

CANADA / JUDGMENT

R. v. Downes

2018 BCSC 488

COURT

Supreme Court of British Columbia

DECIDED

26 March 2018

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2018 BCSC 488 R. v. Downes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Downes,

2018 BCSC 488

Date: 20180326

Docket: X80191-4

Registry: New Westminster

Regina

v.

Randy William Downes

Before: The Honourable Mr. Justice Verhoeven

On appeal from: An order of the Provincial Court of British Columbia, dated September 26, 2017 (R. v. Downes, Port Coquitlam Registry, 96701-4A).

Reasons for Judgment

Counsel for the Appellant:

G. Orris, Q.C.

Counsel for Respondent:

J. Fogel

Place and Date of Hearing:

New Westminster, B.C.

March 9, 2018

Place and Date of Judgment:

New Westminster, B.C.

March 26, 2018

I. Introduction

- [1] Mr. Downes appeals from a decision of the Provincial Court of British Columbia made September 26, 2017, convicting him of one count of breach of recognizance of bail, contrary to s. 145(3) of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] Mr. Downes was found to have "attended a park" on June 21, 2017, contrary to condition 9 of a recognizance of bail he entered into on April 19, 2017. He was arrested for this offence on June 21, 2017.
- [3] The Learned Trial Judge held that he had some doubt about whether Mr. Downes intentionally entered the park, but that he was reckless as to his "entry into and passage through" the park.
- [4] For the reasons that follow, I conclude that the appeal should be allowed and an acquittal entered.

II. Legal Principles

- [5] Section 686(1) of the Criminal Code applies to this appeal. The section states as follows:

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

- (a) may allow the appeal where it is of the opinion that
- (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
- (iii) on any ground there was a miscarriage of justice;

- [6] I adopt my comments in *R. v. Patel*, 2017 BCSC 1596; leave to appeal denied, 2017 BCCA 459:

- [21] A convenient summary of the applicable legal principles is set out in in the decision of Justice Rogers in *R. v. Jalifi*, 2015 BCSC 1085 at paras. 21 to 22:

[21] The function of the summary conviction judge is to determine whether the trial judge could reasonably have reached the conclusion that the appellant was guilty beyond a reasonable doubt: *R. v. W.(R.)*, [1992] 2 S.C.R. 122; *R. v. Grosse* (1996), 29 O.R. (3d) 785 (Ont. C.A.). An appeal judge must consider the evidence at trial, and must, to a limited extent examine and weigh it. That exercise has a limited purpose though, and that is to assess whether the evidence is reasonably capable of supporting the trial judge's conclusions. If it is, the appeal court is not entitled to substitute its own view of the evidence for that of the trial judge: *R. v. Burns*, [1994] 1 S.C.R. 656.

[22] When it comes to reviewing the trial court's findings of fact, an [appellate] court must give due deference to the trial judge. See, for example *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, where Iacobucci and Major JJ. said at paras. 22 and 24:

[T]rial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

[22] In *R. v. R.P.*, 2012 SCC 22, in discussing the test under s. 686(1)(a)(i), Deschamps J., for the majority of the Supreme Court of Canada, stated as follows:

9 To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebe*s, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).

10 Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).

[23] Thus, questions of witness credibility are questions of fact, which must be given substantial deference on appeal. To repeat, credibility assessments must not be interfered with on appeal unless they "cannot be supported on any reasonable view of the evidence".

[24] Similarly, findings of fact must be given significant deference by an appellate court. The phrase "palpable and overriding error" is often applied. This phrase was explained in *R. v. Clark*, 2005 SCC 2, at para. 9 by Fish J. for the Court:

Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

[25] Similarly, in *Benhaim v. St-Germain*, 2016 SCC 48, the Supreme Court of Canada adopted the comments of Stratas J.A. in *South Yukon Forest Corp. v. Canada*, 2012 FCA 165 as follows:

38 Palpable and overriding error is a highly deferential standard of review ... "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[7] The question of the nature of the mens rea required for breach of the section is subject to some uncertainty in this Province: *R. v. Zora*, 2017 BCSC 2070; 2018 BCCA 34; *R. v. Downes*, 2017 BCPC 332, at para. 19.

[8] The case was argued both at trial and on this appeal on the basis that breach of s. 145(3) is a mens rea offence, requiring the Crown to establish that the accused had actual knowledge he was entering the park, or that he was reckless in doing so. This is consistent with the statement of the law set out in *R. v. Flores-Rivas*, 2008 BCSC 1595, at para. 9:

This section places the onus on an accused to establish that he or she had a lawful excuse for failing to comply with the order, on a balance of probabilities. The mens rea of this offence is that the accused knowingly or recklessly infringed the conditions of the recognizance: See *R. v. Custance*, 2005 MBCA 23, 194 C.C.C. (3d) 225, leave to appeal to SCC refused, [2005] S.C.C.A. No. 156.

[9] On the appeal the respondent Crown does not argue that the offence with which Mr. Downes is charged does not require subjective mens rea. As a result, I do not consider it necessary to address the legal controversy.

[10] The issue on the appeal is whether the trial judge's finding of mens rea based upon recklessness of Mr. Downes is unreasonable or cannot be supported by the evidence within the meaning of s. 686(1).

III. Facts

[11] The relevant bail condition is as follows:

You are not to attend any park, swimming pool, daycare centre, school, playground, beach, amusement park, movie theatre, community centre or ice rink, except you may attend at an ice rink for the sole purpose of working as an official for adult hockey game provided that you a) advise your Bail Supervisor in advance of the time and location; b) arrive and depart within thirty (30) minutes of the scheduled game time; c) are not in the same dressing room with any child under the age of seventeen (17). You will not attend within a 150 ft of any location within a public building or otherwise that has been set aside for children and should you come across one accidentally you will not stop, but walk through that location without stopping until such time as you are beyond the prohibited area.

[12] The trial judge described the facts as follows:

- [24] The testimony of three police officers was, with one exception, largely uncontradicted. On June 21st, 2017, while conducting surveillance on Mr. Downes to ensure his compliance with bail conditions, he was observed to park his vehicle at 9:39 a.m. near the intersection of Elgin Street and Maple Street in Port Coquitlam. He left his vehicle on foot, crossed Maple Street and entered onto the Traboulay PoCo Trail, which is a walking trail following a roughly north-south direction along the Coquitlam River.
- [25] He was followed by Cst. Sandy Gill on foot. When he entered the trail, he followed it northbound in the direction of Lions Park. He proceeded northbound along the paved trail. There was no evidence of signage indicating a name of a park, but at a certain point there was a plaque in the asphalt of the trail stating "Lions Park". Mr. Downes walked over or passed this sign in the pavement. He then took a trail to the right which he continued eastbound until almost reaching Shaughnessy Street before doubling back to the main trail and continuing northbound through to the end of Lions Park. Mr. Downes was then arrested after he had proceeded through Lions Park when he was met by police where the trail meets Prairie Avenue.
- [26] Photographs taken of this route shortly after the fact, show that as one approaches the Lions Park sign on the ground, a prominent playground is in the park on the right side of the trail, north of the sign. The playground area contains a water park and various structures for children to play on. Numerous children were present in the playground at the time of Mr. Downes passing by.
- [27] The northbound trail that Mr. Downes followed, has a forested area to the left next to the river and grass fields to the right. Cst. Gill estimated that it was approximately 40 to 50 feet from the trail to the playground apparatus, although he did not measure the distance. He was challenged on this distance in cross-examination and I accept that the photographs suggest a distance greater than 40 to 50 feet. It is nonetheless clear that the playground was clearly and obviously visible from the trail with only a grass field between the two. The grass field also included picnic tables and park benches.

- [30] Cst. Gill confirmed that Mr. Downes walked briskly the entire time that he was observed. Mr. Downes states that when he was approaching the underpass of Lougheed Highway, which is at the north end of the park, he noticed the children's playground to his right and decided to just keep walking to get out of the park. As noted, he was then arrested after he had left the north end of the park.
- [13] The Traboulay PoCo Trail surrounds nearly all of Port Coquitlam. It extends, in several segments, from a point near Colony Farm Regional Park in the south west, along the eastern edge of the Coquitlam River, north to Coquitlam River Park, then east to the Pitt River, then south along the Pitt River until it reaches the Fraser River along the southern shore of Port Coquitlam. There are substantial portions of the trail that do not intersect with a park. The western part of the trail along the Coquitlam River is relevant in this case. There, the trail enters Lions Park at the south end of the park, close to the Coquitlam River, at a pedestrian underpass beneath Kingsway Avenue. The trail transects the park in a generally north-south direction, roughly parallel with the Coquitlam River. The trail exits the park at the north end via another pedestrian underpass, beneath the Lougheed Highway. Most of the park area lies east of the trail. The eastern edge of the park is on Shaughnessy Street, where the main park entrance and park signage is located.
- [14] Mr. Downes entered Lions Park at the south end, via the Kingsway Avenue underpass, and transited the park from south to north, remaining on the trail throughout, before exiting the park at the Lougheed Highway underpass. He was walking briskly the entire time he was observed by Constable S. Gill, who followed him on foot. Mr. Downes testified that he was wearing headphones and was walking briskly for exercise and weight reduction.
- [15] On appeal the Crown concedes that the trial judge erred in finding that Mr. Downes left the north-south trail he was walking on, within the park. At paragraphs 25 and 35, the trial judge states that Mr. Downes left the "main trail" (the north-south trail) to take another trail forking from the main trail, proceeding easterly off of the main trail, and located south of the playground, almost reaching Shaughnessy Street, before doubling back and continuing on, northbound, on the main trail. This finding misconstrued the evidence of Constable S. Gill.
- [16] Mr. Downes left the north-south main trail (the Traboulay PoCo Trail) and went east on another trail only after he had exited the park.
- [17] The mistake is understandable, as Constable S. Gill's evidence was confusing and erroneous. Constable S. Gill testified correctly that Mr. Downes left the main trail and detoured eastbound on another trail after he had exited the park via the northern underpass, but the photos he referred to in his evidence in this context showed the underpass at the southern entrance to the park. He erroneously testified in chief and in cross examination that some of the photos of the southern entrance to the park along the trail depicted the northern exit (Lougheed Highway) end of the trail. He was not familiar with the photographs, which were critical to the case. He also testified erroneously that the Lions Park plaque was located at

the southern entrance to the park, when in fact it is located about equidistant between the south and north underpasses where the trail enters and exits Lions Park.

- [18] At trial Mr. Downes testified that he did not know the trail he was walking on was part of the park and denied intentionally going into the park. He testified that he saw no indication that he was entering a park and that he did not see the "Lions Park" plaque in the pavement. However as he approached the Lougheed Highway underpass he noted the playground, and at least became aware of the risk that he was in a park. He thought if he stepped off the pathway he would be in the park. Since he could not "just evaporate", he continued to walk in the same direction, remaining on the path, until he exited the park at the north end. He was arrested after his eastern detour.

IV. Reasons for Judgment of the Trial Judge

- [19] The key portion of the reasons for judgment of the trial judge is as follows:
- [32] The defence says that the evidence shows that Mr. Downes did not intentionally enter the park and he was not reckless as to doing so. Significant reliance is placed on the fact that the Lions Park sign embedded in the trail, seems to be well into the park instead of at its entrance. As well, the placement of the sign suggests that it is capable of not being seen by someone who is not paying attention to the ground. No other signs noting the park were evident other than the large signs at the entrance off Shaughnessy Street but there is no evidence that Mr. Downes would have seen that sign on this occasion.
- [33] The defence further states that while recklessness will fulfil the mens rea required for this offence, mere carelessness or negligence will not. Recklessness as defined in *Sansregret v. The Queen*, [1985], 1 SCR 570, at page 581:

...is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.

- [34] In the present case, I have some doubt as to whether Mr. Downes intentionally entered the park. With some reservations, I am able to accept that he was going for a walk on the trail and that the signage does not clearly indicate that a park is ahead. However, I find that at the least the evidence is overwhelming that he was reckless as to his entry into and passage through the park. The photographs clearly show that this area had all of the hallmarks of a park well before the Lions Park sign in the trail that Mr. Downes claims to have not seen. The park contained expanses of grass, picnic tables and park benches. The playground appears to be of significant size and impossible to miss well in advance of the Lions Park sign.

- [35] Indeed, the evidence of Cst. Gill was that he proceeded east on a trail south of a playground before doubling back and then proceeding north on the main trail. That gave him even more of an opportunity to appreciate not only his presence in the park but his proximity to the playground. There was no suggestion that he at any time turned back to where he had entered the park upon realizing his apparent mistake.
- [36] My conclusion that Mr. Downes was at least reckless as to entering the park is also supported by the fact that he has lived in the area for many years, presently lives nearby and has walked on this trail before. This is not an area unknown to him. In my view, the facts support a finding that Mr. Downes far more than negligent and, bound by the conditions as he was, he saw the risk and chose to take it.
- [37] As such, I found Mr. Downes guilty of this one count of breaching his recognizance.

V. Analysis

- [20] As the trial judge observed at paragraphs 23 and 32 of the reasons, at trial, the defence did not dispute that Mr. Downes was in a park as he walked along the trail within the park, so as to fit within the first sentence of condition 9.
- [21] The defence argued that Mr. Downes was not aware that he was entering a park when he entered it, and therefore he lacked the intention to enter a park, and that he was not reckless in entering the park. The Crown argued that he was reckless in entering the park.
- [22] As can be seen, the trial judge accepted that there was a reasonable doubt about whether Mr. Downes intentionally entered the park.
- [23] The reasons are ambiguous as to whether Mr. Downes was convicted for recklessly entering the park, or whether he was convicted for recklessly remaining in the park, or both.
- [24] In paragraph 34 of the Reasons the trial judge states that Mr. Downes was reckless as to "his entry into and passage through" the park. This suggests the judge convicted Mr. Downes for recklessly entering the park and for recklessly remaining in the park, once Mr. Downes realized he had entered a park by accident or mistake. The difficulty is compounded because the next sentence of the reasons refers to an "area" that had all the hallmarks of a park, but the reasons are not clear as to whether the trial judge meant to refer to the area leading to the entrance to the park, or an area well within the park.
- [25] The comments in paragraph 35 support the interpretation that Mr. Downes was convicted for his conduct after he was within the park, when he either became aware of or was reckless as to whether he was in a park. This paragraph contains the factual error I referred to earlier. As I interpret the reasons, the trial judge faults Mr. Downes for failing to "turn back to where he had entered the park upon realizing his apparent mistake." This comment is consistent with a conclusion that he entered the park by mistake, as Mr. Downes contended.

- [26] However, the Crown did not argue that Mr. Downes was reckless in remaining in the park. No doubt for this reason that proposition was not put to Mr. Downes in cross-examination.
- [27] In the next paragraph (para. 36), the judge states that Mr. Downes is convicted for recklessness as to entering the park. There, the judge refers to the fact that Mr. Downes had lived in the area for many years, had previously walked on this trail, and the area was not unknown to him. These facts could possibly apply to the conduct of Mr. Downes in entering the park. The judge then states that Mr. Downes, "saw the risk and chose to take it" but unfortunately, he does not state precisely what risk Mr. Downes saw and chose to take.
- [28] Thus, there are two primary issues to be considered on this appeal. They are whether the trial judge could reasonably have reached the conclusion that the appellant was guilty beyond a reasonable doubt on the basis of: (1) recklessness in entering the park; or (2) recklessness in remaining in the park.
- [29] Due to the ambiguity in the reasons, in order to resolve this appeal, I have found it necessary to review the entirety of the transcript of the evidence at the trial (which was short, as one would expect for a case of this nature), together with the exhibits, and the submissions. Plainly the evidence of the police officers in conjunction with the photographs of the park and park vicinity were critical to the Crown's case.
- a) Entry into the Park
- [30] The trial judge stated that the signage along the route into the park taken by Mr. Downes does not clearly indicate that a park is ahead. In fact, there was no evidence of any signage about the park at or near the park entrance that Mr. Downes utilized.
- [31] The evidence does not support the conclusion that the expanses of grass, picnic tables, park benches and the playground described by the judge as "hallmarks of a park" were visible to Mr. Downes before he entered the park. They would have become visible to Mr. Downes as he proceeded north along the trail, as he transited the park. The trial judge's decision rests almost entirely on this point. With respect, this was a palpable and overriding error.
- [32] Within Lions Park the trail is paved with asphalt. At some point within the park the paved trail crosses an enlarged rounded paved area or "central hub" as Constable K. Gill described it, where several paved pathways including the trail connect.
- [33] On both the south and north edges of this central hub a sign or plaque is embedded in the pavement reading "Lions Park." The photographs show that the sign and the words within it are not prominent.
- [34] Although no plans or measurements are available, the photographs and the testimony of Constables S. Gill and K. Gill clearly show that the plaques embedded in the asphalt (the only signage along the route taken by Mr. Downes), were roughly in the middle of the trail section within the park, that is, about equidistant from the south and north underpasses. Constable S. Gill estimated the distance between the Kingsway underpass to the south

plaque at one and one-half to two city blocks, or around 400 meters. Constable K. Gill's testimony was similar.

- [35] The trial judge states that the playground is in the park on the right side of the trail, "north of the sign" as one approaches the sign. The photographs and testimony indicate that the playground is roughly centrally located within the park, within the north-south axis, and east of the central hub.
- [36] In order to establish that Mr. Downes was reckless in entering the park, the court would be required to make findings supporting the conclusion that Mr. Downes saw the risk, and then took the chance by entering the park, despite awareness of the risk.
- [37] The trial judge emphasized the prominent playground located in the park to the east of the trail. The trial judge seems to have accepted that the plaque is "well into the park instead of at its entrance" as the defence argued. The evidence supports this. The trial judge states that the playground was impossible to miss well in advance of the Lions Park sign, and that the other indicia of a park were also visible well before the Lions Park sign.
- [38] Although the trial judge did not expressly find that the playground or any of the other indicia of a park were visible to Mr. Downes before he entered the park, as I have said, the reasons for judgment depend on such findings, which are plainly in error.
- [39] In addition to the erroneous and confusing evidence of Constable S. Gill about the photographs, the Crown's submissions at trial could have contributed to this error. In the closing submissions, Crown counsel (who was not counsel on this appeal) argued that Mr. Downes was reckless in entering the park. However in making that argument counsel referred to photographs (photos 17 and 18 of exhibit two) which depict the central hub area. With reference to these photos the Crown argued that "he had to know that he was approaching a park, or he was reckless as to whether or not he was approaching he park", when at this point on his walk Mr. Downes was well within the park, and nowhere near the entrance.
- [40] The trial judge noted that Mr. Downes was familiar with the area and had previously walked this trail. He did not go on to make any findings as to how this knowledge led to recklessness in entering the park. These comments might have led to a conclusion that Mr. Downes was in fact aware of the park, however the trial judge specifically rejected that conclusion. They might have led to a finding of negligence in not taking sufficient care or in failing to investigate whether the trail ran through the park, but the trial judge accepted that negligence is insufficient to establish criminal liability, at least in the circumstances of this case.
- [41] Therefore, I conclude that a conviction based upon recklessness in entering the park is unreasonable.

b) Remaining in the Park

- [42] In my respectful view, there is also no basis in the evidence to support a finding that Mr. Downes was reckless in remaining in the park after he had entered it.
- [43] As I have said, no such theory of liability was put to Mr. Downes or argued. It is unlikely that the trial judge convicted him on this basis.
- [44] In circumstances where he was not liable for entering the park in the first place, in order to convict Mr. Downes for remaining in the park once he had entered it, in my view the trial judge would be required at least to find that he had intentionally and unnecessarily remained in the park once he became aware that he was in a park, or perhaps that he recklessly remained in the park after he became aware of the risk. There is no evidence to support such findings.
- [45] On appeal, the Crown argues that once he became aware the trail was located in the park, he recklessly remained in the park by continuing on in the same northerly direction, rather than immediately reversing course and exiting the park at the southern end of the trail, where the trail enters the park. This argument is similar to the reasoning of the trial judge in paragraph 35 of the reasons. However, that part of the trial judge's reasoning rested on his erroneous finding that Mr. Downes "proceeded on a trail south of the playground before doubling back and then proceeding north on the main trail."
- [46] It is apparent that the trial judge thought that Mr. Downes made this diversion after he was well within the park. In paragraph 25 he states that Mr. Downes took the trail to the right after he walked over or passed the sign in the pavement. From this he may have inferred that Mr. Downes was aware of his presence in the park or reckless concerning his presence in the park before he took this diversion. If true this might have supported a finding of recklessness in remaining in the park. However such a finding would be contrary to the evidence.
- [47] The Crown asks me to infer, based upon the photographs, that Mr. Downes must have seen the playground when he was somewhere nearer his southern entry point than his northern exit point. Therefore, the Crown argues he ought to have turned around and if he had done so, he likely would not have been criminally liable.
- [48] It is speculative to suggest that the southern entry point was closer at hand, at the relevant moment. The judge made no such findings, and was not asked to do so. Again, no such theory was put to Mr. Downes at trial.
- [49] As Mr. Downes testified, he could not simply disappear or evaporate. In my view, on the evidence, his decision to proceed north, exiting the park immediately, was reasonable. This point is fortified by the wording of the second sentence in condition 9, which for convenience I repeat:

You will not attend within a 150 ft of any location within a public building or otherwise that has been set aside for children and should you come across one accidentally you will not stop, but walk through that location without stopping until such time as you are beyond the prohibited area.

- [50] While not directly relevant to the situation of accidentally finding himself in a park, this part of condition 9 nevertheless provides reasonable guidance as to what Mr. Downes ought to do in such circumstances. He testified in cross examination that he thought that if he accidentally walked into a park he was obliged to continue through without stopping, and that is what he did. I cannot conceive how this decision would be sufficient to found criminal liability in the circumstances of this case.
- [51] In summary, absent findings that Mr. Downes intentionally or recklessly did something that resulted in him remaining in the park when he should not have, and without the Crown actually having taken this position at trial, Mr. Downes could not be found criminally responsible for breaching the condition of his recognizance on this basis. As there is no evidence that could support such a finding, Mr. Downes ought to have been acquitted.
- [52] A further issue is that this second possible avenue to liability would require a finding that the words "attend a park" in the bail condition included remaining in park, accidentally entered, for only as long as it takes to exit the park. I am doubtful that such conduct contravenes the bail condition. The reasons for judgment do not address this issue. Given my other conclusions, it is not necessary that I address this issue.

VI. Conclusion

- [53] The principles of law applicable to the issue of whether a summary conviction appeal court should enter an acquittal or order a new trial were considered by Mr. Justice S.R. Romilly in *R. v. Whincup*, 2011 BCSC 168:

52 The relevant statutory law in dealing with the above issue can be found in s. 686(2) of the Criminal Code. It reads as follows:

686(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

- (a) direct a judgment or verdict of acquittal to be entered; or
- (b) order a new trial.

53 Application of this section was considered by the British Columbia Court of Appeal in the case of *R. v. L. (J.R.)*, [1994] B.C.J. No. 2612 (21 October 1994), Vancouver CA018273 (C.A.). In this case, the general proposition was outlined that "it is within the discretion of the Court of Appeal ... to direct a verdict of acquittal be entered, or to order a new trial when quashing a conviction for lack of evidence to support it" and that this discretion be exercised "as the justice of the case requires."

54 When an appeal is allowed with respect to a conviction, an appellate court may direct that a verdict of acquittal be entered or order a new trial: Criminal Code ss. 686(1)(a) and 686(2). The appeal court should exercise its discretion and enter an acquittal, rather than order a new trial, where it concludes there was no reasonable evidence of an essential element in the crime charged. See: *R. v. MacNeil*, 2009 NSCA 46 at paras. 16-18, and *E. G. Ewaschuk*, *Criminal Pleadings & Practice in Canada*, 2d ed., looseleaf vol. 3 (Aurora: The Cartwright Group Ltd., 2010) at para. 23:10120. Consequently, I would allow the appeal and substitute an acquittal.

[54] In *R. v. L. (J.R.)*, the decision referred to by Romilly J., above, the Court of Appeal quoted from what it described as the leading case in this province on the issue, *R. v. More and Melville* (1959), 124 C.C.C. 140 (B.C.C.A.), as follows:

I think it further appears from these judgments that broadly speaking where a conviction is quashed because of some mistake in the conduct of the trial the Court will direct a new trial where there was legal evidence upon which the jury might have convicted on a proper trial. But where the Court concludes that there is no reasonable evidence of an essential element in the crime charged it will direct a judgment of acquittal to be entered for it is repugnant to our conception of justice that the accused prisoner be again placed in jeopardy after the Crown has failed to prove his guilt in order to give the Crown another opportunity to convict him.

[55] In my view there was no reasonable evidence of mens rea on the part of Mr. Downes in entering the park, or remaining in the park. Mens rea is an essential element of the offence. The case was argued on the basis of actual intent, or recklessness. The trial judge concluded there was no actual intent. There was no evidence to support recklessness. There was also no evidence that would support wilful blindness, a theory of liability not argued at trial, but raised by the Crown on this appeal, as being an avenue of potential liability if a new trial were ordered. Nothing new or different would occur at another trial. In my view the justice of the case requires that an acquittal be entered.

[56] The appeal is allowed, and I direct that an acquittal be entered.

"Verhoeven J."

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Prepared on 29 October 2026 · Esheria