

CANADA / JUDGMENT

R. v. A.B.

2021 BCCA 20

COURT

British Columbia Court of Appeal

DECIDED

21 January 2021

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2021 BCCA 20 R. v. A.B.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. A.B.,

2021 BCCA 20 REDACTED

Date: 20210121

Docket: CA45531

Between:

Regina

Respondent

And

A.B.

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.5(1) of the Criminal Code restricting the publication, broadcasting, or transmission in any way of information that could identify the appellant, referred to in these reasons for judgment as A.B.

SEALED FILE

An order has been made by this Court sealing all materials in the court file and directing that the appeal proceed under the style of cause, Regina v. A.B.,

2019 BCCA 387. This published judgment has been redacted from the original reasons for judgment, which have been sealed. These redacted reasons set out the background to the case and explain, in as much detail as is appropriate in the circumstances, the legal issues raised in the appeal and the resolution of those issues.

Before:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated February 28, 2018 (R. v. [A.B.], 2018 BCSC 1371, Revelstoke Docket 22872-2).

Counsel for the Appellant:

T.M. Arbogast

K.A. Kirkpatrick

Counsel for the Respondent:

J.N. Walker

Place and Date of Hearing:

Vancouver, British Columbia

September 29, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 21, 2021

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Voith

Summary:

The appellant appeals his conviction for possession of cocaine for the purpose of trafficking. He argues that the search of his truck that uncovered the drugs violated his Charter right to be secure from an unreasonable search and seizure. He further submits that the trial judge erred in assessing whether the Crown had proved the mens rea element of the offence beyond a reasonable doubt. Held: Appeal dismissed. The search was authorized by statute and was not unreasonable. There was no error in the trial judge's finding that the mens rea was proved beyond a reasonable doubt.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] The appellant was convicted of possession of three kilograms of cocaine for the purpose of trafficking. The cocaine was discovered in a duffel bag found during a search of the commercial tractor-trailer the appellant was driving, after the appellant was pulled over for erratic driving. The location of the duffel bag was variously described by the parties in a toolbox (by the Crown) or the sleeping compartment in the cab (by the appellant).
- [2] The appellant appeals on two grounds. First, the appellant submits that the search that uncovered the cocaine was unlawful, and the trial judge erred in admitting the evidence resulting from the search. Second, he argues that the judge erred in concluding that the Crown had established that the appellant had the requisite mens rea to commit the offence.
- [3] As this Court explained in *R. v. Bacon*, 2020 BCCA 140, there are rare cases that demand protection of privileged and confidential information to the degree that the reasons must be sealed to allow the issues engaged to be adjudicated. This is such a case. Due to the sensitive nature of certain information in this appeal, a sealing order and publication ban are in place. The unredacted reasons are sealed. The analysis of the appellant's second ground of appeal, relating to the trial judge's approach to proof of mens rea, is redacted to be suitable for publication. These redacted reasons set out the background to the case and explain, in as much detail as we are allowed, the legal issues raised in the appeal and the resolution of those issues.
- [4] The characterization of the location of the cocaine drives the first issue raised by the appellant, who contends that the warrantless search that led to the discovery of the drugs exceeded the authority of the arresting officer. The appellant submits that an accused person has a protected expectation of privacy in the sleeping compartment of a commercial truck, and in any event, the intended purpose of the stop had already been satisfied. This issue turns largely on the findings of fact made by the trial judge, assessed in light of the principles explained by the Supreme Court of Canada in *R. v. Nolet*, 2010 SCC 24.
- [5] In my view, for the reasons that follow, the principles in *Nolet* govern this appeal. I am not persuaded that the trial judge erred in his application of those principles.

- [6] The second issue raised by the appellant arises from his testimony at trial providing exculpatory evidence about whether the mens rea element of the offence was satisfied. The trial judge rejected the appellant's explanation and concluded that the Crown had proved the requisite mens rea beyond a reasonable doubt. The appellant submits that in coming to this conclusion, the trial judge failed to properly apply the principles set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.
- [7] For the reasons that follow, I do not agree that the trial judge failed to follow the principles in *W.(D.)* in finding that the appellant had the requisite mens rea for the offence.

Admissibility of the Evidence of Cocaine Possession

- [8] The question of admissibility of the cocaine found in the tractor-trailer the appellant was driving was addressed at a voir dire. The judge's restricted reasons are indexed at 2017 BCSC 2672.
- [9] During the voir dire, the arresting officer, Constable Coleman, testified that after he pulled over the appellant, he asked the appellant to produce his logbook, licence and fuel receipts, required under the Motor Vehicle Act Regulations, B.C. Reg. 26/58 [Regulations]. The appellant produced his logbook, but there were no entries within the prior four days, which is an offence under the Regulations.
- [10] Constable Coleman advised the appellant that he was going to be placed out of service for a minimum of eight hours and possibly up to 72 hours. The appellant asked to be able to drive the truck about three kilometers up the road to a parking lot at a motel. At the parking lot, Constable Coleman conducted a search of the vehicle. He located the duffel bag containing the cocaine in what he described as a jockey box or toolbox. The judge described the location of the toolbox in this way:
- [9] Constable Coleman was aware that evidence of log books might be concealed in the toolbox area. The toolbox was used to store items required for the operation and maintenance of the tractor-trailer unit. Included in the items typically carried in the toolbox was lubrication oil, tie-on straps, windshield washer fluid, road flares, and dirty rags.
- [10] The toolbox was divided off in a separate compartment from the sleeping area. The officer was aware that the driver had an expectation of privacy with respect to the bed and the closet. He did not search the bed, the bedding, or clothing.
- [11] Constable Coleman testified that the toolbox was also accessible from the exterior of the truck, but that the easiest way to search the toolbox area was to lift the bed and look down on the toolbox.
- [12] The judge described the discovery of the drugs in this way:

- [13] Constable Coleman lifted up the bed in the sleeping berth of the truck and looked into the toolbox area. He saw a bag partially open and showing a brick of cocaine. In the bag there were other two similar-sized bricks of cocaine weighing about 1,065 grams respectively. The officer arrested [A.B.] for possession of drugs for the purposes of trafficking.
- [13] The judge accepted Constable Coleman's evidence that he was searching for the missing logbooks when he searched the truck. He concluded that the search was authorized by statute and was carried out lawfully. The evidence of the cocaine was admitted.
- [14] In this Court, the appellant alleges that the judge erred in admitting the evidence on the basis that the search was unreasonable and violated the appellant's Charter rights. He raises two issues in relation to the search, which he frames as follows:
1. Did Constable Coleman have the authority to engage in a further search of the vehicle after he had determined that the appellant was non-compliant and had issued him a violation ticket?
 2. If Constable Coleman had the authority to engage in a further search, was that search properly conducted or did Constable Coleman step out of bounds when he searched the sleeping compartment of the truck and lifted up the bed?

Authority to Search

- [15] The power to search commercial vehicles is set out in s. 239(1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA], as follows:

A peace officer may, without a warrant, search a business vehicle on a highway to determine whether this Act and the regulations are being complied with in the operation of that business vehicle, and for that purpose may require the driver of the business vehicle to stop the business vehicle and permit the search to be made.

- [16] The appellant submits that once Constable Coleman was presented with incomplete logbooks and had decided to issue a ticket, there was no further reason (nor further authority) for any search. He further submits that apart from accepting Constable Coleman's evidence that he was looking for logbooks, the judge did not address the issue of why a search for missing logbooks was necessary when the appellant had been unable to produce them when requested to do so. He concludes that the judge erred in interpreting s. 239 to permit a further search in these circumstances.
- [17] In my opinion, the judgment in Nolet provides a complete answer to this ground of appeal. In Nolet, a commercial truck was pulled over by a police officer for a random spot check. The officer noticed an expired fuel sticker on the outside of the vehicle. Driving without a current sticker was a provincial offence. The officer asked for the logbook and vehicle registration. The logbook was incomplete, and the vehicle registration had not been prorated for commercial driving in Saskatchewan, which was also a provincial offence. The officer conducted an initial search of the trailer, looking for documents to confirm or dispute

the contents of the logbooks. Instead he found a duffle bag containing more than \$100,000 in small denominations. After police back-up was summoned, the officer conducted a further search of the trailer, and discovered a hidden compartment containing significant volumes of prohibited drugs. The question for the Court was whether this sequence of searches violated Mr. Nolet's Charter right to be secure from unreasonable search or seizure. The Court held that it did not.

[18] The statutory authority at issue in Nolet was s. 63(5)(b) of the Highways and Transportation Act, 1997, S.S. 1997, c. H-3.01 [H&TA], which read as follows:

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(5) Where the peace officer or the person appointed by the minister has reasonable grounds to believe that a vehicle is being operated in contravention of a regulation made pursuant to clauses 69(1)(v) to (oo), the peace officer or person appointed by the minister may:

(b) search the vehicle for evidence of an offence

[19] The Supreme Court held that, armed with this statutory authority, the police officer was authorized to search for further evidence of provincial offences:

[28] There is no doubt that, after the initial stop, the officer quickly obtained reasonable grounds to believe that the appellants were operating the truck in violation of the H&TA, having regard to the lack of a truck licence valid in Saskatchewan, the display of an expired fuel sticker and inconsistent entries in the driver's logbook. At the time the officer began to investigate the cab of the tractor unit, it was quite within his statutory authority to search for further evidence related to H&TA offences.

[20] The Court concluded that "the search of the tractor-trailer rig for relevant papers was authorized by s. 63(5)(b)": para. 29.

[21] The appellant seeks to distinguish Nolet from the circumstances at bar on the basis that the Saskatchewan statute has preconditions for a warrantless search, whereas the MVA does not. The only precondition for a search contained in s. 63(5)(b) is that the police officer must have reasonable and probable grounds for believing that the vehicle was being operated in contravention of regulation. Section 239 of the MVA does not contain such precondition, but in my view it does not follow that the statutory authority granted is less broad than the Saskatchewan statute under consideration in Nolet. I note that, as in Nolet, the reasonableness of the law itself is not challenged on this appeal.

[22] The appellant also argues that Constable Coleman was acting on a "good hunch" rather than on reasonable grounds because appellant had a history of criminal activity and had admitted his failure to comply with the logbook regulations. However, the trial judge specifically considered, and rejected, the defence argument that the officer's reliance on the MVA and the Regulations to search the vehicle was merely a "ruse" to uncover drugs or guns. He accepted Constable Coleman's evidence that he was searching the toolbox to look for

logbooks: at paras. 16, 24, 26, 30. There is no basis to disturb this conclusion on appeal.

- [23] The Supreme Court of Canada in *Nolet* went on to address whether the specific search was reasonable, as I will discuss in the next section of this judgment, but in my view the conclusion of the Court that the officer in *Nolet* was justified in conducting a search once he was aware of a provincial infraction is not materially distinguishable from the conclusion reached by the trial judge in the case at bar. I would not give effect to the first ground in relation to the initial decision to search the truck.

The Location of the Search

- [24] The second objection to the search raised by the appellant is the location of the search, near the sleeping compartment of the truck. The appellant submits that he had an expectation of privacy in the sleeping compartment of the truck, which was violated when Constable Coleman accessed the toolbox by lifting the sleeping berth from within the cab of the truck.
- [25] The Court in *Nolet* dealt with this issue as well and concluded that in light of the possibility of mandatory inspections and searches, there could be little expectation of privacy, even in the sleeping area of the truck:
- [31] While the appellants did not testify about their subjective belief, the court may presume that individuals would expect a measure of privacy in what, for a long-distance trucker, suffices as a temporary mobile home. The expectation is objectively reasonable because living quarters, however rudimentary, should not be classified as a Charter-free zone: *Johnson v. Ontario (Minister of Revenue)* (1990), 75 O.R. (2d) 558 (C.A.), and *R. v. Belnavis*, [1997] 3 S.C.R. 341. Nevertheless, the level of expectation is necessarily low because the cab of a tractor-trailer rig is not only a place of rest but a place of work, and the whole of the cab is therefore vulnerable to frequent random checks in relation to highway transport matters. As *Wilkinson J.A.* pointed out, "[k]nowledge of the transportation legislation is a requirement to be licensed as a driver. The [appellants] would be well aware of the possibility of mandatory inspections and searches, whether for documents or for potential violation of any one of the countless obligations imposed by the regulatory scheme" (para. 70). Accordingly, there can be little expectation of privacy, even in the sleeping area of a truck (particularly one which is travelling in violation of relevant highway regulations). A stop may quickly precipitate a search, and the occupants either know or ought to know of that reality and govern themselves accordingly.

[Emphasis added.]

- [26] Thus the search of the toolbox, located below the sleeping berth, was not, without more, a violation of the appellant's right to be secure from unreasonable search or seizure.
- [27] The appellant submits, however, that this principle cannot apply if the statutory authorization for the search prohibits entry to the sleeper area of the truck. He relies on s. 37.19.02(1) of the Regulations, which reads as follows:

A peace officer may at any reasonable time enter or stop and enter a commercial motor vehicle, except for its sleeper berth, for the purpose of inspecting the daily logs and supporting documents.

[Emphasis added.]

[28] The trial judge addressed this argument in his voir dire ruling. After reviewing s. 239 and s. 37.19.02(1), as well as the definition of "sleeper berth" found in Schedule 1 of the Regulations, the judge concluded as follows:

[22] Based on those provisions, I am also satisfied that Constable Coleman was entitled to search the toolbox. It was not part of the sleeper berth.

[23] The mere fact that [A.B.] may have stored some of his personal items in the toolbox does not change the character of that area to become part of the sleeper berth. It is apparent from looking at the contents of the toolbox that the items stored in it were to be used for the operation and maintenance of the truck.

[Emphasis added.]

[29] I conclude that on the findings of fact by the trial judge, the toolbox where the drugs were located was not part of the sleeper berth such that the search of the toolbox can be said to have been in violation of s. 37.19.02(1) of the Regulations.

[30] The secondary argument of the appellant is that the entry to the area of the sleeper berth was itself contrary to s. 37.19.02(1), rendering the subsequent search illegal. The implication of this argument is that the regulation limits the scope of the general statutory authority in s. 239 of the MVA to "search a business vehicle on a highway to determine whether this Act and the regulations are being complied with in the operation of that business vehicle." I cannot agree that the regulation has the effect of qualifying the general power contained in the statute.

[31] On its face, s. 37.19.02(1) relates to an inspection of the daily logs and supporting documents, not the search for undisclosed logbooks. To the extent that there may be overlap between the authority to inspect daily logs of commercial motor vehicles and the authority to search business vehicles for documents evidencing non-compliance with regulations, I do not consider that the regulation could be read as prevailing over the general power expressed in the statute: see *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 38-39.

[32] Accordingly, it is my view that s. 239 of the MVA authorized the search of the toolbox, notwithstanding that the police officer located the toolbox beneath the sleeper berth of the truck and notwithstanding the provisions of s. 37.19.02(1) of the Regulations. The law recognizes broad powers for search of commercial vehicles when the purpose of the search is regulatory oversight: *R. v. Kenyon*, 2010 MBCA 70 at para. 7. The trial judge did not err in admitting the evidence of the cocaine that was seized pursuant to this search.

Proof of the Mens Rea Requirement

- [33] At trial, the appellant gave exculpatory evidence relating to the mens rea element of the offence. Two other witnesses gave evidence relevant to this issue, and certain parts of their evidence were contradictory. I will refer to these witnesses as "Witness A" and "Witness B". The appellant's position was that his evidence, combined with contradictory evidence given by the other two witnesses, raised a reasonable doubt about whether the Crown had proved mens rea.
- [34] The trial judge recognized that the issue was whether the appellant had the requisite mens rea to commit the offence, which engaged the principles set out in W.(D.). He summarized the question before him in this way:
- [7] The Crown must prove the case against [A.B.] beyond a reasonable doubt. The burden of proof remains with the Crown throughout the case. The burden never shifts to [A.B.]. [A.B.] has testified. Where an accused testifies, the convenient manner of analyzing the issues is set out in the W.(D.) (R. v. S. (W.D.), [1994] 3 S.C.R. 521 line of cases. It requires the trier of fact to follow the following principles:
- 1) if I believe the testimony of [A.B.] that he did not commit the offence charged, I must find him not guilty;
 - 2) if I do not believe the testimony of [A.B.], but if it leaves me with a reasonable doubt about his guilt, I must find him not guilty;
 - 3) if I do not know whom to believe, it means I have a reasonable doubt and I must find [A.B.] not guilty; and
 - 4) even if the testimony of [A.B.] does not raise a reasonable doubt about his guilt, if, after considering all of the evidence, I am not satisfied beyond a reasonable doubt of his guilt, I must acquit.
- [8] These four principles are simply a convenient way of describing the court's duty to consider the whole of the evidence on every issue.
- [35] The appellant takes no issue with this statement of principle, but argues that in his assessment of the evidence, the judge did not apply the W.(D.) principles properly.
- [36] The judge reviewed the testimony of the three witnesses. He held that the evidence of the appellant was not reliable, and identified some specific contradictions in his testimony. With respect to the other two witnesses, the judge found Witness A to be reliable and specifically accepted his version of the evidence where it contradicted that of Witness B. The judge also accepted Witness B's testimony, except where it contradicted Witness A's evidence. Part of the evidence from Witness A and Witness B that the judge accepted tended to contradict the exculpatory evidence the appellant gave relating to his mens rea.

- [37] It is this part of the judge's reasoning that the appellant submits demonstrates error in assessing his mens rea. The appellant submits that the judge failed to grapple with the significance of the inconsistency between the evidence of the two witnesses, which in turn undermined the strength of the Crown's case. He relies on the judgment of the Ontario Court of Appeal in *R. v. M.G.* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.), for the proposition that if there is a significant inconsistency in a witness's testimony then the trial judge must pay careful attention to it when assessing the reliability of the witness's evidence.
- [38] In my view, the judge's reasons addressing the inconsistency in Witness B's evidence demonstrate that he paid careful attention to the inconsistency, and explain why he did not consider it sufficiently significant to affect the reliability of the evidence that related more directly to the issue at hand, the appellant's mens rea to commit the offence.
- [39] The judge went on to conclude that he was satisfied the appellant had the requisite mens rea to commit the offence of drug trafficking. In particular, he found the Crown had proved beyond a reasonable doubt that the appellant had the intention of transporting or delivering cocaine. He therefore found the appellant guilty as charged.
- [40] The judge was entitled to accept all, part or none of Witness B's testimony. He accepted the witness's testimony that was most relevant to the appellant's mens rea, which tended to contradict the appellant's evidence. It was unnecessary for the judge to go further and expressly state that he did not have a reasonable doubt about the appellant's guilt: *R. v. R.E.M.*, 2008 SCC 51 at para. 56.
- [41] The judge correctly articulated the principles from *W.(D.)* that he was to follow. I can see no error in his application of these principles in his judgment.
- [42] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Voith"

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