Indexed as:
R. v. [redacted]

Between
Her Majesty the Queen, appellant, and
[redacted], respondent

[1996] A.J. No. 954

192 A.R. 283

32 W.C.B. (2d) 452

No. 50860006P10101-0102 App. No. 9601-0120s1

Alberta Court of Queen's Bench
Judicial District of Calgary

Moshansky J.

November 5, 1996.

(14 pp.)

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 8, 24(2). Criminal Code, ss. 686(1), 830.
Customs Act, ss. 155, 159, 160.

Criminal law -- Mens rea or intention -- Proof of mens rea -- Procedure -- Verdicts, discharges and dismissals -- Directed verdicts -- Summary conviction proceedings -- Appeals -- Customs -- Search and seizure -- Search warrants -- Issue of -- Offences and penalties -- Possession of unlawfully imported goods -- Smuggling.

Appeal by the Crown from a directed verdict of acquittal on charges under the Customs Act. The accused asked an acquaintance to purchase firearms for him in Texas. The acquaintance was a Canadian citizen resident in Texas, who intended to move to Canada and as such did not require a Firearms Acquisition Certificate to import firearms into Canada. The accused asked him to include the firearms as part of his personal and household effects. However, when he cleared his personal effects through Canada Customs, he did not disclose the firearms. Customs duties of $560 which would have been

payable on the firearms were not paid. Shortly before the goods arrived the accused applied for a Firearms Acquisition Certificate. About two years later, the accused's residence was searched and the firearms were seized. The trial judge held the warrant to be invalid because the Crown proved only that the accused owned the residence that was searched, and did not prove that he resided there. The trial judge also held that there was no mens rea on the part of the accused to commit the offence. The Crown appealed the acquittal on the grounds that the trial judge erred in ruling that there were insufficient grounds to issue a search warrant, in excluding the seized firearms as evidence, that the mens rea element of the offence should not have been restricted to an intent to evade payment of duties, and that a non-suit application should not have resulted in a directed acquittal.

HELD: Appeal dismissed. It was reasonable for the trial judge to conclude that there was insufficient evidence to link the accused to the residence that was searched, and he was entitled to exclude the seized firearms as evidence. This was a full mens rea offence which required the accused to be aware of the regulation of the goods and to intend to avoid that regulation by smuggling the goods into Canada. The accused's request that the firearms be disclosed, together with his application for a Firearms Acquisition Certificate, suggested no intention to smuggle. There was nothing to suggest that the trial judge did not apply the correct test for a non-suit application.

Counsel:

J.P. Petch, Q.C., for the appellant.
P.C. Fagan, for the respondent.

REASONS FOR JUDGMENT

1 MOSHANSKY J.:-- This is a Crown appeal from a directed verdict of acquittal of the accused in the Provincial Court of Alberta on two summary conviction charges under Section 160, as to Count No. 1 and Section 159, as to Count No. 2, of the Customs Act. Count No. 1 involves a charge of possession of imported firearms in respect of which the Customs Act and Criminal Code provisions regulating importation have been breached thereby contravening Section 155 of the Customs Act and committing an offence under Section 160 thereof. Section 155 reads as follows:

> "155. No person shall, without lawful authority or excuse, the proof of which lies on him, have in his possession, purchase, sell, exchange or otherwise acquire or dispose of any imported goods in respect of which the provisions of this or any other Act of Parliament that prohibits, controls or regulates the importation of goods have been contravened."

2 Count No. 2 is a charge of smuggling six firearms and two rifle scopes subject to

duties, the importation of which is prohibited, controlled or regulated by the Customs Act and the Criminal Code thereby committing an offence under Section 159 of the Customs Act. Section 159 reads as follows:

> "159. Every person commits an offence who smuggles or attempts to smuggle into Canada, whether clandestinely or not, any goods subject to duties, or any goods the importation of which is prohibited, controlled or regulated by or pursuant to this or any other Act of Parliament."

3 The facts in the within matter are not in dispute. The accused who is a resident of Calgary, Alberta, in September or October 1992 asked an acquaintance, one Arnold Boyd, a Canadian citizen who was then a resident of Texas, to purchase some firearms for him in the state of Texas. Mr. Boyd was at the time planning to move to Calgary and, as a Canadian citizen, did not require a Firearms Acquisition Certificate in order to import firearms into Canada. The accused asked Mr. Boyd to include the firearms purchased on his behalf as part of Mr. Boyd's personal and household effects upon his return to Calgary.

4 The accused met Mr. Boyd in Texas on October 27, 1992 at which time, according to the Crown memorandum, five firearms and two scopes were purchased for the accused by Mr. Boyd using his state driver's license and residency status. The accused paid for the firearms with American Express Travellers cheques.

5 Mr. Boyd cleared his personal and household effects, valued at $75,000, through Customs at Calgary on January 13, 1993 without disclosing the inclusion of the accused's said firearms among his household effects. Custom duties of $560.00 which would have been payable on the firearms were not paid.

6 Mr. Boyd testified that the accused had told him to "declare" the guns to Customs as part of the household contents. There was no discussion between them about the possibility of payment being required by Customs at the border. Mr. Boyd, however, did not, contrary to the accused's instructions, include the firearms on the list of goods which he provided to Customs at the border. He stated that he believed that Customs would advise him if there was a problem with the way things were done and that if there were any costs at the border in connection with the firearms he believed he could pass these on to the accused. The duty payable on the firearms would be the same whether they were declared to be the property of Mr. Boyd or of the accused.

7 As a returning resident, Mr. Boyd did not require a Firearms Acquisition Certificate if the guns were his. The accused would require such Certificate. The evidence is that the accused in fact had applied for a Firearm Acquisition Certificate on December 7, 1992 (one month before the goods crossed the border), a rather curious action if one indeed were intent on smuggling the guns into Canada. He received notice of approval of his application at some time between December 7, 1992 and January 27, 1993.

8 Mr. Boyd delivered the firearms to the accused in February 1993. Almost two years later, on January 15, 1995 His Honour Judge Demong, based upon an Information sworn by Customs Officer Randy Welgan for the purpose of obtaining a Search Warrant to

search the alleged dwelling of the accused at 383 Arbour Lake Way N.W. in Calgary, granted such Warrant. The execution of the Warrant resulted in the seizure of six firearms and two scopes.

9 Crown counsel has raised four grounds of appeal. The first being that the trial judge erred in law as to the standard of review applicable to his reconsideration of the sufficiency of the grounds relied upon to obtain the Search Warrant and in his subsequent ruling that such grounds were insufficient to justify issuance of a Warrant.

10 Crown counsel urges as a second ground of appeal that the learned trial judge failed to exercise his discretion judicially and erred in law in excluding the seized firearms and scopes as evidence at the trial pursuant to Section 24(2) of the Charter.

11 Crown counsel in his memorandum referred to Section 686(1) of the Criminal Code as providing the standard for appellate review applicable on summary conviction appeals. At the hearing of this appeal Crown counsel conceded that the correct section is Section 830 of the Criminal Code which section restricts the Crown inter alia to appeals based on errors in point of law.

12 Although the trial judge's reasons for judgment are brief it must be pointed out that he is not required to give reasons for his decision. Sopinka J. of the Supreme Court of Canada in R. v. Morin (1992), 76 C.C.C. (3d) 193 stated at page 200:

> "There is, however, no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts. To apply Morin, supra, as a basis of review of a trial judge's findings of fact whenever the reasons for judgment fail to deal with a particular piece of evidence, or the inference from such evidence would require a trial judge to record each piece of evidence and his or her assessment of it. This would be a misapplication of Morin to the trial process when the trial is by judge alone. A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect."

13 See also: R. v. Burns (1994), 89 C.C.C. (3d) 193 and R. v. Hobbs (1994), 155 A.R. 58 which state that the trial judge is presumed to know the law and to have applied it correctly. Where counsel specifically refer the trial judge to applicable principles and case law, during the trial, this reinforces the presumption that the judge knew and correctly applied the law. That occurred in this case. The trial judge was provided with a binder of authorities by counsel at the commencement of the trial which binder contained the main authorities now cited by the Crown in its appeal. The authorities put before the trial judge are essentially those put before this Court by the Crown.

14 At the trial of this matter before His Honour Provincial Court Judge McDonald, Defence counsel challenged the validity of the Search Warrant, arguing that it was issued on insufficient grounds thereby contravening Section 8 of the Charter and he urged that

evidence relating to the seizure he excluded as inadmissible. The learned trial judge adjourned the trial for several hours while he considered the evidence, the arguments of counsel, and the authorities cited by them. His subsequent decision, in essence, was that the Search Warrant was granted in the absence of sufficient proof before the authorizing judge who issued the Warrant that the accused in fact lived at [redacted] the address specified in the application for the Warrant. The evidence at trial was that the investigating officer had searched the City of Calgary tax records and obtained a City of Calgary Property Tax Statement of Account which shows that on January 16, 1995 that [redacted] was owned by [redacted] and [redacted] The Investigating Officer Randy Welgan admitted that no surveillance of this residence was conducted nor were any other efforts of any kind made to confirm that the accused in fact resided at this residence prior to the application for the Search Warrant being made. Judge McDonald at the end of his brief judgment in this regard, and having expressed his familiarity with Section 24(2) of the Charter, referred to the necessity for the Crown to establish actual residence rather than merely ownership of a premises on part of the accused and he stated "I find that the Search Warrant was fatal because that, those premises could have been owned by these people, but not necessarily resided in there, and the Search Warrant is invalid. These materials are excluded from the evidence."

15 The learned trial judge subsequently acquitted the accused as to Count No. 1.

16 In my view there is nothing in the record to suggest that the learned trial judge misinstructed himself as to the law relating to the standard of review applicable at trial with respect to the issuance of the Search Warrant, as is urged by Crown counsel. Clearly, it was reasonable for the trial judge to conclude from all of the evidence that there was insufficient evidence before the authorizing judge to link the accused to the address in question. In addition to the several concerns expressed by the learned trial judge in this regard one might add the fact that the name of the accused on the Indictment is [redacted] while the Property Tax Statement for the address in question indicates one [redacted] as one of two owners. In the absence of some other confirming evidence, it requires a not-substantial leap of faith to hold that the two are necessarily one and the same person.

17 Other weaknesses in the Crown evidence in support of the Warrant application pointed out by Defence counsel, both at trial and on appeal, include the absence of any evidence as to where the accused took the firearms in 1993 and the absence of any evidence that he was still in possession of them almost two years later when the Warrant was obtained. In Baron v. Canada (1993), 99 D.L.R. (4th) 350 (S.C.C.) it was held that there must be a credibly based probability, established by sufficient evidence, that the goods in question are located at the premises alleged at the time the Warrant is issued. See also Re: Church of Scientology (1987), 31 C.C.C. (3d) 449 (S.C.C.), R. v. Turcotte [1988] 2 W.W.R. 97 and R. v. Dolicante (1996), 40 Alta. L.R. (3d) 78.

18 The learned trial judge having assessed the evidence and the authorities obviously concluded that there was not sufficient evidence to establish such a credibly based probability. Although I may not have come to the same conclusion, I am not prepared to interfere with the learned trial judge's judgment to exclude the evidence under Section

24(2), there being no clear indication from the record that he failed to exercise his discretion in a judicial manner.

19 The matter of the applicable principles for a review of a trial judge's decision made under Section 24(2) of the Charter is dealt with by Chief Justice Fraser in a dissenting judgment in Regina v. Groncalves, subsequently upheld by the Supreme Court of Canada reported at 81 C.C.C. (3d) 240. Her judgment is quoted at page 242 as follows:

> "Whether or not evidence should be excluded under s. 24(2) is a question of law from an appeal will generally lie: R. v. Collins (1987), 33 C.C.C. (3d) 1 38 D.L.R. (4th) 508 [1987] 1 S.C.R. 265. However, the Supreme Court of Canada has emphasized that while it has the jurisdiction to review a trial judge's findings under s. 24(2), it will not do so as a general rule. This very point was addressed by the majority in R. v. Duguay (1989), 46 C.C.C. (3d) 1 at p. 5, 56 D.L.R. (4th) 46, [1989] 1 S.C.R. 93:
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> > 'It is not the proper function of this court, though it has jurisdiction to do so, absent some apparent error as to the applicable principles or rules of law, or absent a finding that is unreasonable, to review findings of the courts below under s. 24(2) of the Charter and substitute its opinion of the matter for that arrived at by the Court of Appeal.'
>
> Similarly, I see no valid reason for this court not adopting the same approach when reviewing s. 24(2) findings made by trial judges. Indeed, quite the contrary. I start from the recognition that these findings necessarily involve the balancing and weighing of many relevant factors. To this extent, they may be characterized as decisions involving the exercise of 'judicial discretion'. I hasten to add that classifying a trial judge's decision under s. 24(2) in this way does not mean that the trial judge's decision under s. 24(2) in this way does not mean that the trial judge's 'discretion' whether to admit or exclude evidence is unfettered. Nor should it be. It is governed by those principles and rules of law applicable to the interpretation of s. 24(2): Collins, supra. However, unless the trial judge proceeds on an improper principle or rule of law or unless the trial judge fails to give due weight to all relevant factors, thereby making an unreasonable finding, the trial judge's decision under s. 24(2), involving as it does the weighing and balancing of relevant factors, should be insulated from de novo appellate review. The very nature of the balancing process militates against a court of appeal intervening for the sole purpose of simply substituting its opinion for that of the trial judge".

20 I now turn to the remaining grounds of appeal which concern Count No. 2 in the Indictment. Ground of Appeal No. 3 is that the learned trial judge erred in law by restricting

the mens rea element under Section 159 of the Customs Act to circumstances where an intent to evade payment of Customs duties and taxes was established.

21 The learned trial judge considered the charge of smuggling under Count No. 2 and concluded, correctly in my view, that this was a full mens rea offence. He also concluded that because of the accused's instructions to Mr. Boyd to declare the firearm at Customs that there was no mens rea on the part of the accused to commit the offence. In my view that is a conclusion to which the learned trial judge was entitled to come to the basis of the evidence before him.

22 Clearly, the law is that a mental element is required to be proved by the Crown. See: R. v. Riddell et al (1973), 11 C.C.C. (2d) 493 and R. v. Ireco Canada II Inc. (1988), 43 C.C.C. (3d) 482 and Pappajohn v. R. (1980), 52 C.C.C. (2d) 481 at 487.

23 The Crown contends that mens rea exists in all cases where goods which are prohibited or regulated by federal legislation are simply brought into Canada without proper declaration to Customs Canada. In my view the requisite mental element entails the accused, at the time of importation being not only aware of the regulation of these goods but also that he intended to avoid that regulation by smuggling the goods into Canada. The evidence of the Crown's own witness, Mr. Boyd, was that the accused in fact specifically told him to declare the firearms at Customs. In addition, and significantly, the evidence is that the accused actually applied for a Firearms Acquisition Certificate approximately one month before the importation and that this was approved within the relevant time frame. This evidence, in my view is starkly inconsistent with the Crown's contention that he intended to avoid that regulation by asking Mr. Boyd to bring the goods to Canada among his household items.

24 The final ground of appeal advanced by the Crown is that the trial judge erred in directing acquittal pursuant to a non-suit application. The record shows that the trial judge was directed by counsel to the law on this issue and that counsel were themselves in agreement as to the law, i.e. that the standard to be met in issuing a Warrant is one of a credibly based probability; that his standard of review was somewhat restricted and that he was required to determine whether there was some basis for the justice to issue the Warrant.

25 There is nothing in the trial judge's reasons for judgment to support the Crown's contention that he failed to apply the correct test for the non-suit application. In the absence of concrete evidence to the contrary an appellate court must presume that the trial judge applied the correct test. I adopt the words of the Court of Appeal in Regina v. Litchfield 120 A.R. 391, 8 W.A.C. 391 at page 393 dealing with a directed verdict:

> "[9] We are unanimous that we should not scrap this difficult trial and its outcome on the Crown's complaints about the judge's errant but isolated choice of language at the time of the directed verdict. On the contrary, we think that the Crown was provided a full and fair trial. At the very least any legal shortfall escorting the directed verdict, made by a judge sitting in his dual capacity, was not so substantial or so egregious to warrant appellate

> reversal of an acquittal which the record shows was gained on the merits. White v. The King (1947), 89 C.C.C. 148; Vezeau v. The Queen (1976), 28 C.C.C. (2d) 81".

26 I am, in any event, of the view that there was insufficient evidence at the conclusion of the Crown's case pursuant to which a properly instructed jury could return against the accused a verdict of guilty, of smuggling. The directed verdict was appropriate in the circumstances.

27 The Crown appeal herein is dismissed.

MOSHANSKY J.