R. v. Brenton, 2001 NWTCA 1

Date: 2001 03 12
Docket: CA 00837

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

THE COURT:

The Honourable Chief Justice Catherine A. Fraser
The Honourable Justice J.E. Richard
The Honourable Madam Justice E. McFadyen

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JAMES KENNETH BRENTON

Respondent

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES
Sitting on appeal from the Territorial Court of the Northwest Territories

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MEMORANDUM OF JUDGMENT

COUNSEL: Loretta Colton for the Appellant
Scott Duke for the Respondent

THE COURT:

[1] This appeal concerns a constitutional challenge to s.33.1 of the Criminal Code. In enacting that section in 1995, Parliament disallowed the defence of self-induced intoxication when an accused was charged with certain specified offences. In the present case the trial judge dismissed the constitutional challenge without detailed reasons. The accused appealed that ruling and was successful on the constitutional issue in the Summary Conviction Appeal Court. For reasons which follow, we are of the view that there was an insufficient factual foundation at trial upon which to mount a constitutional challenge to s.33.1. In our respectful view, this was not a proper case in which to engage this important constitutional issue.

[2] The Respondent was convicted in Territorial Court of the summary conviction offences of sexual assault, common assault and two assaults of police officers. There was evidence before the trial judge that the Respondent had, prior to committing the assaults, smoked one-half of a marijuana cigarette. The Respondent gave evidence at his trial that after smoking the marijuana he started to feel funny and weird. He stated that he blacked out and the next thing he remembered was being in the R.C.M.P. detachment. He claimed he did not recall committing the assaults.

[3] The trial judge found that the Respondent was not telling the truth and he did not find his evidence to be credible.

[4] A defence psychiatrist, Dr. Clemmey, offered an opinion at trial to the effect that the Respondent was in a state of automatism at the time in question because of his reaction to the substance known as tetrahydrocannabinol (THC) contained in the marijuana cigarette. Dr. Clemmey's opinion was, of course, largely based on statements about the offence events by the Respondent himself (who the trial judge disbelieved); nevertheless, the trial judge found a reasonable doubt:

> "All I can say is that Dr. Clemmey's report, in my mind, raises a reasonable doubt as to the accused's mental state as a result of self-induced intoxication." (emphasis added).

[5] The trial judge was asked to rule s.33.1 C.C. unconstitutional in order that the Respondent could avail himself of a defence of automatism, i.e., automatism arising

from self-induced intoxication (the so-called *Daviault* defence). The trial judge ruled against the Respondent on the constitutional point, and went on to convict the Respondent of the offences charged. The Summary Conviction Appeal Court carefully considered the constitutionality of s.33.1 C.C. and held that these newly-enacted provisions infringed the Respondent's s.7 and s.11(d) Charter rights and were not saved by s.1 of the Charter. The Summary Conviction Appeal Court accordingly set aside the convictions and directed acquittals to be entered on all charges.

[6] To put the notion of a defence of automatism (as a result of self-induced intoxication) in context, we refer back to the *Daviault* decision, as Parliament's enactment of s.33.1 C.C. was a direct response to *R. v. Daviault* (1994), 93 C.C.C.(3d) 21.

[7] Prior to *Daviault* (and prior to the Charter) there existed a common law rule that self-induced intoxication could not form the basis of a defence to a general intent offence. In *Daviault*, the Supreme Court of Canada held that common law rule to be in violation of the Charter, in particular, of the guarantee to fundamental justice in s.7 and of the presumption of innocence in s.11(d). The Court crafted a new common law rule that recognizes a defence of intoxication for a person charged with a general intent offence where it is established that the person's intoxication was so extreme that the person is in a state akin to automatism. The Court clearly stated that this defence is extremely rare and that the burden will be on the accused to establish the defence on a balance of probabilities:

> In my view, the Charter could be complied with, in crimes requiring only a general intent, if the accused were permitted to establish that, at the time of the offence, he was in a state of extreme intoxication akin to automatism or insanity. Just as in a situation where it is sought to establish a state of insanity, the accused must bear the burden of establishing, on the balance of probabilities, that he was in that extreme state of intoxication. This will undoubtedly require the testimony of an expert. Obviously, it will be a rare situation where an accused is able to establish such an extreme degree of intoxication. Yet, permitting such a procedure would mean that a defence would remain open that, due to the extreme degree of intoxication, the minimal mental element required by a general intent offence had not been established. To permit this rare and limited defence in general intent offences is required so that the common law principles of intoxication can comply with the Charter.
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> Cory J. at p.69-70.

[8] Parliament, in enacting s.33.1 in 1995, abolished the so-called *Daviault* defence:

> s.33.1(1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).
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> (2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
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> (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

[9] To return to the present case, the Respondent did not establish to the satisfaction of the trial judge that he was in an extreme state of intoxication akin to automatism. The record expressly indicates that the trial judge merely entertained a reasonable doubt on that point. The Respondent did not meet the burden stipulated by the Supreme Court of Canada in *Daviault.* Hence, a so-called *Daviault* defence was not engaged, and there was no reason to consider the issue of the constitutionality of s.33.1 C.C. either at trial or in the Summary Conviction Appeal Court.

[10] For these reasons, we find that the issue of the constitutionality of s.33.1 C.C. before the Summary Conviction Appeal Court was academic. We accordingly respectfully decline to comment on the extensive Charter analysis of the learned justice in the Summary Conviction Appeal Court. His decision must be set aside and the convictions for general intent offences must be restored.

[11] The Crown on this appeal fairly acknowledged that with respect to the two charges of assaulting peace officers in the execution of their duty (contrary to s.270(1)(a) C.C.) -- specific intent offences -- the accused could only be convicted, on the evidence and the finding of the trial judge, of the included general intent offence of common assault.

[12] In conclusion:

a) the appeal is allowed,

b) the decision of the Summary Conviction Appeal Court is set aside and convictions are restored for (i) sexual assault of the complainant, (ii) assault of the neighbour, and the two convictions pursuant to s.270(1) (assaulting a police officer) are varied to convictions under s.266 (common assault), and

c) the Respondent's appeal from sentence is returned to the Summary Conviction Appeal Court for consideration on the merits.

[13] In closing we wish to thank both counsel for their excellent briefs and oral submissions on the constitutional question notwithstanding these reasons make that question irrelevant.

APPEAL HEARD October 12, 2000
MEMORANDUM FILED at Yellowknife, Northwest Territories
this 12th day of March 2001

FRASER C.J.

RICHARD J.A.

M^{C}FADYEN J.A.