Citation: *R. v. Green,* 2010 YKTC 13

Date: February 23, 2010
Docket: 09-00130B
08-00300A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

MICHAEL JOHN GREEN

Appearances:
K.C. Komosky — Counsel for Crown
Malcolm Campbell — Counsel for Defence

REASONS FOR DECISION

Overview

[1] Mr. Green was acquitted after trial on a charge of having committed an assault against Monique Martin. He was also tried on a s. 145(2)(b) charge for failing to attend court and three s. 145(3) charges alleging breaches of the terms of a recognizance he was subject to. Crown counsel is not proceeding on the s. 145(2)(b) charge that Mr. Green failed to attend court on September 10, 2008.

[2] Two of the s. 145(3) charges involve allegations of a breach of a term of the recognizance requiring Mr. Green to have no contact with Ms. Martin, and a breach of a condition that Mr. Green not be in Burwash Landing. These charges were the subject of a no evidence motion by Defence counsel, which was adjourned for further argument.

[3] The remaining s. 145(3) charge is an allegation of failing to comply with a condition not to possess or consume alcohol. While this charge was not part of the no evidence motion, both counsel submit that the argument on the other s. 145(3) charges could, if successful, possibly apply to this charge as well.

[4] The Crown elected to proceed by indictment on all charges.

[5] Counts three, four and five on the Information allege that Mr. Green:

> 3. On or about the 17th day of May, 2009, at or near Burwash Landing, Yukon Territory, did unlawfully commit an offence in that: he did being at large on his Recognizance given to or entered into before a Justice or Judge, and being bound to comply with a condition of that Recognizance directed by the said Justice or Judge fail without lawful excuse to comply with that condition, to wit: have no contact directly or indirectly or communicate in any way with Monique Martin, except with the prior written permission of your bail supervisor in consultation with Victim Services, contrary to s. 145(3) of the Criminal Code.
>
> 4. On or about the 22nd day of May, 2009, at or near Burwash Landing, Yukon Territory, did unlawfully commit an offence in that: he did being at large on his Recognizance given to or entered into before a Justice or Judge, and being bound to comply with a condition of that Recognizance directed by the said Justice or Judge fail without lawful excuse to comply with that condition, to wit: abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner contrary to s. 145(3) of the Criminal Code.
>
> 5. On or about the 22nd day of May, 2009, at or near Burwash Landing, Yukon Territory, did unlawfully commit an offence in that: he did being at large on his Recognizance given to or entered into before a Justice or Judge, and being bound to comply with a condition of that Recognizance directed by the said Justice or Judge fail without lawful excuse to comply with that condition, to wit: do not attend Burwash Landing, Yukon, except for the purposes of court or employment with the prior written permission of your bail supervisor, contrary to s. 145(3) of the Criminal Code.

[6] Mr. Green was bound by the terms of his Recognizance on May 17 and 22, 2009. The terms were as stated in these counts of the Information. It is not disputed that Mr. Green had contact and communication with Ms. Martin on May 17, 2009, and that he was in Burwash Landing on May 22, 2009. He also was in possession of and had consumed alcohol on May 22, 2009.

[7] Crown counsel did not lead any evidence as to whether the bail supervisor had given Mr. Green permission to have contact with Ms. Martin on May 17, 2009, whether Mr. Green had permission to be in Burwash Landing on May 22, 2009, or as to Mr. Green not possessing a prescription from a physician for the alcohol he possessed and consumed. Mr. Green did not testify and the only witness called for the defence did not provide any probative evidence as to whether Mr. Green had permission or a prescription on either or both of these dates.

Issues

[8] The first issue in this case is whether Crown counsel has to establish that Mr. Green did not have the permission of the bail supervisor, or whether the onus shifts to Mr. Green to establish that he did, once Crown counsel has proved the occurrence of the contact or communication by Mr. Green with Ms. Martin, and/or the presence of Mr. Green in Burwash Landing.

[9] The second issue is whether the requirement for a prescription applied to the possession and consumption of alcohol, rather than being limited to controlled drugs and substances and, if so, whether the Crown has to prove that Mr. Green did not possess a prescription.

Statutory Provision

[10] Section 794 of the *Criminal Code* reads as follows:

> (1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in an information.
>
> (2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[11] Section 794 is within PART XXVII of the *Criminal Code* dealing with summary conviction matters.

[12] Defence counsel submits that s. 794(2) does not apply, firstly, as the Crown has elected to proceed indictably, and secondly, because s. 794(2) is only intended to apply to non-criminal summary conviction matters.

[13] Crown counsel concurs that s. 794(2) does not apply in this case as the Crown proceeded by way of indictable election, but asserts that it applies in cases involving s. 145(3) charges where the Crown has proceeded by way of summary election. Crown counsel argues that in this case, resort to the common law is required. (See ***R.*** v. ***Thompson***, [1992] A.J. No. 833 (C.A.) at p. 3 for authority that s. 794(2) may also apply to charges in which the Crown has proceeded indictably, or at least does not effect or limit the application of the common law rule in indictable offences).

[14] I do not need to address this issue for the purposes of my decision in this case, but a consideration of s. 794(2) is found in many of the cases cited within this judgment when considering the application of the common law.

Common law

[15] I have reviewed and considered the following cases: ***R.*** v. ***Edwards***, [1975] 1 Q.B. 27; ***R.*** v. ***H.(P.)*** (2000), 129 O.A.C. 299; ***R.*** v. ***Truong*** 2008 BCSC 1151; ***R.*** v. ***Hammoud*** 2009 ABPC 26; ***R.*** v. ***Dumais*** 2009 SKPC 32; the transcript of the unreported decision of ***R.*** v. ***Dwayne Henry Bird***, December 20, 2007, (Sask. Prov. Ct.), referred to in ***Dumais***; ***Rex*** v. ***Edmonton Malting & Brewing Co. Ltd.*** (1923), 50 C.C.C. 236 (Alta.S.C.A.D.); ***R.*** v. ***Williams*** 2008 ONCA 173; and ***R.*** v. ***Liptak*** 2009 ABPC 342.

[16] These cases provide an interesting, albeit not necessarily compatible or conclusive overview of the law regarding the application of s. 794(2) and the common law to factual situations which, at times, are close to that in the case at bar. In order to decide this case, however, it is not necessary for me to reconcile or interpret these decisions by embarking upon a detailed analysis of the principles of the common law as it applies to these charges.

[17] Suffice it to say that these cases do not alter the fundamental principle of law that the Crown to is required to prove all the elements of the offence charged, unless otherwise excepted from doing so, either by statute or common law.

[18] Generally speaking, under the common law, the burden of proof will shift to an accused (or the defendant in a civil proceeding), only when the fact in issue is difficult or impossible for the Crown (or the plaintiff), to prove.

Conclusion

[19] I find that the Crown has proven Count 4 beyond a reasonable doubt. It is not disputed that Mr. Green possessed and consumed alcohol. As the term of the recognizance reads, the plain and logical meaning is that the prescription exception applies to the use of controlled drugs or substances, and not to the

possession and/or consumption of alcohol, for which an individual does not require a prescription. Therefore Mr. Green is convicted of this charge.

[20] With respect to Counts 3 and 5, firstly, there is no statutory exception to the obligation on the Crown in this case. As stated earlier, s. 794(2) does not provide an exception because the Crown elected to proceed by indictment on these charges.

[21] I consider that these charges would not fall within the application of s. 794(2) in any event, because the permission of the bail supervisor is not an exception, exemption, proviso, excuse or qualification prescribed by law. The fact that, in this case, these terms of the recognizance arise from the ability to impose terms and conditions in s. 515(4), does not change this.

[22] I also find that no other exception applies to remove the Crown's obligation to prove every element of the offence. The bail supervisor is employed by the Yukon government to provide services in the criminal justice system, and is easily available to the Crown to call as a witness. There is no reason in law to displace the general rule and place the onus on Mr. Green to present evidence to show that he had the required permission of the bail supervisor to have contact with Ms. Martin or to be in Burwash Landing. The onus remains with the Crown to prove that Mr. Green did not have permission.

[23] As the Crown did not tender evidence to establish that Mr. Green did not have the permission of the bail supervisor, he is acquitted of Counts 3 and 5.

COZENS T.C.J.