) applies then it provides the lesser penalty than the old s. 89(1). This is as the sentencing judge found, and how he sentenced.

[21] If however the new s. 89(2) applies to these offences as the Crown submits, then in these circumstances the new penalty would be greater than the penalty under the old s. 89(1), and the older penalty, the one in force at the date of the offences would apply.

[22] Its first ground of appeal reads:

> "The learned trial judge erred in applying Section 89(1) instead of Section 89(2) of the *Revenue Act*, R.S.N.S. 1995-96 c. 17, as amended, to this sentencing."

[23] Before the sentencing judge and before me the parties agreed that neither Mr. Brook's offence act of "selling" tobacco or Mr. Safatli's offence act of "transporting" tobacco is included in the acts described by the new s. 89(2) which reads:

> "...unlawfully possesses, purchases, acquires or stores tobacco, in contravention of this *Act*".

[24] This section is ambiguous says counsel for the two Respondents. The verbs in the penalty section of s. 89(2) do not correspond to the acts for which the Respondents were convicted.

[25] As Respondents counsel promotes the interpretation as set out in *Driedger, Construction of Statutes* (1st ed., 1974) at pages 153-154:

> " That penal statutes are to be construed 'strictly' in the sense described by Lord Radcliffe in *Attorney-General v. Hallet & Carey* is clear from the decisions. In *Tuck & Sons v. Priester* Lord Esher said:
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> 'We must be very careful in construing that section, because is [sic] imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections"
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> In *Kelly v. O'Brien* Rose C.J. said:
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> '...you do not establish a right to a penalty be establishing that upon one of the two equally reasonable readings of the statute the penalty has been incurred. The defendant is entitled to judgment if the *Act* is ambiguous and if one reasonable reading will let him out'.
>
> The principle to be applied in reading penal statutes was expressed in slightly different terms in *London County Council v. Aylesbury Dairy Co.* by Wright J. where he said 'I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it...' The same words were used by Maclean J. in *Parker v. The King.* One may ask whether one ought ever 'to do violence' to language, but, in any case, 'doing violence' would be placing an unreasonable construction on language, and, clearly, a reasonable construction that does not impose a penalty is preferred to an unreasonable construction that does."

[26] This argument found favour with the sentencing judge. At page 19 of the transcript of the sentencing he states:

> "I find (Defence Counsel's) argument compelling. The...it is a penal statute. It must be construed strictly and the convictions are for selling in Mr. Brooks' case, and transporting in Mr. Safatli's case, which do not fall within s. 89(2). So I think we are back to 89(1).

[27] He then sentenced pursuant to s. 89(1).

[28] The current edition of Sullivan's *Sullivan and Driedger on the Construction of Statutes* , 4th Ed. (2002), mentions the strict construction principle:

> ...but Sullivan adds the caveat that strict construction is rebuttable. It does not reconcile easily with the requirement in the [s. 9(5)] *Interpretation Act* that all legislation is to be interpreted in a liberal, purposive and remedial manner. It may also place too much emphasis on the rights of the accused at the expense of the public's right to be protected from harmful conduct. While cases to this effect do not mean the end of strict construction, they "merely indicate that courts feel free to reject strict construction in appropriate circumstances, when the values protected by strict construction (such as liberty or privacy) are outweighed by other concerns (the administration of justice)" (pp. 384-389).
>
> Sullivan also points to a line of case law in which the Court has treated strict construction as a "presumption of last resort". Sullivan supports a view of the strict construction rule as "one factor among many", not one that trumps other considerations (pp. 389-390).

[29] In *Bell Express Vu Limited Partnership vs. Rex et al.*(2002) 212 DLR (4th) 1 S.C.C.:

> Justice Iacobucci said, at para. 28, that "[0] her principles of interpretation - such as the strict construction of penal statutes and the "Charter values" presumption - only receive application where there is ambiguity as to the meaning of a provision. "An ambiguity, he went on, [at para 29] "must be 'real' ... The words of the provision must be 'reasonably capable of more than one meaning' ... By necessity, however, one must consider the 'entire context' of a provision before on can determine if it is reasonably capable of multiple interpretations." He quoted *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)* (1999), 171 D.L.R. (4th) 733, where Major J. said, at para. 14, that "[i]t is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids." To the last phrase Justice Iacobucci added, "including other principles of interpretation."

[30] See also the decision of Justice Robertson of this Court in *Municipal Enterprises Limited vs. Nova Scotia (Attorney General),* [2001] N.S.J. No. 530 (S.C.).

[31] As stated the Respondents argued before the trial judge, that the new s. 89(2) of the *Revenue Act* did not address the acts for which they were convicted ("selling" and "transporting") and therefore did not apply to them.

[32] Before me on Appeal they contend that the strict interpretation of s. 89(2) employed by the trial judge was correct and should not be interfered with.

[33] With deference I find that the trial judge's "strict" interpretation of s. 89(2) creates an irrational result.

[34] Only one of the verbs listed in that section is a designation offence under the *Act* and so a strict interpretation has the result of setting out penalties for offences that don't exist under this *Act.*

[35] S. 89(2), if so interpreted has no meaning at all.

[36] The Crown argues that rather than adopt an interpretation that defeat the purposes of the legislation the sentencing judge should have read the words "possesses, purchases, acquires or stores" in s. 89(2) to apply to the actions taken by the accused Safatli in the course of the offence of "transporting" under s. 40 of the *Act*, and the actions of the accused Brooks in the course of the offence of "selling" under *Regulation* s. 78(3)(a)(ii).

[37] On the facts it is clear that each did one or more of these actions in the process of committing their respective offences.

[38] I find that I agree with the Crown's submission. The recent case law and commentary suggests that the "strict construction" approach when dealing with penal statutes has been superceded by the search for plain meaning and legislative intent.

[39] It is only when there is more than one reasonable interpretation of the provisions that "strict construction" need be considered. This legislation, although clumsy lends itself to only one meaningful interpretation. It is not ambiguous.

[40] Professor R. Sullivan, in her text, *Statutory Interpretation* (Irwin Law 1997), at 32 states:

> It has frequently been noted that the "rules" of statutory interpretation do not impose binding constraints on judges and other official interpreters. The "failure" to follow a rule of statutory interpretation is normally not an appealable error. Although bad interpretations may be appealed or reviewed, the error lies in failing

> to apply the statute, not in failing to apply the statutory interpretation rule. As Lord Reid wrote in *Maunsell v. Olins*...

[41] I find that by interpreting s. 89(2) "strictly" the trial judge failed to apply the sentencing provisions that I find were meant to govern these offences.

[42] I find that the sentencing judge was mistaken when he determined that s. 89(2) as a penal statute, should be strictly construed and not applicable to the offences of "selling" and "transporting".

[43] Had the trial judge considered s. 89(2) to be applicable, based on the quantity of cigarettes involved, both Respondents would have had fines of $21,298.00.

[44] The Crown Appellant agrees that the penalty in place at the time of the offence, a minimum of $10,000.00, is the more favourable to the two accused, and therefore should be applied.

[45] Having found that the learned trial judge was wrong in his interpretation of s. 89(2) of the *Revenue Act* and as a result sentenced under s. 89(1) the wrong section, I grant this Appeal and according to the principle that the Respondents be given the benefit of the lesser penalties in place at the time of the offences. I order that the accused Safatli pay a fine of $10,000.00 plus a 15% surcharge and that the accused Brooks pay a fine of $10,000 plus a 15% surcharge. Time in default will be a period of 3 months incarceration.

Joseph P. Kennedy
Chief Justice