Selamio v. H.M.T.Q. 2002 NWTSC 15

Date: 20020221
Docket: S-1-CR-2001000087

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

JASON SELAMIO

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Summary conviction appeal on a charge of failing to attend court.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife, Northwest Territories
on February 7, 2002

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Counsel for the Appellant: Graham Watt
Counsel for the Crown: Caroline Carrasco

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REASONS FOR JUDGMENT

[1] This is a summary conviction appeal on a charge of failing to attend court, contrary to s.145(5)(b) of the Criminal Code. The appellant submits that the trial judge erred in his treatment of what the appellant says was evidence of an honest and unintentional forgetfulness on his part as to the trial date.

[2] The appellant's trial consisted of some admissions by the defence and then testimony by the appellant. The defence admitted that the appellant was charged with the offence of theft; that when he was released by the police he signed a promise to appear in court on June 7, 2001; and, that he failed to appear on June 7th. The appellant testified as to how he was an alcoholic. During the relevant time, both before and after June 7th, he was drinking pretty well all the time. He was often arrested and kept in the drunk tank. He had no permanent home but stayed in the shelter provided by the Salvation Army.

[3] The appellant testified as to the promise to appear document and his awareness of the date for his court appearance. First, on direct examination, he said:

Q. When June 7th came, did you have your promise to appear with you?

A. No, I don't think so.

Q. Do you know where your promise to appear was?

A. Lost it, I guess.

Q. When June 7th came around, did you remember you had to go to court?

A. No.

Q. When was the first time after you were released - - or after June 7th, rather, that you remembered you had a court date?

A. When they threw me in the drunk tank, they let me out in the morning. They told me I missed court and they charged me with it, and they let me go with another promise to appear.

Q. Okay. And you know what date that was that you were thrown in the drunk tank?

A. I don't know; maybe the 9th, June 9, June 10th.

Q. Okay.

A. It wasn't too long after I missed court, anyway, because the police officer said, "You weren't in court a couple of days ago," or something.

Q. All right. What steps did you take to remind yourself about the date on your promise to appear?

A. For the 21st?

Q. No, for June 7th.

A. I don't know. I just, like, put the thing in my pocket and it just said I had to go to court in June.

Q. Okay. Is there a place at the Salvation Army where you can keep your important papers?

A. You just keep it in your things, like, with -- if you don't show up after, like, 48 hours, they donate your things.

Q. Okay. Did you put your promise to appear in with your things?

A. Probably. I could have washed it in my jacket, too, because, like, when you wash your clothes you've got to do it real fast, like, you know, just throw everything in.

Q. All right. You don't really know what happened to it?

A. No.

Then, on cross-examination, he said:

Q. And, as I understand it, you say that you had a promise to appear, the paper that you were given by the RCMP --

A. M'hmm.

Q. -- right? And when you were given that promise to appear, you understood that that meant that you had to come to court; right?

A. Yeah.

Q. And you don't have any problem with reading? You told us that already.

A. Yes, I did.

Q. Okay. So basically the problem is is that you lost the promise to appear? Is that basically what you're saying?

A. I guess so.

Q. All right. And you were staying at the Salvation Army at that point?

A. Yeah.

Q. And I think you have told us there was a place for you to keep your stuff; right?

A. You just keep your own stuff together, like.

Q. Okay.

A. Yeah.

Q. Other than holding onto your promise to appear -- or failing to do that, did you do anything else to remind yourself that you had court?

A. No.

. . .

Q. No. Did you write it down anywhere to remind yourself?

A. No.

Q. So basically you didn't do anything to remind yourself that you had to go to court; right?

A. No.

Q. And part of the reason for that was that, really, you were focused on drinking during this period of time; is that fair to say?

A. I guess so.

[4] So, essentially, the appellant acknowledged that he did not do anything to make sure that he remembered the court date and he had no idea what happened to the promise to appear. He also acknowledged, on cross-examination, that he has a criminal record and he understood the importance of appearing in court when required to do so.

[5] The defence position, as put to the trial judge, was that the appellant honestly forgot the court date and thus the *mens rea*, the mental element respecting his intention to commit the crime, was negated. At the least, it was argued that the appellant's evidence raised a doubt as to whether he had the intent to evade his court appearance. In rejecting these arguments the trial judge said:

> . . . Honest mistake, things happen through errors. Sometimes we categorize them or classify them as honest mistake or forgetfulness, and the law is that even if there is negligence involved, honest mistake or forgetfulness is a defence to a charge of failing to attend court, as it goes to mens rea.
>
> I listened to the evidence of the accused . . . And I don't see any elements that would indicate honest mistake, honest forgetfulness. I see elements in his testimony of a cavalier ignorance, of an utter disregard to his obligation under the promise to appear . . .
>
> The promise to appear that he was served with went into his clothes, and that was the end of it. It's not as though he is living in a 4,000 square foot house where he might have misplaced it, which would, perhaps, support forgetfulness or honest mistake. The evidence is that he received the promise to appear and it evaporated. To me, this has all the hallmarks of something far different than honest mistake or forgetfulness, and, in my view, it goes to criminal intent.
>
> Insofar as his intention goes: He didn't care one way or another, and the evidence would appear to support that. Insofar as his intention with respect to attending court - there was no intention to attend court that I can determine on the evidence.

[6] Appellant's counsel raised two points on this appeal. First, he submitted that the trial judge applied the wrong test with respect to the *mens rea* element of the charge. Counsel conceded that the appellant was careless and negligent but, he argued, that in itself does not establish the requisite *mens rea* to support a conviction. The forgetfulness of the appellant, no matter if it was due to negligence or not caring or "cavalier ignorance", as the trial judge put it, negatives the intent required to convict, that being a conscious intention to avoid his court appearance. Second, counsel submitted that the verdict of guilty was unreasonable. This requires a review of the evidence to determine if the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered: *R. v. Yebes*, [1987] 2 S.C.R. 168. Counsel argued that the evidence of the appellant, being the only evidence as to his intent, should not have been rejected out of hand. In his view that evidence was unshaken and thus was entitled to some credibility.

[7] This appeal turns on an analysis of the trial judge's reasons for judgment in the context of the evidentiary record. Those reasons must be considered as a whole keeping in mind the purpose for which they were delivered. The trial judge was not instructing a jury on fine points of law but rather was attempting to explain, in a summary manner, why he found the accused guilty. I am sure his reasons were not meant to be "a

verbalization of the entire process engaged in by the trial judge in reaching his verdict": see *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont.C.A.), at 205.

[8] As an initial comment, it seems to me that two obvious conclusions can be drawn from the trial judge's reasons quoted above. One is that he accepted the broad legal proposition advocated by appellant's counsel when he said that an honest mistake or forgetfulness is a defence to this charge even if there is negligence. The second is that the trial judge did not disbelieve the accused. The trial judge believed him when he said that he had no idea what happened to the promise to appear and he took no steps to remember the court date. The trial judge, however, assessed this evidence and came to the conclusion, as a fact, that this did not show honest forgetfulness but a complete disregard for his legal obligation to attend court. It was a matter of interpreting the evidence, not rejecting it.

[9] The charge under s. 145(5) of the Criminal Code states that "everyone who fails, without lawful excuse, the proof of which lies on the person, to appear . . . " is guilty of an offence. It is not disputed that this offence is a true criminal offence requiring proof of *mens rea*. The onus is on the Crown to establish the elements of the offence, i.e., the *actus reus*, that being that the accused was aware of the requirement to appear and that he failed to appear, and the *mens rea*. The mental element, the intent to not appear, is more often than not a matter of drawing reasonable inferences. This was explained by K.W. Wright in "Forgetfulness Revisited", an article appearing in 14 C.R. (3d) 87, at 91-92:

> It does not necessarily follow, however, it is submitted, that the Crown will be placed in the position of having to lead some positive evidence of "intent to fail to appear" or knowledge, or "lack of forgetfulness", any more than it is required to lead positive evidence of intent in any other situation. A court is always entitled to make reasonable inferences from proven facts, and it may be that, upon proof of his failure to attend in court as required, the court could infer that the failure was intentional and cast upon the accused an evidential burden of raising a reasonable doubt as to his lack of mens rea, failing which he runs the risk of being convicted: see *R. v. Lock* (1974), 4 O.R. (2d) 178, 18 C.C.C. (2d) 477 (C.A.).

[10] If the Crown leads evidence to establish the requisite elements of the offence, including the *mens rea*, there is then an evidentiary burden on the accused to put before the court some defence or lawful excuse. The fact that s.145(5) contains a reverse onus on the accused to prove lawful excuse is arguably a violation of sections 7 and 11(d) of the Charter of Rights and Freedoms. This appeal was not argued on that point and, in

my opinion, the trial judge did not rely on any onus of proof in coming to his verdict. I think the proper approach is that applied generally to defences of justification or lawful excuse: see D. Stuart, *Canadian Criminal Law: A Treatise* (2nd ed., 1987), at 392-393. The only burden on the accused is an evidentiary one of adducing some evidence to put the defence of lawful excuse in issue. It is sufficient if this evidence raises a reasonable doubt. I say that because, once it is put in issue, then the Crown still bears the burden of negating it in order to establish proof beyond a reasonable doubt.

[11] A "lawful excuse" is really nothing more than saying: "I did the act but I have an excuse that should relieve me from liability". It may be, in response to a failing to attend charge, saying that the person could not attend because he or she was hospitalized, or incarcerated, or some other factor that made it impossible for that person to attend. It is a different matter than the requirement on the Crown to establish the *mens rea* of an offence, directly or by inference.

[12] The use of the phrase "without lawful excuse" may be nothing more than a handy reminder, to those who are apt to forget, that an array of general justifications and excuses are available to anyone charged with a crime. As such it may be a redundancy in drafting. This is not an original thought of mine but one expressed by Prof. Glanville Williams in his *Textbook of Criminal Law* (2nd ed., 1983), at 458. Common law justifications and excuses are expressly preserved by s.8(3) of the Criminal Code. Some common "excuses" are necessity, duress, an honest but mistaken belief in some essential fact, and even self-defence. As Prof. Stuart explains in his text (*supra*) at 386:

> Our focus here is on those instances in which an accused is exonerated following an apparently criminal act because there are circumstances which justify or excuse (legalize) her conduct. For example, one who repels an attacker with force may rely on the defence of self-defence even though she committed the *actus reus* of assault with the necessary *mens rea.*

[13] When seen in this context it is apparent that lawful excuse is an additional defence available to an accused beside the one of simply relying on an absence or lack of proof of *mens rea*. This was the conclusion arrived at by the Ontario Court of Appeal in *R. v. Legere* (1995), 95 C.C.C. (3d) 555 (at 565). In the case under appeal, what the defence advanced was not an excuse but evidence as to a lack of *mens rea*. The whole thrust of the evidence was that the accused failed to appear due to the fact that he forgot the date. Thus he lacked the intention to commit the crime.

[14] This begs the question of what is the requisite *mens rea* for this offence. In my opinion, the requisite mental element is proof that the accused committed the prohibited act intentionally, or recklessly, or with wilful blindness. This necessarily imports a higher standard than mere negligence.

[15] In my opinion, what the trial judge concluded was that the appellant's own evidence established recklessness on his part. This is a finding of fact (just as the rejection of the explanation of honest mistake or genuine forgetfulness is a finding of fact). Recklessness, as distinct from mere negligence, was explained in *R. v. Sansregret* (1985), 18 C.C.C. (3d) 223 (S.C.C.), at 233:

> The concept of recklessness as a basis for criminal liability has been the subject of much discussion. Negligence, the failure to take reasonable care, is a creature of the civil law and is not generally a concept having a place in determining criminal liability. Nevertheless, it is frequently confused with recklessness in the criminal sense and care should be taken to separate the two concepts. Negligence is tested by the objective standard of the reasonable man. A departure from his accustomed sober behaviour by an act or omission which reveals less than reasonable care will involve liability at civil law but forms no basis for the imposition of criminal penalties. In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term "recklessness" is used in the criminal law and it is clearly distinct from the concept of civil negligence.

[16] In this case, it was open to the trial judge to conclude, as he did, that the appellant was aware of and familiar with the obligation to attend court, aware that there were consequences for failing to attend, and his "cavalier" attitude showed not just a disregard for his obligations but recklessness as to the results of his actions. He knew the risks and he just did not care. In other words, he took the chance.

[17] In my opinion the evidence satisfies both whatever subjective and objective components may be necessary to establish recklessness. And also, in my opinion, self-induced intoxication is no excuse: see *R. v. Ludlow* (1999), 136 C.C.C. (3d) 460 (B.C.C.A.), at para. 38; and *R. v. Storzuk*, [1984] B.C.J. No. 908 (Co.Ct.), at para. 15.

[18] Counsel for the appellant relied primarily on the judgment of Matlow J. in *R. v. Neal* (1982), 67 C.C.C. (2d) 92 (Ont.Co.Ct.), as establishing the proposition that an honest and unintentional forgetfulness would negative the *mens rea* element that must be

proved by the Crown. The facts of *Neal* are critical, however, because they are distinguishable from the case on appeal.

[19] In *Neal*, also a charge of failing to attend court, the trial judge found as a fact that the accused's failure to attend court was the result of confusion attributable to certain personal problems. He found as a fact that the failure to attend was the result of honest and unintentional forgetfulness. There was no suggestion that the accused had been reckless about his obligation to attend or that he was wilfully forgetful. It was therefore a genuine mistake about the trial date and this mistake negatived *mens rea*. Matlow J. did not equate an honest and unintentional forgetfulness with a reckless and cavalier disregard for one's obligations. It seems to me that if one wishes to plead honest forgetfulness there should be some evidence indicating at least some diligence on his or her part to satisfy the legal obligation to attend court. And here there was none.

[20] All of the cases on this topic recognize that these are questions of fact. In the absence of a palpable and over-riding error affecting the trial judge's determination of the facts, an appellate court should not interfere with the findings of the trial judge. This is particularly so where the findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses.

[21] The appellant has failed to demonstrate an error in the trial judge's findings of fact in this case. The trial judge assessed the evidence given by the appellant and held that all of the necessary elements of the charge had been made out. The verdict was one that, in my opinion, a properly instructed trier of fact could reasonably have rendered.

[22] The appeal is dismissed

J.Z. Vertes
J.S.C.

Dated this 21th day of February, 2002.

Counsel for the Appellant: Graham Watt

Counsel for the Crown: Caroline Carrasco

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