

CANADA / JUDGMENT

Gregory v. Canada

2002 FCT 420

COURT

Federal Court

DECIDED

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Decision Content

Date: 20020411

Docket: T-58-99

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Toronto, Ontario, Thursday the 11th day of April, 2002

Present: Roger R. Lafrenière, Esquire

Prothonotary

BETWEEN:

SANDRA GREGORY

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The Plaintiff claims that she was subjected to an unreasonable search by Canada Customs at the Pearson International Airport in Toronto on March 28, 1998. She further alleges that she was detained and placed under arrest without due cause and denied an opportunity to contact a lawyer. By this action, she seeks redress for the violations of her Charter rights.

[2] Six witnesses were called to testify at trial: the Plaintiff Sandra Gregory ("Gregory"), her partner Orrette Gray ("Gray"), the arresting customs officer Steven Lee ("Lee"), his supervisor Robert Hogan ("Hogan"), customs officer Dawn Tedford ("Tedford") and Frank Bardoul ("Bardoul"), an expert witness on drug interdiction indicators.

Preliminary matters and rulings

[3] A number of preliminary matters were raised at the start of the two-day trial. First, the Defendant moved for leave to amend the Statement of Defence to include a limitation defence under the Customs Act and to strike the claim for failure to disclose a reasonable cause of action in that it was commenced outside the limitation period. On consent of the Plaintiff, the Defendant was granted leave to amend the Statement of Defence. The motion to strike out the claim was adjourned to be addressed by counsel in their closing argument.

[4] Secondly, counsel for the Defendant questioned whether the Plaintiff should be allowed to proceed with her claim that the search of her baggage was unlawful in light of the unequivocal withdrawal of the allegation as reflected in an Order of the Associate Senior Prothonotary issued following the pre-trial conference. Counsel for the Plaintiff replied that the withdrawal was subsequently retracted at a second pre-trial conference held by teleconference and insisted that the propriety of the search of the baggage remained a live issue. A ruling was deferred until after the close of evidence.

[5] Thirdly, the Court noted that the parties had failed to comply with Rule 299 which requires that evidence in chief in simplified actions be adduced by affidavit. Both parties acknowledged that the simplified procedure had not been followed, but indicated that their witnesses were all present and available to testify. In the circumstances, the parties were granted leave to adduce their evidence in chief orally at trial.

[6] Finally, during the trial the Plaintiff sought to introduce evidence of systemic discrimination against black passengers by Customs officers at the Pearson International Airport. The Defendant objected on the grounds of relevance, arguing that the issue had not been raised in the pleadings and that admitting the evidence would prejudice the Defendant. There is no dispute that the function of pleadings is to define with clarity and precision the questions in controversy between the parties and to give fair notice of the case which has to be met so that the opposing party may direct its evidence to the issues disclosed by them. After reviewing the pleadings, I concluded that the issue of racial discrimination had not been properly pleaded, or at all, and that accordingly the Plaintiff was prevented from raising the issue at trial.

Credibility of witnesses

[7] As the evidence given by the principal witnesses, Gregory and Lee, was at times inconsistent and even contradictory, a credibility finding is required. I have concluded, after hearing all the evidence, that Lee was a more credible witness. I have reached this conclusion

based on the consistency and rationality of Lee's testimony, as well as taking into account his demeanor before me. I found him to be a forthright, honest and professional witness. Despite a gruelling cross-examination, Lee's evidence remained unshaken. His testimony was substantially corroborated by his written notes that were prepared contemporaneously or immediately after the events. They proved remarkably accurate, except, that is, for one notation reflecting that Gregory's ticket was purchased one day prior to departure. Lee candidly admitted that, in retrospect, his conclusion that Gregory's airline ticket had been purchased the day before her departure for Jamaica was incorrect. Lee's explanation for the error satisfies me that he had no intention to fabricate evidence and was genuinely mistaken.

[8] Although I have no doubt that Gregory was greatly affected by her arrest, I found her to be somewhat disingenuous in attempting to portray herself as a victim. Certain discrepancies between her account of the events and that of Lee could be

explained away as simple differences of perception. In addition, Gregory could very well have attributed greater significance to events that were viewed as inconsequential or immaterial by Lee. Ultimately however, I could not help but sense that Gregory's testimony was influenced by her strong conviction that she had been improperly targeted by Lee on the evening in question. During her testimony, she appeared remarkably naive regarding customs protocol, especially in light of her previous travel experience and dealings with customs. As an example, Gregory testified that she was not aware that she would have to pay taxes on some of the six bottles of rum she purchased in Jamaica. Mr. Lee's evidence was accordingly preferred when it differed from that given by Gregory.

[9] The evidence of Hogan and Tedford proved to be of little assistance in my determination of crucial facts. Hogan was not present during the material times when Gregory was being examined and her luggage inspected. As a result, he could only confirm to a limited extent the chronology of events and certain customs procedure. As for Tedford, she had very little independent recollection of what transpired, even with the benefit of her notes. Her evidence was therefore given little weight.

[10] I was particularly impressed by the evidence of Bardoul who testified as an expert witness on the importance of indicators to Canada Customs procedures. Bardoul is employed as a Senior Intelligence Adviser with Canada Customs at the Contraband and Intelligence Services Directorate in Ottawa, which is responsible for the enforcement-related policy within Canada Customs and for the Intelligence Services Program of Canada, a co-ordinating body for intelligence officers. His testimony regarding the validity of indicators was not only logical, but struck me as self-evident. I reserved to myself however the ultimate decision whether sufficient indicators were present to justify the search and arrest of Gregory.

Background facts

[11] Passengers arriving from abroad at the Pearson International Airport are required to clear customs. After a passenger disembarks the aircraft, he or she must travel through the gate and proceed to the primary inspection area, which is manned by customs officers. The passenger

lines up at any given counter with a completed declaration card, which provides information regarding their travel, any goods acquired while away and personal information, such as their name and address. Once the primary inspection is completed, the passenger continues on, either to Immigration or to retrieve their luggage. If further examination is required, such as when allowable exemptions have been exceeded, the passenger is referred to the secondary area. Throughout this process, customs officers are keeping an eye out for "indicators".

[12] An indicator is defined by Customs Canada as "an abnormality or inconsistency in information or physical appearance that could create a reasonable suspicion in the mind of an inspector that contraband is present." According to Bardoul, indicators are used to maximize the effectiveness of customs officers in selecting those persons who pose a high risk of smuggling of contraband. Indicators can be gleaned through observation of the passenger's behaviour, through questioning, and also by reviewing documentation produced or requested. Customs officers are taught to look for a multiplicity of indicators, as the presence of one may be insufficient to infer that a passenger is carrying contraband.

[13] Smugglers, or "couriers", often work for organizations who make travel arrangements for them. Consequently, a person travelling alone with a ticket purchased by a third party may attract the attention of a customs officer. Last minute airline ticket purchases can also pique the interest of a customs officer since it could

be interpreted as an attempt to frustrate law enforcement personnel who regularly screen tickets in advance of travel to foreign destinations.

Drug couriers are also known to arrive at the last possible moment at foreign airports to avoid perusal or examination by customs or police prior to departure. Luggage marked as a "late check-in" will therefore raise a flag.

[14] Bardoul testified that certain countries are recognized by Customs Canada as major drug source countries based on statistics reflecting previous interception experience. Because of limited resources available on any given shift, customs officers are required to identify and focus on the flights representing the highest risk while carrying out their interception mandate. According to departmental statistics, Jamaica was ranked first in terms of seizures among 96 countries with almost 20% of the total street value of all drugs seized. Flights originating from Jamaica are therefore routinely considered high risk.

The Facts

[15] Gregory is a Canadian citizen residing in Toronto. She has two children and works for Canada Post. On March 9, 1998, Gregory left for Jamaica by plane to attend an aunt's funeral. Her ticket was purchased by her boyfriend Gray a week earlier on March 2, 1998, however he did not accompany her on the trip. She remained in Jamaica for approximately three weeks and returned to Canada on March 25, 1998.

[16] Prior to her departure from Jamaica, Gregory purchased three bottles of white rum and three bottles of rum cream at the duty free shop at the airport. She packed three bottles of white rum and one bottle of rum cream in a box provided by the shop and attached the shop receipt to the outside of the box. The two other bottles were wrapped in brown paper and placed in her hand luggage. Just before boarding the plane, Gregory was directed by a Jamaican customs officer to check her hand bag because it was too heavy to be carried on board. After checking her bag, she was handed a late acceptance receipt.

[17] Upon her arrival at approximately 10:00 p.m. at the Pearson International Airport, Gregory joined a line with other passengers for Canada Customs. She spoke with a Customs officer at primary inspection who questioned her regarding the purpose of her trip and goods being declared. Gregory produced her airline ticket and declaration form, which listed the bottles and their value. After answering the officer's questions, Gregory was motioned to move on.

[18] As Gregory was leaving primary inspection around 11:05 p.m., she was approached by another customs officer who was later identified as Lee. Although Lee's duties generally involve clearing or processing passengers arriving from the United States and overseas travelling by air, that evening he was working on a team called the Flexible Response Team, which required him to rove the area between the primary area and the baggage hold.

[19] As part of his roving duties, Lee randomly picked Gregory for questioning. He asked her questions about her trip to Jamaica, including how long she had been away, who had bought her ticket and how many pieces of luggage she had with her. Despite Lee's assertion that Gregory had only declared five bottles in her declaration card, I have not taken into account the allegation of under-reporting against Gregory since it had not been put to her as a contentious fact during her cross-examination.

[20] While questioning Gregory, Lee noted that her declaration card had already been coded for mandatory referral to secondary for excess alcohol. Lee placed his call sign on the declaration card to identify to customs officers in secondary that he was the officer who had spoken to Gregory and that he would be speaking to her once again in secondary.

[21] After picking up her luggage, Ms. Gregory arrived at secondary inspection at

approximately 11:20 p.m. She was directed to an empty desk where, much to her surprise, she once again encountered Lee. Lee asked her further questions and requested that she produce her travel documents and hand over her purse. He then proceeded to inspect her luggage, first by emptying the entire contents of the purse, including some sanitary pads, onto the desk, much to Gregory's embarrassment.

[22] Lee continued his inspection by turning to the duffle bag containing the bottles of rum cream which had been checked in late. Gregory testified that there were only two bottles in the

hand bag, however Lee recalled finding three bottles of alcohol. Lee also testified that the brand of liquor of the bottle which caught his attention was Wray & Nephew, Meadows. This is disputed by Gregory, who correctly pointed out the Wray & Nephew brand was a rum and not a rum cream. In my view, not much turns on the number of bottles or the brand name. There is no dispute that Lee eventually focussed his attention on a particular bottle of rum cream with a different label from the others. I am satisfied that the misnomer was nothing more than an inadvertent mistake, especially since Wray & Nephew is the maker of Meadows rum cream, according to Lee.

[23] Although the evidence isn't clear as timing, at one point Lee and three other customs officers started passing the rum bottles between themselves and closely examining them. Lee noticed what appeared to be a separation in the liquid or a foreign object inside the bottle through the opaque glass of its neck. What Lee saw appeared familiar to him since he had had previous experience in intercepting liquid cocaine in rum bottles.

[24] Lee testified that he opened the bottle and saw clear liquid which he believed to be liquid cocaine. Gregory maintained that the bottle was not opened until some time after she was handcuffed. I prefer Lee's evidence and conclude that the bottle was opened before he arrested Gregory. Logic dictates that Lee would have examined the suspect bottle more closely, beyond a cursory inspection through opaque glass, before taking any further action.

[25] Taking into account the fact that Gregory had arrived from a drug-source country, that her bag had been checked in late, that her flight was a high risk flight, that she was travelling alone and that she appeared to be carrying contraband drugs, Lee concluded that there were reasonable grounds to arrest Gregory. As stated earlier in these reasons, Lee incorrectly assumed that the airline ticket had been purchased the day before Gregory left for Jamaica. Lee wasn't sure how he had come to this conclusion, but speculated that since it appeared in his notes, the information must have been obtained from Gregory. He admitted that the airline ticket produced at the hearing reflects that the purchase was made one week before the departure date and that he may not have looked at it on the evening in question.

[26] At approximately 11:26 p.m., Lee decided that in order to effect the arrest, he would apply handcuffs, thereby eliminating injury to himself, Gregory or anyone else in that area and to eliminate any risk of flight. Gregory was asked to turn around and place her hands behind her back. Bewildered, she complied with the request and slowly brought her hands down. Lee then proceeded to handcuff her. Gregory reacted with stunned disbelief and shouted, "What are you doing? Are you crazy?". Lee advised Gregory that she was under arrest for attempting to smuggle an illegal substance into Canada. He also told her that she had the right to remain silent and "a right to a lawyer". The two had the following exchange, as related by Gregory: "Why am I under arrest? Why am I under arrest?" He said, "You have narcotics". I said, "Are you saying..." I said, "What is narcotics?" He said, "Drugs". I said, "Are you saying that I have drugs on me?" He said, "Yes". I said, "Where is the drugs?", and that

is when the officer picked up the bottle of rum cream like this, and he tilted it forward and he said, "You see these chunks in the bottle?" I said, "No, I didn't see any chunks", because, at that point, all I saw was the air bubble.

[27] Gregory testified that she couldn't see anything in the bottle because the glass was brown and opaque. She claims that she repeatedly insisted that Lee check the receipt on the box to confirm that she had in fact bought the bottles at the duty free shop in Jamaica but that Mr. Lee refused to do so. Lee has no recollection of this. I am satisfied that Gregory did in fact repeatedly ask Lee to check the invoice on the box and that she was ignored. This finding should not be interpreted however as a criticism of Lee's action as he was fully entitled to conduct his examination as he saw fit. Skepticism is an important trait for customs officers, as reflected in Lee's response to a question from counsel for Gregory: "If I believed everything that everybody told me, I don't think I would ever catch anyone coming in with contraband."

[28] Lee was clearly preoccupied with his inspection of the suspicious bottle and apparently was not swayed by Gregory's protest of innocence. In any event, the receipt would not have definitively established the source of the bottle in question, simply that Gregory had bought a bottle bearing the same brand name at the duty free shop.

[29] Lee pulled up a chair and told Gregory to sit down and be quiet while he continued his examination. Gregory testified that she told Lee that the handcuffs were too tight and hurting her wrists, but that her complaints went unheeded. In addition, when she asked for permission to stand up to relieve the pain, she said that Lee continued to ignore her. Lee did not recall being advised that the handcuffs were too tight or painful. He testified that he had ensured that they were double-locked to prevent them from tightening. Further, according to Lee, the handcuffs were in place for no more than eight minutes.

[30] After arresting Gregory, Lee briefed his supervisor Hogan as to what had transpired. Tedford, a female customs officer, was assigned to assist. Because Gregory was obviously upset, Lee decided to take her from that secondary area to a more isolated room to continue the search. Gregory expressed concern about leaving her personal effects strewn all over the desk but was once again told to be quiet.

[31] Lee testified that once they entered the search room, he immediately removed the handcuffs. He explained that the decision to remove the handcuffs was taken because it was a much more controlled environment and there was no risk of flight. Gregory maintains that the handcuffs were not removed until the search was completed. Once again, I prefer Lee's evidence which is consistent with the time frames he provided which were not seriously contested by Gregory.

[32] At approximately 11:35 p.m., Lee examined the contents of the suspect bottle by pouring them into a plastic bag. No foreign objects were seen to be present. A Narcotic Identification Kit (NIK) test was then conducted and the results were found to be negative. Lee apologized for the inconvenience and advised Gregory that she was free to leave. Observing that she was distraught, Lee inquired whether someone was meeting her at the airport. Gregory replied that her boyfriend was waiting for her. Lee handed Gregory his card and she double-checked his name and badge number. When asked if she wanted the rum cream in the plastic bag, Gregory refused it, saying, "What use is that to me now?"

[33] By all accounts, Gregory was left shaken by the experience. She testified that she was "a nervous wreck" and requested permission to stay for a few minutes and compose herself. After approximately ten minutes, Lee took her to the exit and made sure that someone was there to meet her. Gregory left the Customs hall at 11:55 p.m..

[34] Gregory met up with Gray and he immediately noticed that she was crying and very upset. He attempted to find out what happened and was eventually told after calming her down. Gray testified that when she returned home, Gregory continued to shake and cry. She tossed and turned all night and had difficulty sleeping. Over the next few days, the trauma of the arrest left Gregory traumatized and she talked obsessively about it.

[35] In cross-examination, Lee was referred to the Customs Enforcement Manual and the Standard Operational Procedures Manual that provides direction on the departmental policy relating to handcuffing and reporting requirements. The enforcement manual provides that handcuffs may be used when there is a need to control an arrested person who is violent, is known to be violent, is attempting to escape, or is considered likely to escape or when it is necessary to restrain and control a number of persons at the same time. Lee acknowledged that none of these conditions were present when he decided to use handcuffs. He testified that it was standard policy to handcuff persons arrested for a serious criminal offence.

Analysis

[36] Four issues arise for consideration. First, was Gregory subjected to an unreasonable search? Second, was there a violation of Gregory's right to retain and instruct counsel without delay and to be informed of that right? Third, was Gregory detained and arrested without due cause? Fourth, was the use of handcuffs justified? I will address each of these issues in turn.

[37] First, with respect to the search of the luggage, there is no evidence to support the contention that Gregory was improperly singled-out for special attention. Airline passengers impliedly consent to be interrogated and searched when go through customs. Lee was simply carrying out his duties when he randomly selected Gregory from amongst the arriving passengers. Although he was mistaken with respect to one indicator, Lee's examination of Gregory and inspection of her luggage were amply justified by the presence of other significant indicators. From an objective point of view, Gregory fit the profile of a drug smuggler, albeit unwittingly.

[38] Secondly, the evidence establishes clearly that there was no denial of the right to counsel. Gregory acknowledged that she was told that she had the right to remain silent and that she had

the right to a lawyer. I am satisfied that Gregory was properly cautioned of her rights, understood her rights and declined to exercise them.

[39] Thirdly, Gregory has failed to establish that her arrest and restraint were unjustified. The Canadian Charter of Rights and Freedoms guarantees to all persons in Canada, the right to life, liberty and security, "except in accordance with the principles of fundamental justice". To deprive someone of their guaranteed liberty must be totally justified.

[40] A peace officer effecting an arrest can only do so upon reasonable grounds or suspicion of an offence having been committed by the person. The officer must have an honest belief in a serious possibility, based on credible evidence, that a criminal offence has been committed. Mere suspicion does not constitute reasonable grounds. Based on the evidence before me, I am satisfied that Lee had reasonable grounds to suspect that Gregory was smuggling cocaine. The serious nature of the suspected criminal offence, coupled with the other indicators, were sufficient in my view to justify the arrest.

[41] Fourthly, in addition to reasonable and probable grounds justifying the arrest, a peace officer must establish reasonable and probable grounds justifying the use of restraint. Lee testified that he was trying to eliminate any possibility of Gregory

escaping, or of anyone being injured. Although I have certain reservations, I conclude on the evidence before me that Lee was reasonable in concluding that handcuffs were required. The interests of enforcement officers in ensuring their personal safety and that of the detained person and the public must be taken into account. Moreover, the possibility of escape is difficult to gauge and I am unwilling to second-guess Lee in the circumstances.

[42] My decision should not be interpreted as condoning a blanket policy of handcuffing suspected persons. The public expects enforcement officers to set high standards of truthfulness and honour; while demonstrating a devotion to duty. They also expect that the officers will be responsible and accountable in their use of the powers provided by law. The unvarying use of handcuffs on all persons arrested without regard for the seriousness of the offence, a reasonable apprehension of violence, risk of escape, or the condition of the arrested person is improper.

[43] In light of the above, I need not dispose of the Defendant's motion to strike the action. The Defendant maintained that no reasonable cause of action was disclosed in that the action was commenced outside the 90 day limitation period in section 106 of the Customs Act. Notwithstanding, if I were required to determine the issue, I would have concluded that the action is barred by the limitation period which applies both to the actions of the customs officers and to the Crown defending against claims based on vicarious liability.

[44] For all of these reasons, the Plaintiff's action will be dismissed. The parties may address me on the issue of costs, if they cannot agree, by submitting written representations, not exceeding three pages in length, within ten days.

JUDGMENT

IT IS ADJUDGED THAT:

1. The action is dismissed. "Roger R. Lafrenière" Prothonotary Toronto, Ontario April 11, 2002
FEDERAL COURT OF CANADA Names of Counsel and Solicitors of Record COURT NO:
T-58-99 STYLE OF CAUSE: SANDRA GREGORY Plaintiff
- and - HER MAJESTY THE QUEEN Defendant DATE OF HEARING: TUESDAY, MARCH 6, 2001
PLACE OF HEARING: TORONTO, ONTARIO REASONS FOR JUDGEMENT AND JUDGEMENT
BY: LAFRENIÈRE P. DATED: THURSDAY, APRIL 11, 2002 APPEARANCES BY: Ms. Kanji
Wignarajah, Mr. Delné Cluady For the Plaintiff Mr. Chris Park, Ms. Lesley King For the
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688 St. Clair Avenue West Toronto, Ontario M6C 1B1 For the Plaintiff Morris Rosenberg
Deputy Attorney General of Canada For the Defendant FEDERAL COURT OF CANADA Date:
20020411 Docket: T-58-99 BETWEEN: SANDRA GREGORY Plaintiff
- and - HER MAJESTY THE QUEEN Defendant REASONS FOR JUDGEMENT AND JUDGEMENT

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