R. v. *S.M*, 2002 YKSC 57

Date: 20021016
Docket No.: 02-AP0006
Registry: Whitehorse

IN THE SUPREME COURT OF YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

S.M.

Zeb Brown — For the Crown

S.M. — On his own behalf

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

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[1] HUDSON J. (Oral): This Summary Conviction Appeal is brought by the Territorial Crown from a dismissal of a charge against S.M. (the young person) of underage drinking, contrary to the *Yukon Liquor Act*, R.S.Y. 1986, c. 105, as amended. The proceedings are pursuant to the *Young Offenders Act,* R.S.C. 1985, C.Y.-1 and came on for hearing on May 14, 2002.

[2] The evidence at trial described a complaint received by the police of a

disturbance. Constable Gork attended and came upon four or five youths. He called them over to his automobile and when they arrived, he detected alcohol on the breath of many of the youths, and particularly the young person. He further detected bloodshot eyes and unsteadiness in standing with respect to the young person.

[3] Four young persons were arrested and taken to the detachment. There is little evidence as to what occurred at the detachment except that breathalyzer tests were performed, as it is done with all persons lodged in cells, as a protective measure. S.M. blew 117 milligrams in 100 millilitres of blood.

[4] With respect to later allegations of a breach of S.M.'s rights under the *Canadian Charter of Rights and Freedoms* , this exchange took place in examination-in-chief of the Crown witness Gork:

> Q Now, was Mr. M. [that is the young person] informed of his rights to counsel, his *Charter* warning?
> A Yes, when I initially took the four youths under arrest.

[5] There was no question of a *Charter* breach raised by the defendant at that time.

[6] No statements were obtained from the young persons by the officer.

[7] The Crown, through the witness Sylvia Kitching, entered proof of the birth date of the young person and therefore his age. There appears to be no issue as to the proof of age.

[8] The Crown witnesses were not cross-examined by S.M., who represented himself at the trial. S.M. testified and stated that he was not told the reason for his arrest and no offer of counsel was made, all in alleged breach of sections 9 and 10 of the *Charter of Rights and Freedoms, supra*. He also testified that he was under the age of 19 and that on the night in question had consumed alcohol.

[9] Two of the young persons who were with him testified. One admitted to having been drinking. He testified that no reason was given by the officer for the arrest of the witness and his three companions and that there was no offer of counsel made by the officer at any time. His evidence was that they were just told to get into the car and that they were under arrest. S.M. said the same thing in his testimony.

[10] The Justice of the Peace found a breach of the *Charter of Rights* and dismissed the charge. The decision of the Justice of the Peace is also referred to as a stay, but I am not aware that the distinction makes a difference to these proceedings. The proceedings were under the *Young Offenders Act, supra,* and dismissal would have seemed to be the proper wording, although the usual relief of this nature for a breach of rights under the *Charter* is a stay of proceedings.

[11] As the accused is unrepresented, I will attempt to render this decision in the simplest terms I can.

[12] One of the grounds of appeal was that the judge erred by find a breach of the *Charter of Rights* without requiring the party alleging the breach to prove it on a balance of probabilities, and further did so without allowing the Crown an

opportunity to call evidence to counter evidence first heard in the defence case. There were no questions put to the officer witness in cross-examination.

[13] Another ground of appeal was that the relief granted should have been the lesser relief of exclusion of evidence based on errors made and not dismissal or stay.

[14] The Crown argues that because of the prospect of an allegation of a *Charter* breach was not introduced in the cross-examination of Gork, the Crown should have been given the opportunity to respond. The Crown was never asked if they wished to introduce rebuttal testimony, but on the other hand, the Crown never requested it. This is a doubtful ground of appeal, for that reason, as the accused in any criminal case has no duty of fairness to the Crown. Therefore, if the Crown fails to request that rebuttal evidence be heard, they have only themselves to blame.

[15] It is certainly wrong for the Justice of the Peace to allow allegations to be made, which have not been put to the witness about whom they are made, in cross-examination but, in this case, the Crown failed to correct it when they had an opportunity.

[16] The failure of the Justice of the Peace to place the burden of proof on the young person and to ensure that the burden was to establish the breach on the balance of probability is more serious. The case of *R.* v. *Collins*, [1987] 1 S.C.R. 265 and cases following it spell out the law clearly that it is the accused's burden. The Justice of the Peace said at paragraph 9:

> As such, I believe that the benefit of the doubt must go to Mr. S. M.

[17] The Justice of the Peace further stated that he "leans towards" the fact that the accused was not properly informed. This cannot equate to a consideration of the balance of probabilities in determining whether there was a breach. In my view, the Justice of the Peace erred in his description of the burden.

[18] The strong indication in his judgment that the young person only need raise a reasonable doubt, instead of proving the matter on a balance of probabilities, is there to be seen. In fact, the Justice of the Peace also appeared to place the burden on the Crown in criticizing the witness Gork for not testifying as to compliance with sections 9 and 10 of the *Charter of Rights and Freedoms, supra*.

[19] He said at paragraph 8 of his Reasons, quoting:

> The evidence that I have, although it is not absolutely clear as to what went on, leans towards the fact that Constable Gork may have alluded to offering rights at some later date. He certainly did not seem to think that they were significant enough of an activity to have made specific reference to them, to the rights that he gave or when he gave them, nor to the responses of each of the accused, or in particular, of Mr. S. M. with regards to whether he declined his right to counsel specifically or not.

[20] In addition to the error made of misquoting the evidence of Gork to which I have earlier referred, the effect of these words is that the Justice of the Peace is considering that the burden of proof is upon the Crown witness to prove

something that is not yet an issue, that is, the breach of the *Charter* rights. As I have indicated before, the burden is on the person alleging the breach. Once the allegation is made, the persons against whom the allegation is made are entitled to an opportunity to reply.

[21] I find that the Justice of the Peace erred in applying the wrong burden of proof and applying it in favour of the wrong party.

[22] Perhaps, most serious, is the Justice of the Peace's misstatement of the evidence on the significant aspect of the matter as to any indication by the witness Gork of the compliance with the *Charter of Rights*. He said at paragraph 3 of his Reasons:

> It was at that point [the breath testing at the detachment], on question from the Crown, that Constable Gork then said that he had given them all their rights.

And further at paragraph 7:

> I have to say, however, that there is no indication that Constable Gork made to us that, in fact, they had been given their rights to counsel and that they had waived those rights and/or had declined those rights before they were then given a breath test.

[23] This is a misstatement of the evidence insofar as Constable Gork and when he gave them the warning under the *Charter*.

[24] These statements are directly contrary to the evidence-in-chief given by Constable Gork. The only evidence before the court is that the warnings and

Charter or Rights were given to S.M. at the time of arrest.

[25] The failure to give the Crown an opportunity to answer allegations not raised in cross-examination of the Crown witness and the failure to correctly apply the burden of proof are not, however, grounds to order a conviction to be entered. If that were the extent of the matter, I would order a new trial.

[26] However, there is other evidence. The accused took the stand and admitted all the allegations necessary to a conviction. This confession does not result from any alleged breach of the *Charter of Rights*. The accused testified to matters that occurred well before the arrival of the officer on the scene, and testified in open court. This was voluntarily done by the accused and stands alone. It is evidence not affected by the alleged *Charter* breach, which, had it been proven, might have justified the exclusion of all evidence subject to the arrest.

[27] S.M.'s confession in the witness box is not the fruit of a poisoned tree. It is not conscriptive. The evidence shows no signs of the accused being intellectually challenged to raise reasons for a stay to be ordered or a dismissal to result. He confessed and he should have been convicted. The Justice of the Peace erred in law in not so finding.

[28] It cannot be argued that, but for the alleged *Charter* breach, the accused would not have been charged and he would never have come close to a witness box. The Crown could easily have proceeded on the basis of the smell of alcohol, the bloodshot eyes and the unsteadiness. This is not a case where any degree of intoxication is at issue. It is mere consumption that is at issue. The

officer was investigating a citizen's complaint of a disturbance. This was not a random stopping. It was not as a result of any alleged breach of the *Charter* that the accused took the witness stand and testified as he did.

[29] The Crown asserts that the dismissal ordered by the Justice of Peace was wrong in law. I agree with the Crown in that regard and for the reasons I have outlined, I find the accused guilty of the charge laid against him.

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HUDSON J.