SUPREME COURT OF YUKON

Citation: *R. v. Krizan,* 2016 YKSC 66

Date: 20161201
S.C. No. 15-AP017
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

PETER ZIGMUND KARL KRIZAN

Appellant

Before: Mr. Justice R.S. Veale

Appearances:

Leo Lane — Counsel for the Crown
Vincent Larochelle — Counsel for the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Peter Krizan appeals his convictions for breach offences under s. 145(3) and s. 733.1(1) of the *Criminal Code* on the basis that the trial judge erred in finding that there was no violation of his s. 9 *Charter* right to be free from arbitrary detention. He also appeals the sentence of 50 days jail concurrent on each offence and a probation term of two years.

[2] At the time of his arrest on April 23, 2015, Mr. Krizan was subject to a bail order out of the Territorial Court of Yukon that prohibited him from possessing or consuming alcohol and prohibited him from having contact or communication with Benita Allison “if

you are under the influence of alcohol.” There was also a probation order from the Northwest Territories Territorial Court prohibiting him from having contact with Benita Allison, if he had "been drinking any alcohol at all within the previous 24 hours".

[3] The issue on appeal is whether the arresting officer had reasonable and probable grounds to arrest Mr. Krizan under s. 524(2)(a), which states:

> 524 (2) Notwithstanding anything in this Act, a peace officer who believes on reasonable grounds that an accused
>
> > (a) has contravened or is about to contravene any summons, appearance notice, promise to appear, undertaking or recognizance that was issued or given to him or entered into by him, or
> >
> > …
>
> may arrest the accused without warrant.

The Trial Judgment

[4] Mr. Krizan was arrested at the house of Joseph Allison, Benita Allison's father. The police had attended at the residence to ask Mr. Allison to move an RV that was blocking the road through his trailer court. The arresting officer, Cst. Greer, noticed Mr. Krizan speaking with Ms. Allison through the window of the trailer, after having spoken with Joseph Allison and while he was waiting for Mr. Allison to make arrangements to move the RV.

[5] Cst. Greer was familiar with Mr. Krizan and with the history of domestic conflict between him and Ms. Allison. He also knew that Mr. Krizan was subject to court orders that prohibited contact between him and Ms. Allison. However, he erroneously believed that the no-contact orders were without the alcohol qualification. There was no indication that Mr. Krizan was or had been consuming alcohol at the time of the arrest.

[6] Following Mr. Krizan's arrest, Cst. Greer detected the odour of liquor on his breath, and the breach charges accordingly proceeded to trial. In the words of the trial judge:

> [20] … At the time of the arrest, Cst. Greer had no belief that the defendant was drinking, but within seconds of putting him under arrest he could smell liquor from his breath. There were no other signs of alcohol consumption.

[7] Although there was not much argument on the point, I note that the trial judge appears to have equated the smell of alcohol with a determination that Mr. Krizan had been drinking. Cst. Greer testified that he smelled liquor on Mr. Krizan's breath but Mr. Krizan asserted that Cst. Greer was wrong in his observation. Cst. Greer testified that there was no other evidence to confirm that Mr. Krizan had been drinking.

[8] The defence essentially advanced two *Charter* arguments before the trial judge. The first was a s. 9 argument with respect to the reasonableness of the grounds for the arrest. The trial judge stated:

> [28] The police could see empty beer cans. They knew there was a party. Cst. Greer knew that the defendant and Benita Allison used the RV. Joe Allison told Cst. Greer that the people to whom he had loaned the RV couldn't move it because they were drinking. The police honestly, but mistakenly, believed there was a blanket no contact provision.
>
> [29] Under these circumstances they were duty bound to effect the arrests as they did. They would have been in neglect of their duty to sit idly by or ignore the presence of the defendant and Benita Allison at this party and await an escalation.
>
> [30] There was much confusion with police communication that early morning, shortly after midnight. Cst. Greer thought that there was just a simple "no contact" provision on two orders, probation and recognizance. There was no work station in the patrol car. It appears that someone at CPIC

> made a mistake. It was busy on the police radio so Cst. Greer went on his cellphone to try to nail down the specifics of these orders.
>
> [31] Clarity was not attained until several minutes later back at the detachment, that there was a probation order from the Northwest Territories and a recognizance from the Yukon. Both had provisions for no contact either if under the influence of alcohol or if drinking alcohol.
>
> [32] It is likely that this clarity would not have been attained until such time as Cst. Greer returned to the station. He tried hard to find out the details at the scene, but to no avail.
>
> [33] Technically, Cst. Greer did not have an honest and well-founded belief before the arrest that the defendant had consumed alcohol but he knew within seconds that in fact the defendant had liquor on his breath.
>
> …
>
> [35] The arrest of the defendant was justified on both the subjective and objective bases that he was at least "about to contravene" the recognizance arrest of Peter Krizan.

[9] The second argument made by defence counsel was with respect to the lawfulness of Cst. Greer's entry into Joseph Allison's house to arrest Mr. Krizan. After hearing evidence in a *voir dire* from both Cst. Greer and Joseph Allison, the trial judge found that Mr. Allison's "fatherly concern" for his daughter led him to consent to Cst. Greer's entry and that the arrest was lawful under s. 524(2)(a) of the *Criminal Code*. In so doing, he rejected the defence evidence that Mr. Allison was threatened with an obstructing justice charge if he refused entry to Cst. Greer.

[10] In the event that he was wrong in finding that there were no *Charter* breaches, the trial judge would have let the evidence of alcohol consumption in under the s. 24(2)

analysis, i.e. having regard to all the circumstances, its admission would not bring the administration of justice into disrepute.

[11] The trial judge applied *R. v. Grant*, 2009 SCC 32, and considered the three factors:

(i) the seriousness of the *Charter*-infringing state conduct;

(ii) the impact of the breach on the *Charter*-protected interests of the accused; and

(iii) society's interest in the adjudication of the case on the merits.

[12] The trial judge did not consider the police conduct to be serious and found that the exclusion of the evidence of the accused's drinking which was discovered after his arrest, would negatively impact the administration of justice in adjudicating breach charges. The trial judge assessed the technical impact of the *Charter* breach(es) as follows:

> [39] The defendant was taken to the detachment and released the same day. He lost a few hours of freedom. There was no evidence of a strip search or search of the RV he had borrowed, nor any evidence of physical or psychological harm. He put himself in a precarious position by being at a party, consuming alcohol and being in the presence of Benita Allison.
>
> [40] Society has a very important interest in the adjudication of this case on its merits. The judicial system can only operate if there is a respect for and compliance with court order.

[13] In sentencing Mr. Krizan, the trial judge found that his breach offences were relatively minor. The Crown recommended a global 105 days, with no further probation. Defence counsel indicated that 45 days would be appropriate in the circumstances and, although he did not propose probation, he did indicate that Mr. Krizan would be

amenable to an absolute no-contact term with respect to Ms. Allison. This term was ultimately included in the two-year probation order imposed by the judge, which started after a 50-day custodial sentence.

CONVICTION APPEAL

[14] There are effectively three facets to Mr. Krizan's conviction appeal. Firstly, he takes the position that the trial judge erred in finding that Joseph Allison gave a voluntary and informed consent to Cst. Greer's entry into his residence. Secondly, he says that the trial judge erred in finding that Cst. Greer had subjectively and objectively reasonable grounds on which to arrest Mr. Krizan. Thirdly, he says that the trial judge's in-the-alternative decision to allow the evidence of alcohol consumption in under s. 24(2) also exhibits reversible error.

Warrantless Entry

[15] Mr. Krizan contends that the trial judge erred in finding that Mr. Allison had given a voluntary and informed consent to police entry into his house. He points to Mr. Allison's evidence that he had been drinking, that he was not advised that he could refuse entry to Cst. Greer, and that he had been coerced in the sense that he was personally threatened with an obstruct charge if he did not let the police in. The trial judge accepted Mr. Allison's evidence about the first two points, but he expressly disagreed with the suggestion that there had been coercion. Rather, he found that Mr. Allison's memory was faulty on this and a few other, more minor, aspects of his recollection. The trial judge also found that Mr. Allison had had similar encounters with the police at his residence before and knew, and had indeed exercised, his right to refuse them entry.

[16] Crown counsel takes the position that the appellant is essentially challenging the trial judge's findings of fact and observes that such findings are to be given deference and are not reversible in the absence of a palpable and overriding error. Relying on *Tymkin v. Ewatski*, 2014 MBCA 4, and *R. v. M.C.G.*, 2001 MBCA 178, he says it is sufficient that Mr. Allison knew that Cst. Greer was requesting entry to arrest Mr. Krizan and that he was aware of his ability to refuse. He says that the judge made an explicit finding of fact that, although Mr. Allison had been drinking, he was not intoxicated.

[17] The law is clear that the police are able to enter into a dwelling house for the purpose of making an arrest (assuming reasonable grounds exist for that arrest) if they secure the sufficiently informed consent of an occupant. The recent law that was provided from Manitoba suggests that important considerations include the good faith conduct of the police, the lack of any trickery or misleading information, and the lack of force. It is clear here that Mr. Allison was informed by Cst. Greer that his intent in entering the residence was to arrest Mr. Krizan, as he testified to this understanding. I accept the trial judge’s finding that Mr. Allison’s level of intoxication was not high enough to raise concerns about his ability to consent; indeed, Mr. Allison’s evidence does not support such a finding. I also see no reason to go behind the trial judge’s acceptance of Cst. Greer’s evidence that Mr. Allison in the past had refused him entry into the residence, especially given that the evidence of Mr. Allison was not that he was unaware that he could refuse Cst. Greer entry, but that Cst. Greer had actually threatened him with arrest for obstructing justice if he refused. In my view, this is the critical aspect of this interaction, and, although Cst. Greer was not expressly cross-examined on whether he used such a threat, the evidence differed as between

Mr. Allison and Cst. Greer on what was communicated prior to entry. On Cst. Greer's evidence, he relayed his concerns about the no-contact condition and asked if he could come inside to arrest Mr. Krizan for disobeying a court order, and Mr. Allison assented, stepping to one side to let him enter the residence. It is obvious that the judge preferred Cst. Greer's evidence to Mr. Allison's on the issue of coercion, and I have not been directed to anything that would give me a basis to interfere with this finding.

Lawfulness of the Arrest

[18] Crown and defence agree that Cst. Greer, in making his determination that he had reasonable grounds to believe Mr. Krizan was breaching a court order, misapprehended the relevant term of that order. Rather than prohibiting any contact at all between Mr. Krizan and Ms. Allison, the no-contact terms of Mr. Krizan's orders were conditional on whether he had consumed alcohol within the past 24 hours (probation order) or whether he was under the influence of alcohol (bail order). It is clear on the evidence, and the trial judge accepted, that Cst. Greer did not have reasonable grounds to believe that Mr. Krizan had consumed alcohol prior to his arrest. The legitimacy of the arrest hinges on whether it was reasonable for Cst. Greer to act in arresting Mr. Krizan without ascertaining the exact terms of his probation order. To the extent that the trial judge relied on his finding that there were objectively reasonable grounds to believe that Mr. Krizan was about to contravene his court order(s) by consuming alcohol, there is no evidence to support that finding and no evidence that this was subjectively contemplated by Cst. Greer.

[19] The Crown argues that, although mistaken, Cst. Greer had a *bona fide* and honest belief that Mr. Krizan was on a straightforward no-contact term, and that this belief was reasonable in the circumstances.

[20] While I accept the honesty of Cst. Greer's belief and take the Crown's point that a police decision to arrest someone is often made quickly, in volatile situations, and with imperfect information, I do not think that in these circumstances the decision to arrest Mr. Krizan was objectively reasonable. This is not a situation where Cst. Greer was required to work on imperfect information. There was a clear way to confirm his understanding of the court-ordered condition(s) Mr. Krizan was bound by, and he opted not to run police checks until after he had arrested him for conduct that was not a breach of any order. While I appreciate his concern that there was the potential for violence between Mr. Krizan and Ms. Allison, there was no indication from the interaction he viewed that things were headed that direction and he was not relying on exigent circumstances to enter the residence in any event. His decision to arrest Mr. Krizan in the residence was objectively unreasonable and a breach of Mr. Krizan's s. 9 right to be free from arbitrary arrest. There is no basis in law for a technical breach to become a justified arrest based on speculation that Mr. Krizan was "about to contravene" his recognizance.

***Charter* Remedy**

[21] The remedy sought at the trial of the appellant was the exclusion of Cst. Greer's observation about the odour of alcohol on Mr. Krizan's breath that was obtained after his arrest. The trial judge in an alternative analysis found that the evidence should not be excluded pursuant to s. 24(2) of the *Charter.* I disagree.

[22] In terms of the first of the three *Grant* factors, I find that the *Charter*-infringing conduct was serious. While I appreciate the extent to which Cst. Greer makes a point of keeping current about the release of individuals who have been implicated in offences of domestic violence, given the sheer number of individuals on court-ordered conditions, it was, in my view, reckless for him to rely on his recollection of an office email when making the decision to arrest Mr. Krizan in a private dwelling house on a breach charge. Cst. Greer had access to the RCMP database, in this case via telecommunication, and it was incumbent on him to check the exact nature of the term before making a determination that he had reasonable grounds for an arrest. The trial judge stated that the *Charter* infringing state conduct was not particularly serious and the police officer was well-intentioned. In my view, not only are the lack of investigation and judgment demonstrated by Cst. Greer in deciding to arrest Mr. Krizan of concern, it is also significantly aggravating that he decided to enter a private home to effect the unlawful arrest.

[23] I also disagree with the trial judge that the *Charter*-protected rights of the accused were only minimally impacted. The trial judge focused on the intrusiveness of the search of Mr. Krizan, but in my view, the analysis should instead be with respect to the arrest itself. Mr. Krizan was apprehended inside a dwelling house, under non-exigent circumstances and without reasonable grounds, and transported to the police detachment where he was detained for a period of at least several hours. The loss of “a few hours of freedom” is no trivial matter.

[24] Finally, the trial judge in assessing society’s interest in an adjudication of the case on the merits focused largely on the nature of the offence for which Mr. Krizan was

charged. He quoted *Hansard* that emphasized the breach of trust inherent in breaches of court orders and observed that the justice system suffers when court orders are ignored. I do not disagree with that observation. As he did throughout his *Charter* analysis, the trial judge relied on *R. v. Gaber*, 2015 YKSC 38, for support that society has an interest in the adjudication of the case on its merits. However, there is a great distinction between the circumstances of *Gaber* and those of this case, including with respect to the third *Grant* factor. In *Gaber,* the evidence recovered was physical evidence capable of being seized and analysed, and clearly reliable from an evidentiary perspective. Here, the evidence sought to be excluded is the observation by one police officer "that the defendant had liquor on his breath". While there is no Crown case without this evidence, and it is therefore important evidence, it is far less reliable than the evidence admitted under the s. 24(2) analysis in *Gaber*.

[25] On balance, considering the three *Grant* factors, the trial judge erred in not excluding the evidence of Cst. Greer's observations.

CONCLUSION

[26] In the result, given the trial judge's errors in law detailed above, I would allow Mr. Krizan's conviction appeal. The conviction is quashed and I direct that an acquittal be entered.

[27] Given this conclusion, I do not need to consider the merits of Mr. Krizan's sentence appeal.

VEALE J.