

CANADA / JUDGMENT

R. v. Kovlaske

2020 BCSC 2098

COURT

Supreme Court of British Columbia

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2020 BCSC 2098 R. v. Kovlaske

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kovlaske,

2020 BCSC 2098

Date: 20201231

Docket: 30609-1

Registry: Vancouver

Regina

v.

Edmund Paul Kovlaske

Before: The Honourable Madam Justice Watchuk

On appeal from: An order of the Provincial Court, dated October 29, 2019 (R. v. Kovlaske, Richmond Registry 62810-1).

Reasons for Judgment

Counsel for the Crown:

K. Gagnon

Counsel for the Accused:

S. Head

Place and Dates of Hearing:

Vancouver, B.C.

November 4, 2020

Place and Date of Oral Decision:

Vancouver, B.C.

November 4, 2020

Place and Date of Written Reasons:

Vancouver, B.C.

December 31, 2020

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I. Introduction

[1] Edmund Paul Kovlaske, the appellant, was convicted on the sole count on Information No. 62810-1, a charge of personating a peace officer contrary to section 130(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46, on September 14, 2018. He appeals from that conviction.

- [2] The trial took place on October 10, 11 and 29, 2019 in Richmond, B.C. The Trial Reasons were given on October 29, 2019 and the appellant was sentenced on March 9, 2020. The trial included a voir dire on the admissibility of recognition evidence as well as a no evidence motion brought by Defence counsel. Rulings on the voir dire and motion were also delivered on October 29, 2019 (the "Voir Dire Ruling", indexed at 2019 BCPC 333, and the "No Evidence Ruling").
- [3] The issues at trial included whether the appellant falsely represented himself to be an RCMP officer to an electric bicycle shop proprietor while shopping for an electric bicycle on September 14, 2018, and whether the Crown had failed to prove that the appellant was not an RCMP officer at the time of the incident.
- [4] The appellant submits that the Trial Judge committed numerous errors of law and fact that went to the heart of her reasoning process in the decisions on the voir dire, the no evidence motion, and the trial proper. He alleges errors with respect to the misapprehension of significant evidence and errors in the application of impermissible reasoning in ruling that the Crown had proven, beyond a reasonable doubt, the essential elements of the offence. He seeks that the appeal be allowed and a verdict of acquittal be entered.
- [5] The respondent Crown opposes this appeal. It says that there was credible evidence on every element of the offence, and that the Trial Judge was satisfied that the accused's guilt was the only reasonable inference available on the totality of the evidence.
- [6] The appellant raises four grounds of appeal. As at the hearing of the appeal, I will deal first with the second ground: whether the Trial Judge erred in finding that the Crown had proven that the appellant was not an RCMP officer at the time of the offence. At the conclusion of the hearing of the appeal, I allowed the appeal and ordered a new trial with reasons to follow. It is therefore not necessary to deal with the other three grounds of appeal. The other issues and some background are included for context.
- [7] These are the Reasons.

II. Summary Conviction Appeals

- [8] The authority for a summary conviction appeal is found in s. 813 of the Criminal Code. That section states that a defendant may appeal from a conviction and against sentence.
- [9] Section 822 of the Criminal Code provides that some of the indictable appeal sections of the Criminal Code, namely ss. 683-689 with the exception of ss. 683(3) and 686(5), apply to summary conviction appeals.

A. Appeal from Conviction

- [10] The test to be applied by an appellate court in determining whether a verdict is unreasonable or cannot be supported by evidence is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered": *R. v. Biniaris*,

2000 SCC 15 at paras. 36-37, citing *R. v. Yebe*, [1987] 2 S.C.R. 168 at 185. The "focus of the inquiry is whether there is any evidence to support the trial judge's findings based on the totality of evidence before him or her, and whether the verdict logically flows from those findings." *R. v. Ceal*, 2012 BCCA 19 at para. 25.

[11] Under s. 686(1)(a) of the Criminal Code, the court 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.

[12] Pursuant to s. 686(2), where an appeal is allowed the court may direct a judgment or verdict of acquittal to be entered, or direct a new trial.

B. The Standard of Review

[13] Different standards of review apply to different types of findings. In *R. v. Bacon*, 2020 BCCA 140, the Court of Appeal explained the various standards of review as follows:

[40] On questions of fact and inferences of fact, a reviewing court must ask "whether there is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33. Madam Justice Bennett explained this standard as it applies in the criminal law in *R v. Nuttall*, 2018 BCCA 479:

[269] To state it simply, a palpable and overriding error is an obvious error that erodes the result.

[41] This same standard applies to findings of credibility (*R v. Gagnon*, 2006 SCC 17 at para. 10). That means that a finding of fact based on acceptance by the judge of a witness's testimony may only be interfered with if the trial judge made an error that, as noted by Justice Moldaver in dissent in *R v. Le*, 2019 SCC 34 at para. 206, is "plainly seen" (*Housen* at para. 6), and is "shown to have affected the result" (*H.L.* at para. 55).

[42] Questions of law, on the other hand, are reviewed on a standard of correctness. This standard applies to an absence of evidence to support a finding of fact because such an absence is not a question of fact but a question of law alone (*Nuttall* at para. 272).

III. The REasons of the Trial Judge

[14] The allegation before the Court was that on September 14, 2018, an individual, identified in the trial as the appellant, went to a bike store in Richmond and asked to see one of the electric bicycles. The individual, who was wearing a police jacket and a police hat, advised the owner of the bicycle store, Phu Tung Nguyen, that he "worked with the police", or "worked for the police force", and offered a badge. When Mr. Nguyen told the individual that the bicycle was not ready, the individual left the store. He was seen on a surveillance video

of a neighbouring business.

- [15] At trial the Crown called five witnesses: Cst. Mushi, Cst. Goguen, Cst. Gerow, Stuart Zhang and Mr. Nguyen. Mr. Nguyen was the only witness who observed the alleged representation. The Defence did not call evidence.
- [16] On October 29, 2019 the Trial Judge gave reasons on the voir dire, the no evidence motion, and on the trial proper (the "Trial Reasons"). In the Trial Reasons the Trial Judge relied upon the reasons in the voir dire and no evidence motion stating:
- [34] For all of the reasons given today in the voir dire, the no evidence motion and herein collectively, I find the Crown has proven the elements beyond a reasonable doubt as to the guilt of Mr. Kovlaske.
- [17] I will therefore commence with the reasons on the voir dire in which Cst. Mushi was the only witness. He testified that he recognised the appellant in the video of the individual who left the bicycle store because in his capacity as an RCMP officer he had eight interactions with the appellant in years from 2012 to 2018. Those interactions are described in the Voir Dire Ruling.
- [18] Prior to entering into the voir dire, Crown counsel informed the Court that Cst. Mushi was the Crown's recognition witness. (The video was not put to Mr. Nguyen to identify the individual who came into his store.) It was proposed and agreed that all of the officer's opinion evidence would be called in the voir dire to determine its admissibility, and then if admissible, the entirety of the evidence would become part of the trial proper. During the submissions, the Court agreed that this was the "admissibility threshold" and that if admissibility was established in the voir dire, the weight of the identification evidence would be an issue on the trial proper.
- [19] At para. 39 of the Voir Dire Ruling, after a thorough discussion of the testimony of Cst. Mushi, the Court stated: "The sole issue within this voir dire is that of recognition evidence." Further in a discussion of the applicable case law, at para. 40: " this Court must determine if the testimony of Officer Mushi is to be admitted for the purposes of recognition evidence."
- [20] The Court found the testimony of the officer to be credible, unwavering, focused and strong. Further, the Court stated at para. 48: " this Officer applied strong and proactive policing recognition skills to identify the accused, placing this recognition as being beyond a reasonable doubt as to the person being the accused before me."
- [21] The testimony of Officer Mushi was deemed admissible.
- [22] The no evidence motion followed the closing of the Crown case after the Voir Dire Ruling.
- [23] In the No Evidence Ruling, at para. 1, the Trial Judge correctly set out the elements of the offence of personating a police officer stating first: " that Crown has a requirement to prove an offence as against Mr. Kovlaske beyond a reasonable doubt which includes a person, the date, the time, that the accused knew he was not an RCMP officer and that the accused

represented himself to be an RCMP officer." Later, at para. 3, she stated: "It is trite to say that indeed it is a required element of s. 130(1)(a) to show that Mr. Kovlaske was not a peace officer and, in this instance, an RCMP officer at the time of the alleged offence."

- [24] In discussing the element that requires proof that Mr. Kovlaske was not a peace officer and not an RCMP officer at the time of the alleged offence, the Trial Judge stated with reference to the evidence of Mr. Nguyen, which evidence also addressed the element of representation:
- [4] It is here that I am satisfied that there is a significant amount of evidence before me to prove the required element that not only was Mr. Kovlaske not a peace officer and not an RCMP officer at the time of the alleged offence. The testimony of Mr. Nguyen was strong and unchallenged. He testified that Mr. Kovlaske entered his shop wearing what he said was a police officer jacket and hat and is such that it was, in his words, "A regular police jacket like you see on the street."
- [5] I pause to note that Richmond, British Columbia is policed by the RCMP.
- [6] Mr. Nguyen testified in great detail that the jacket had the police name and logo on the side of the arm and on the chest designation and that the back of the jacket had the word "police". He further described in detail that the hat was that of one being worn by a police officer with the word "police" on the front and on the middle portion of the hat and again said, "Like on the street we see" and that the sign on the hat matched the sign on the jacket. Mr. Nguyen further was clear that Mr. Kovlaske identified himself as being a police officer verbally in addition to wearing physical descriptors.
- [7] I am satisfied that the element of s. 130(1)(a) has been made out by the Crown and note that the testimony of Mr. Nguyen was unchallenged and that he said he found the man in the police clothing to be suspicious, wearing ripped jeans and red shoes and was physically shaking during his interaction.
- [25] The trial judge also relied on the evidence of Cst. Mushi who testified in the voir dire, and whose evidence regarding identification was admitted on the trial proper. She stated with regard to his evidence:
- [9] I am also drawn to the totality of the facts and circumstances before me and that it cannot be addressed merely in a vacuum. The evidence of Cst. Mushi at the conclusion of the voir dire was deemed admissible and admitted into the trial proper. Based on the interactions, the historical, the length of the interactions, the number of interactions and very notably, that each and every interaction that Cst. Mushi had with Mr. Kovlaske was in the context of Cst. Mushi being on duty as an RCMP officer, and that in each circumstance Mr. Kovlaske was arrested, was observed at known residences for property offences and that in his proactive policing, Mr. Kovlaske particularly in the testimony more than once, that he was bound by a no-go and no-contact conditions including reporting to a probation officer.

- [10] The interactions between Mr. Kovlaske and Cst. Mushi were not one of an RCMP officer to an RCMP officer interaction. All interactions, each and every one, were in the context of the criminal justice system including more than once handcuffing him, processing him and observing him in the lockup cells. Applying the totality of the interactions, the facts of each interaction, the location of each interaction, the testimony and knowledge of Mr. Kovlaske being bound by criminal conditions including no-go zones and not operating a vehicle and reports of breach allegations, I am satisfied that Mr. Kovlaske at the time and date of the alleged offence before me was not an RCMP officer.
- [26] The evidence of Cst. Goguen was referenced:
- [18] There is also the testimony of Officer Goguen. In his preparation of the Help Identify bulletin that he not only prepared by extracting images and viewing high definition video but Officer Goguen made it clear in how the Help Identify bulletin is prepared from a template, how it is uploaded and to where it is circulated within the RCMP. At no time did any RCMP member come forward to identify himself as being that RCMP officer, nor did any fellow RCMP member come forward to identify the person as being a RCMP officer. Cst. Mushi identified the person as being Mr. Kovlaske.
- [27] The Trial Judge dismissed the no evidence motion and found that the elements of s. 130(1)(a) had been proven:
- [19] While sections 130(1)(a) and (b) are two distinctive offences, I am satisfied that the no evidence motion must fail. There is a significant amount of evidence before me to support the allegation and in fact, so much so that the very elements have been proved.
- [28] Later, the Trial Judge stated that it was the evidence of Mr. Nguyen that provided prima facie proof of the falsity of the representation that the appellant was an RCMP officer. The Trial Judge stated:
- [23] I am satisfied that there is a prima facie proof of the falsity of the representation. The testimony of Mr. Nguyen who personally interacted with Mr. Kovlaske and who is the owner of the E-Bike store is prima facie evidence to cast the burden to defence.
- [24] In relying upon the Billet [sic] decision, I will note on paragraph 9 [page 172], in particular, the court stated:
- I do not think that the proof of the falsity of the representation that the accused is a policeman is sufficiently made without at least showing that he was not a policeman with authority in the area where the representation has been made. Some evidence should be presented to shift the onus on the accused and I do not think that the facts adduced in evidence on cross-examination go any further of necessity than that the accused had no recollection of anything concerning the matter.
- [29] Following the No Evidence Ruling, the Defence did not call evidence and closing submissions were heard. The Trial Reasons were given on the same day.

- [30] In the Trial Reasons, the Trial Judge first dealt with the evidence of Mr. Nguyen. Although in dealing extensively with the representation issue, she stated incorrectly that the individual in the bike store had verbally identified himself as a police officer, rather than reciting the evidence that he had said that he worked for or with the police. That ground of appeal is not being addressed in these Reasons.
- [31] The identification evidence was reviewed including the video evidence taken by the nearby business, and relied upon by Cst. Mushi. Based upon the evidence of Cst. Mushi in the voir dire, the Trial Judge found that identification of the appellant as the individual in the bicycle store was proven.
- [32] The Trial Judge then discussed the representations made by way of the police clothing and insignia and the statements to Mr. Nguyen. In the course of that discussion, the Court addressed the mens rea of the offence and found that the appellant intended to falsely represent himself to be an RCMP officer:
- [29] Mr. Nguyen provided detailed physical descriptors on the jacket and the hat which matched what Officer Mushi observed in the stills and the video on the same date and time. Mr. Nguyen was sufficiently and wisely suspicious when the man offered to provide his badge and badge number to him. Thus, the court can take from it that Mr. Kovlaske further intended as falsely presenting himself to be an RCMP officer that he had or intended to present some form of identification. Mr. Nguyen was suspicious and followed him out of the industrial warehouse site and no form of any police vehicle was observed. He testified that the man was physically shaking, that he had a bump or bruise on his head, ripped jeans and red shoes, so much so that he found it suspicious that any officer on duty would be an officer working with that on his head.
- [33] Further with regard to the evidence of Cst. Mushi, she referred to the officer's interactions with the appellant:
- [30] Cst. Mushi's testimony remains strong in my mind, both in the decision of the voir dire and the no evidence motion and in my decision in the trial proper. He testified about his historical interactions with Mr. Kovlaske in great detail, the nature of those interactions and notably the interactions, two of which were both less than one month before this offence. In addition to the physical descriptors and the application of his seven in-person encounters with Mr. Kovlaske, he testified confirming as to the identification of the RCMP patrol jacket and hat.
- [34] The Trial Judge then found that the Crown had proven the required elements of the offence beyond a reasonable doubt. The appellant was found guilty.

IV. GROUNDS OF APPEAL

- [35] The appellant raises the following grounds of appeal:

- (i) The Trial Judge misapprehended the substance of significant evidence she relied on in convicting the appellant.
- (ii) The Trial Judge erred in finding the Crown had proven the appellant was not a peace officer at the time of the offence.
- (iii) The Trial Judge erred in using evidence of a distinct offence under the Criminal Code in supporting a conviction on the particularized information.
- (iv) The Trial Judge erred in proceeding to weigh the evidence prior to hearing all the evidence and prior to hearing the submissions of counsel.

[36] The Crown submits that:

- (i) That any misapprehensions about the evidence were so minor to have been of no significance when considered in relation to the totality of the evidence.
- (ii) That there was circumstantial evidence sufficient to "prove the negative" to the necessary extent sufficient to constitute prima facie evidence.
- (iii) That the trial judge correctly examined the whole of the circumstances in coming to her conclusion about the offence charged.
- (iv) That the trial judge ruled in a manner consistent with the functional purpose of a "no evidence" motion.

V. Submissions of the Parties

A. The Appellant

[37] With regard to the issue of the alleged error in finding that the Crown had proven that the appellant was not an RCMP officer, the appellant submits in his written submissions:

An essential element of the offence charged is that crown counsel prove that the accused was not a peace officer or public officer at the time of the offence.

At trial crown counsel attempted to adduce evidence that the accused was not an RCMP officer through crown witness, Cst. Goguen.

Cst. Goguen testified that he hypothetically would have been able to check whether the individual was an RCMP officer through his GroupWise or email account. However, he testified that no such steps were taken and that no steps whatsoever had been taken to check the appellant's occupation.

Following Cst. Goguen's testimony no further evidence was brought by crown to establish the appellant was not an RCMP officer at the time of the offence.

An aspect of defence's no evidence motion, therefore focused on the fact that crown had failed to prove that the appellant was not an RCMP officer at the time of the incident.

In her decision on the no evidence motion the trial judge did not engage with Cst. Goguen's testimony that no steps had been taken to confirm whether the appellant was an RCMP officer. The appellant asserts it is quite concerning that the direct evidence on this issue was given no consideration by the judge in her decision.

Instead the trial judge proceeded to focus on factors that the appellant argues were irrelevant and prejudicial in coming to the assumption that the appellant was not a RCMP officer. She focused on the testimony of Mr. Nguyen and the prior interactions between the appellant and Cst. Mushi.

B. The Respondent's Submissions

[38] The respondent Crown's written submissions include the following passages:

The appellant's issue #2 at paragraphs 33-42 deals with "proving that the accused was not a peace officer or public officer at the time of the offence.

The burden borne by the party seeking to prove a state of affairs that does not exist is governed by what is referred to as "The Rule in Edwards," referencing the English case *R. v. Edwards*, [1975] 1 QB 27, which in turn references English case law dating back to 1754, principally concerning prosecution of regulatory offences that proscribe certain actions absent specific exemptions or provisos.

Having discussed the question of whether the burden of proof ought to shift to an accused where the fact at issue (eg. whether one held a certain licence or the like) was "peculiarly within the knowledge of the party," the Court of Queen's Bench decided that this conception was too broad, and would require defendants to disprove their own mens rea. Instead, the Court resolved the matter thusly:

Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation upon an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and secondly, what shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden. When the exception as we have adjudged it to be is applied to this case, it was for the appellant to prove that he was the holder of a justices' licence, not the prosecution.

The application of the Rule in Edwards to various charges remains somewhat vexed, as drafting and pleadings appear to inform the interpretation of what is required for proof (or lack thereof) in a case where exceptions, provisos, or "reasonable excuses" will justify the impugned behaviour.

For the charge at bar in particular, the application of the Rule in Edwards was set out in *R. v. Billet* [sic], a B.C. decision which delimits what the Crown must prove and to what extent. That case says:

I do not think that the proof of the falsity of the representation that the accused is a policeman is sufficiently made without at least showing that he was not a policeman with authority in the area where the representation has been made. Some evidence should be presented to shift the onus on the accused .

[T]he Court in Billet [sic] also ruled that the charge ought to be particularized (as it has been in the case at bar) and indicated the Crown should have "no difficulty in presenting some prima facie evidence of the falsity of the allegation."

What, then, is prima facie evidence? The BC County Court in R. v. Dickie had some helpful directions on the topic:

18 It might be trite, at this point, but it sometimes is wise to refresh one's mind, or memory, as to what the proper meanings of certain expressions used constantly by lawyers are, and prima facie is one that I think is necessary for the purposes of this decision, to refresh my own mind in particular. The meaning of prima facie was defined first as far as I could find in the Law of British Columbia, because it is consistent with what I understand to be the Law of Canada, in an old case, Kirk vs. Kirkland, a decision of Mr. Justice Walkem, (1899) 7 BCR 12 and the definition is as follows: "Prima facie evidence is evidence, which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if it is to be accredited unless it be rebutted or the contrary proved."

Black's Law Dictionary states, and the heading is "Prima Facie Case":

"Such as will suffice until contradicted and overcome by other evidence."

The instant question is, then, did the Crown raise "some evidence" about Kovlaske not being an RCMP officer that raised such a degree of probability in its favor that it must prevail unless rebutted? Or evidence which will suffice until contradicted? The respondent says that it did.

Even in forwarding the case to the Crown, the police were so convinced that the accused was a person *impersonating* a Richmond RCMP officer that they did not need "further proof" that he wasn't one of them: they were long time members of the Richmond RCMP, they had investigated this individual numerous times over the preceding years, they knew he was on conditions (including a no-go to Richmond) and they were *very* concerned with expediting his arrest so they could get the police uniform out of circulation as soon as possible. Moreover, they arrested him at a Probation appointment where he was sweating profusely and appeared to be intoxicated by "a narcotic".

The appellant, in their argument, complains that there was no "direct evidence" that Mr. Kovlaske was NOT a local police officer--but such is the nature of "proving the negative," and why the Rule in Edwards has developed. Instead, the Court is faced with circumstantial evidence tending to illustrate the "negative" state of affairs. And again, circumstantial evidence will by its nature require inferences. Again, from Robinson, supra:

38 I approach the first ground of appeal, then, on the basis that this court's task is to determine "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable inference available on the totality of the evidence.

The judge had a concatenation of evidence which, when considered as a whole, created a picture that was consistent solely with Mr. Kovlaske NOT being a member of the Richmond RCMP:

- Man came into bike shop shaking, wearing torn jeans, sporting an injury to his head, claiming to be a police officer but having no squad car in the area and only wearing half of an official RCMP uniform (evidence of Nguyen)
- Richmond RCMP had no record of an officer being in the area of the bike shop at the time (evidence of Nguyen)
- The investigating officer, having reviewed the surveillance tape, became so concerned about the circulation of official police uniform components that he put out a Help Identify bulletin to "all police" (Evidence of Cst. Goguen)
- Cst. Mushi identified the individual in the bulletin as someone he had known in his Richmond RCMP policing career since 2012 having investigated/arrested him multiple times, and whom he knew to have a present-day condition of "no go to City of Richmond." He was so concerned about the police uniform being in circulation that he rushed to take over as the investigator so that he could have Kovlaske arrested right away (evidence of Mushi)
- Cst. Gerow was sent to arrest Kovlaske at his probation office along with Cst. Beauchamp, whom he said also recognized Kovlaske from previous dealings with him as a suspect, and observed him to be seemingly high on narcotics (Evidence of Gerow).

Based on the evidence before the Court, the inference that Mr. Kovlaski was not an RCMP officer was an eminently reasonable one: there was thus a body of "prima facie evidence" which cried out to be "rebutted" "contradicted" or "overcome" by some evidence to the contrary. It was not: following the no-evidence motion, the defence retained the right to call evidence, and they chose not to do so.

Thus it was eminently reasonable that the trial judge was satisfied that the accused was not a Richmond RCMP officer.

[Emphasis in original].

VI. Discussion

[39] As at the hearing of the appeal, I will deal first with the appellant's second ground of appeal set out above: whether the Trial Judge erred in finding that the Crown had proven that the appellant was not a peace officer at the time of the offence. In this case since the Information charged the appellant as representing himself as an RCMP officer, the issue becomes whether the Trial Judge erred in finding that the appellant was not an RCMP officer at the time of the offence.

A. Second Ground of Appeal: The element that the representation was false

- [40] It is a foundational principle of criminal law that the Crown must prove every element of an offence beyond a reasonable doubt. The burden of proof beyond a reasonable doubt, sometimes called the legal or persuasive burden, applies to every element of an offence.
- [41] Further, where the Crown's case rests largely or solely on circumstantial evidence, the trier of fact must be satisfied that guilt is the only reasonable inference available on the totality of the evidence: *R. v. Villaroman*, 2016 SCC 33.
- [42] For the offence of personating a peace officer by falsely representing oneself to be a peace officer or a public officer, contrary to s. 130(1)(a) of the Criminal Code, the Crown must prove that the accused falsely represented himself or herself to be a peace or public officer. This requires proof that the accused made a representation, and that the accused must not be a peace officer, or proof of the element of representation and the element of falsity of the representation. Secondly, the Crown must prove the mens rea, that the accused made such a representation knowing that it was false.
- [43] The evidence relied upon by the Trial Judge to prove the element of falsity of the representation was primarily dealt with in the No Evidence Ruling. On the no evidence motion, the Defence argued that the Crown had not presented any evidence that Mr. Kovlaske was not a peace officer at the time of the offence and that no steps were taken to confirm that he was not a peace officer, or specifically not an RCMP officer. The Crown correctly argued that the test on the no evidence motion was whether there is any evidence that a properly instructed jury acting reasonably could convict, or the same test as the committal test on a preliminary inquiry.
- [44] The parties agreed on the trial, and agree on the appeal that the leading case on the elements of the offence of personating a peace officer is *R. v. Billett* (1952), CarswellBC 159 (S.C.). As the Trial Judge was led into relying on Billett, I will first address the application of that case.
- [45] The accused Billett was convicted of and sentenced for the offence of unlawfully and falsely representing himself to the constable or other police officer, contrary to the Criminal Code. The Crown had failed to particularize the indictment to indicate which class of constable or other police officer the accused had falsely represented himself to be. At trial, the Crown

brought no direct evidence to prove that the accused was not a constable or other peace officer and no direct proof that the accused's representations were false. However, the Trial Judge relied on the totality of the evidence to find that this element of the offence had been established. At para. 1 the case is stated:

Upon the above ground upon which the proceeding is questioned, having found that the said Billett was the person who represented himself to be a policeman, I considered that it was not necessary to have direct evidence to prove a negative, namely that Billett was not a constable or other peace officer, and secondly, that on the whole of the evidence, for example the facts quoted below there was sufficient evidence to establish the fact that Billett was not a constable or other peace officer.

Witness Clarence Billett -- the Accused -- cross-examination:

Q. Mr. Billett, you don't know then whether you committed this crime or not? A. No, I honestly don't. Q. You are not prepared to say you did not; did you answer that question? A. What was that? Q. I say, are you prepared to say whether you committed this offence or not? A. No, I don't remember whether I did or whether I didn't. I don't remember seeing the girl before or the gentleman.

No evidence was adduced to show that the said Billett was a constable or other peace officer.

Upon the above findings of fact and other findings not questioned I found the said Billett guilty as charged.

[46] On a motion to quash the conviction, the British Columbia Supreme Court considered the requirement that the accused's representation be false. The Crown submitted that where the subject of an averment or negative relates to the accused personally or is peculiarly within his or her knowledge, the negative should be proved by the accused as a matter of defence. The Court considered this submission and held as follows, at paras. 7-8:

If the charge were properly stated the Crown would have no difficulty in presenting some prima facie evidence of the falsity of the representation. I think the law is well stated in Phipson on Evidence, 8th ed., at pp. 34 and 35, and I do not know that I can add much to the statement of it there contained. Generally it is said some prima facie evidence must be given by the complainant in order to cast the burden on his adversary. The shifting of the burden of proof depends on the circumstances. It is there said that "the rule that the burden of proof may be shifted where matters of defence may be supposed to be peculiarly within the knowledge of the accused cannot be used so as to cast on the accused the burden of proof that no offence has been committed (*Attygalle v. The King*, [1936] A.C. 338 referred to and applied in *Seneviratne v. The King*, [1936] 3 All E.R. 36)".

This case to my mind involves two fundamental principles: (1) that a charge should be so drawn that an accused knows specifically with what he is charged, and (2) that the burden of proof with respect to the essential ingredients of any offence rests upon the Crown and not on the accused. I do not think that the proof of the falsity of the representation that the accused was a policeman is

sufficiently made without at least showing that he was not a policeman with authority in the area where the representation was made. Some evidence should be presented to shift the onus on the accused, and I do not think that the facts adduced in evidence on cross-examination go any further of necessity than that the accused had no recollection of anything concerning the matter. I do not think that the only inference from what he said in answer to the question put to him is that he was not a policeman. Here when the accused was on the stand he could have been asked one simple question as to whether he was a policeman or not and that question was not asked. [Emphasis added]

- [47] It is not clear if at trial the parties in this case argued the issue of the circumstances of shifting the burden of proof. As stated at para. 7 of Billett, the burden of proof shifts depending on the circumstances, and where " matters of defence may be supposed to be peculiarly within the knowledge of the accused " However, this rule "cannot be used so as to cast on the accused the burden of proof that no offence has been committed": at para. 7.
- [48] In this case, the evidence of Cst. Goguen established that the matter of the defence, the element of not being an RCMP officer, was not peculiarly within the knowledge of the accused. He testified that he did not take any steps with respect to inquiring about the appellant's occupation. He also testified that every RCMP officer has access to all RCMP officers through their internal GroupWise email accounts. It was possible to check through GroupWise to see if a person was an officer or not. There was no evidence that Cst. Goguen or any other officer or witness checked through GroupWise to determine if the appellant was an RCMP officer.
- [49] Thus, this case does not fall within the circumstances concerning the shifting of the burden of proof identified at para. 7 of Billett. The matter of defence was not peculiarly within the knowledge of the accused. Billet does not apply. The burden of proof did not shift. The burden was on the Crown to prove the element of falsity beyond a reasonable doubt. It was an error of law to find otherwise.
- [50] The Crown did not prove this element by the direct evidence available of the GroupWise RCMP email accounts.
- [51] The evidence of Cst. Goguen, that he did not pursue the available RCMP internal websites to determine the employment of the appellant, led the Trial Judge to rely on Crown's submissions regarding circumstantial evidence, including that of Cst. Mushi regarding his interactions with the appellant in various law enforcement circumstances. Even if the trial judge could rely on the voir dire evidence of identification for the purpose of proof of another element being the falsity of the representation, an issue I will not address, the inference drawn which was that because the appellant had interactions with the police such as being on probation, that he was not a peace officer is an inference but is not the only inference available on those facts. There was no evidence to establish that RCMP officers do not have such histories or that the appellant could not be an RCMP officer due to past criminal conduct and the presence of probation conditions.

- [52] Direct evidence was available to the Crown and not proffered. The circumstantial evidence relied upon does not prove an element of the offence. The Crown simply failed to prove the element of falsity. It was an error to find that the element of falsity was proven as the evidence did not support the finding.
- [53] Further, following the misinterpretation of the circumstances of shifting of the burden of proof described in Billett, after correctly listing the elements of the offence at the outset of the No Evidence Ruling, the Trial Judge relied on Billett and stated that the evidence cast the burden to the Defence:
- [23] I am satisfied that there is a prima facie proof of the falsity of the representation. The testimony of Mr. Nguyen who personally interacted with Mr. Kovlaske and who is the owner of the E-Bike store is prima facie evidence to cast the burden to defence.
- [54] However, after citing para. 9 of Billett in the next paragraph, at the conclusion of the No Evidence Ruling, rather than leaving the onus with the Defence, she found that the evidence "proves the falsity of the representation that Mr. Kovlaske is not a police officer and particularly not an RCMP officer ". It is here that the Trial Judge relied on circumstantial evidence that arguably met the test on a no evidence motion, but was not proof beyond a reasonable doubt. In the result, the Trial Judge found in the No Evidence Ruling that the element of falsity was proven.
- [55] That the Defence had not yet determined whether it would call evidence, and the parties had not made their closing submissions, is the fourth ground of appeal which I will not address.
- [56] These findings of error are sufficient to allow the appeal and order a new trial. However, if I am incorrect, for the reasons below there was an error in applying a reverse onus. I will continue in order to deal with the submissions of the Crown on the reverse onus it says applies.

B. Reverse Onuses and Burden of Proof

- [57] The Crown argued that, on the totality of the circumstantial evidence raised by the Crown on both the recognition voir dire and the trial proper, the Trial Judge was entitled to draw an inference that the appellant was not an RCMP officer. In the Crown's view, this was so even when faced with the direct evidence of Cst. Goguen confirming that no steps had been taken to confirm whether the appellant was or was not an RCMP officer. I have above dealt with and dismissed this argument finding that there was direct evidence available not proffered by the Crown, and further that there were other inferences available on the circumstantial evidence.
- [58] The scope of s. 130(1)(a) is broader in application than only to RCMP officers as in this case. It states:

Personating peace officer

130(1) Everyone commits an offence who

(a) falsely represents himself to be a peace officer or a public officer.

[59] The Crown relies upon Billett as well as the rule in Edwards, as set out above. On the basis of these authorities the Crown argues that, once the Crown has raised some prima facie evidence that an accused was not a peace officer or public officer, the burden then shifts to the accused to rebut the Crown's evidence. It says that the Crown's prima facie evidence will be such that it will suffice until contradicted.

1. Common Law and Statutory Rules

[60] In criminal law, the Crown bears the burden to prove all elements of an offence beyond a reasonable doubt. This may be referred to as the legal, ultimate, or persuasive burden.

[61] Nonetheless, there are cases in which the law will place a form of burden or onus upon the accused. This may take the form of an evidentiary onus or a persuasive burden, also called a legal burden. (I add here that since Bill C-51 repealed nearly 30 reverse onus provisions, few remain with s. 383(1) being one example of those remaining.)

[62] An evidentiary onus places upon the accused an onus to adduce some evidence. In some cases, the law may require the accused to adduce some evidence that will have the effect of raising a reasonable doubt in the face of an assumed fact or statutory presumption of facts or law. Such evidence is sometimes referred to as "evidence to the contrary": *R. v. Downey*, [1992] S.C.R. 10; *R. v. Morrison*, 2019 SCC 15, "evidence which raises a reasonable doubt": *R. v. Laba*, [1994] 3 S.C.R. 965 at 1014, or "evidence tending to show": *R. v. Gibson*, 2008 SCC 16.

[63] An evidentiary onus also arises when the accused wishes to rely on affirmative defences. For example, the defence of provocation requires that the accused to raise an evidentiary basis to the subjective and objective elements of the defence, after which the Crown must prove beyond a reasonable doubt that there was no provocation: *R. v. Thibert*, [1996] 1 S.C.R. 37.

[64] A persuasive or legal burden is much more onerous. Also called a reverse onus, it may place upon the accused a burden to persuade the trier of fact of the non-existence or existence of a fact. An onus such as this may arise in an instance in which the statute or common law (the issue in the present case arises from the common law) establishes a presumption which the accused is called upon disprove on a balance of probabilities: see discussion of *R. v. Oakes* [1986] 1 S.C.R. 103 below. If the accused fails to prove the non-existence of the presumption, the presumed fact will be taken as proven: Hill, Tanovich & Strezos, eds, *McWilliams Canadian Criminal Evidence*, 5th ed. (Thomson Reuters Canada, 2019) at 29:10:80.

[65] The standard of proof to which the accused is subjected when discharging a reverse onus is found in *R. v. Proudlock*, [1979] 1 S.C.R. 525 at 550, where Pigeon J. explained the standards of evidence in criminal law as follows:

1. Proof beyond a reasonable doubt which is the standard to be met by the Crown against the accused;
2. Proof on a preponderance of the evidence or a balance of probabilities which is the burden of proof on the accused when he has to meet a presumption requiring him to establish or to prove a fact or an excuse;
3. Evidence raising a reasonable doubt which is what is required to overcome any other presumption of fact or of law.

[66] Thus, the accused is required to discharge a reverse onus on a balance of probabilities. This rule above was explained in *R. v. Appleby* (1971), [1972] S.C.R. 303 at 310, citing *R. v. McRae* (1969), 4 CCC 374 at 365-367 (B.C.S.C.):

when a statute imposes an onus upon an accused person to establish or to prove an essential fact that burden of proof is fulfilled by satisfying the obligation which rests upon the party in a civil action to prove by a preponderance of evidence or by a balance of probability the allegations of which proof is required by the party so asserting.

[67] Traditionally, the law also placed upon the accused a reverse onus where the offence was such that the accused could escape liability by virtue of an exception, proviso, or exemption. In other words, the law did not require the Crown to prove a negative state of affairs beyond a reasonable doubt: *R. v. Hunt*, [1987] A.C. 352 (H.L.); *R. v. Edwards*, [1975] 1 Q.B. 27. The rationale behind this rule was that the Crown was not required to prove a negative state of affairs that was peculiarly within the knowledge of the accused.

[68] The Supreme Court of Canada addressed the rule in *Appleby*, as well as other reverse onuses under the law, in a series of cases following the enactment of the Charter: *R. v. Dubois*, [1985] 2 S.C.R. 350; *R. v. Oakes* [1986] 1 S.C.R. 103; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Schwartz*, [1988] 2 S.C.R. 443; *R. v. Chaulk*, [1990] 2 S.C.R. 1303; *R. v. Keegstra*, [1990] 3 S.C.R. 697; and *Laba*. In those cases, the Court held that any statutory provision that has the effect of permitting a conviction, notwithstanding the existence of a reasonable doubt as to guilt, contravenes the presumption of innocence under s. 11(d) of the Charter. In *Schwartz*, a majority of the Court held:

In pre-Charter cases the imposition of a reverse onus upon an accused was frequently recognized and accepted as an exception to the general rule requiring proof by the Crown of all elements of an offence beyond a reasonable doubt. It was settled, as well, that where the accused was required to discharge an onus relating to an element of a criminal offence, he had to do so according to the civil standard of proof, that is, he had to establish the matter on a balance of probabilities. A statement of the rule, as then accepted, is to be found in *R. v. Appleby*, [1972] S.C.R. 303. It must be recognized now, however, that a statutory provision which imposes a burden of proof or disproof of an element of an offence on an accused creates an impermissible reverse onus under the Charter: see *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 655; *R. v. Oakes*, [1986] 1 S.C.R. 103; and *R. v. Whyte*, [1988] 2 S.C.R. 3. It has been held that any statutory provision

which could have the effect of permitting a conviction, notwithstanding the existence of a reasonable doubt as to guilt, would contravene s. 11(d) of the Charter which guarantees the right to be presumed innocent until proven guilty according to law [emphasis added].

[69] Notwithstanding the Supreme Court's direction on s. 11(d), the rule in *Edwards and Appleby* remained in our Criminal Code until Bill C-51 in December 2018, by virtue of s. 794(2) of the Criminal Code (as it then read):

Burden of proving exception, etc.

794(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[70] The words "except by way of rebuttal" were added to s. 794(2) (then s. 702(2)) in 1955.

[71] The common law rule and statutory provision have been interpreted in the following cases.

[72] In *R. v. Perka*, [1984] 2 S.C.R. 232, the Supreme Court of Canada held that s. 7(2) of the Narcotic Control Act, , R.S.C. 1970, c. N-1, which placed the persuasive burden on the accused to prove an exception, exemption, excuse or qualification, did not apply to a general excuse or justification, such as the common law defence of necessity. As such, once the accused placed before the court sufficient evidence to raise the defence, the onus rested with the Crown to meet it beyond a reasonable doubt. The reverse onus under 7(2) was restricted to the relevant statutory exceptions (for example, those who held a license to sell, import, manufacture or possess narcotics).

[73] In *R. v. Goleski*, 2014 BCCA 80, aff'd 2015 SCC 6, the Court of Appeal held that the persuasive burden when an accused claims to have a "reasonable excuse" for failing or refusing to provide a breath sample, contrary to s. 254(5) rested with the accused on a balance of probabilities: at paras. 60, 74-75. Section 794(2) of the Code applied to a charge under s. 254(5), and so a "reasonable excuse" was an "excuse" under s. 794(2).

[74] In the result, the Court allowed the appeal and restored the respondent accused's conviction. The Court's conclusion with respect to the reverse onus under s. 794(2) rested on a review of the legislative history of s. 794(2) and similarly worded provisions in the Criminal Code and other provincial, territorial, and federal statutes. It determined that, when Parliament first enacted a provision dealing with exceptions in the context of summary conviction proceedings, it did so "in a way that affirmed the common-law principle which placed the burden of proving such matters on an accused on a balance of probabilities": at para. 74.

[75] In the Criminal Code, section 794(2) only explicitly applied to summary conviction proceedings, although the common law principles in *Goleski* and earlier cases have been applied to cases where the Crown proceeded by indictment: *R. v. Ali*, 2015 BCCA 333 at para. 30; *R. v. Thompson (D.D.)* (1992), 131 A.R. 317 (C.A.).

(a) Repeal of Section 794(2)

[76] On December 13, 2018, Parliament repealed s. 794(2): An Act to amend the Criminal Code and the Department of Justice Act to make consequential amendments to another Act, S.C. 2018, c. 29, s. 64.

[77] The Summary to that Act known as Bill C-51 states:

This enactment amends the Criminal Code to amend, remove or repeal passages and provisions that have been ruled unconstitutional or that raise risks with regard to the Canadian Charter of Rights and Freedoms, as well as passages and provisions that are obsolete, redundant or that no longer have a place in criminal law. It also modifies certain provisions of the Code relating to sexual assault in order to clarify their application and to provide a procedure applicable to the admissibility and use of a complainant's record when in the possession of the accused.

(b) Exception as Distinguished from Constituent Elements of the Offence

[78] The offence date, September 14, 2018, preceded the repeal of the legislative provision. In considering whether the Crown in this case could have relied on s. 794(2), I have concluded that the provision did not apply because the relevant exception was a constituent element of the offence.

[79] The issue was considered in *Thompson* where the accused was charged with touching for a sexual purpose the body of a person under the age of 14 years. Section 150.1(2) of the Criminal Code provided that consent was not a defence unless the accused was under the age of 16 and was less than two years older than the complainant. The accused thus argued that there was no admissible evidence before the Court concerning his age and therefore it had to be assumed that he was within the age-exemption. The accused was convicted and appealed.

[80] The Court dismissed the appeal and gave three reasons for placing the persuasive burden on the accused pursuant to s. 794(2) (despite the fact that the Crown had proceeded by indictment). First, the accused's age was "not an affirmative, let alone an essential, element of the offence": at para. 6. Second, the evidence was found "if not exclusively, at least conveniently within the knowledge of the accused": at para. 6. Finally, s. 794(2) was the "current statutory expression of the common law rule that, in matters of pleading and proof, the Crown is not required to negative an exception": at para. 8.

- [81] The Court in Thompson made an implicit distinction for the age of the complainant, which was an essential element of the offence that must be proved by the Crown beyond a reasonable doubt. In addressing the application of s. 794(2) and the common law rule, the Court held that the reverse onus applies "where the exception is not, upon a reading of the offence, an affirmative element of that offence. If it is a mere exception, the onus of its proof, or really disproof, is not assumed by the Crown.": at para. 8.
- [82] The Ontario Court of Appeal in *R. v. Williams*, 2008 ONCA 173, further addressed the distinction between an essential element of an offence and a statutory exception, exemption, or proviso. In *Williams*, the accused was convicted under s. 55(1) of the Immigration Act (now s. 52(1)) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27), which prohibited entry after deportation "without written consent of the Minister". At trial, the Crown failed to adduce any evidence that consent was not given. The Trial Judge ultimately relied upon circumstantial evidence to determine that the Minister had not given consent, including falsehoods on the accused's Immigrant Visa and Record of Landing.
- [83] The Court of Appeal held that the lack of consent of the Minister was an element of the offence that must be proved beyond a reasonable doubt by the prosecution, and that there was neither a persuasive nor an evidentiary burden placed on the accused: paras. 18-24; see also *R. v. Greenwood* (1991), 67 C.C.C. (3d) 435 at 445-446 (Ont. C.A.); *R. v. Fisher* (1994), 88 C.C.C. (3d) 103 (Ont. C.A.); *R. v. Zeplin* (1998), 165 Nfld. & P.E.I.R. 306 (Nfld. C.A.).
- [84] In setting aside the accused's conviction, the Court held that the falsehood on the Immigrant Visa and Record of Landing was not a sufficient basis for a conviction. The Court also noted that, on the authority of *Zeplin*, a database had been available to the Crown called the Immigration Query Response Centre which would have permitted them to determine if the Minister had give written consent for the accused to enter Canada.
- [85] In this case, the falsity of the representation is an essential element of the offence that must be proven by the Crown beyond reasonable doubt. As such, s. 794(2) would not have applied. It is therefore not necessary to consider the retrospectivity of the repeal of s. 794(2), which came after the date of the offence.
- (c) Supreme Court of Canada Case Law
- [86] The Charter was not raised in this appeal. However, no discussion of the issue of reverse onuses arising from a 1952 case is possible without consideration of the following Charter cases.
- [87] In its first comments on s. 11(d), in *Dubois*, the Supreme Court of Canada explained the prevailing values embedded within s. 11(d): first, the Crown must prove the accused's guilt beyond a reasonable doubt; and second, the Crown must establish its case against the accused before he or she is put in a position to respond to allegations of criminality: at 357-58.

[88] Section 11(d) of the Charter states:

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[89] Oakes remains a leading case on reverse onuses arising from a statutory presumption. The accused, Mr. Oakes, had been charged with trafficking. Section 8 of the Narcotic Control Act, as it then read, provided that if the court found that the accused was in possession of a narcotic, the accused would be presumed to be in possession for the purpose of trafficking, unless he established that he had no intent to traffic.

[90] The Court held that s. 8 violated s. 11(d): "[a] provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence violates the presumption of innocence": at 133. Here, s. 8 infringed s. 11(d) in requiring the accused to prove no purpose of trafficking once the basic fact of possession is proven. The fact that the standard required to disprove the basic fact of possession was the civil standard of balance of probabilities did not render the provision constitutional: at 134-135. Section 8 was not justified under s. 1 of the Charter.

[91] In Vaillancourt, the Court held that, "Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt of any essential element infringes ss. 7 and 11(d)": Vaillancourt at 655. This may result from the existence of a reverse onus provision or from the elimination of the need to prove an essential element of an offence: at 655. The provision at issue in Vaillancourt, which substituted for the offence of murder proof beyond a reasonable doubt of objective foreseeability of death with proof beyond a reasonable doubt of certain forms of intentional dangerous conduct, infringed both ss. 11(d) and 7, and was not justified under s. 1 of the Charter.

[92] In Whyte, the Court addressed the offence of having care or control of a motor vehicle while impaired. Section 237(1)(a), as it then read, required the accused to prove lack of intent to set the vehicle in motion, on a balance of probabilities, after the Crown first proved that the accused occupied the driver's seat. This provision violated s. 11(d) of the Charter, as it allowed an accused to be convicted while a reasonable doubt existed. However, s. 237(1)(a) was justified under s. 1.

[93] In Schwartz, the Court considered s. 106.7(1) of the Criminal Code, as it then read, which required the accused to "prove that [he or she] was the holder of [a] firearms acquisition certificate, registration certificate or permit" to escape liability for the offence of possessing a restricted weapon without a registration certificate. The majority of the Court concluded that s. 106.7(1) did not place a reverse onus on the accused, and so it did not violate s. 11(d) of the Charter. This was because, once possession of the restricted weapon was proven, the only relevant evidence was the certificate itself. In these circumstances, the accused could

not raise evidence to cast a reasonable doubt without at the same time establishing that a certificate had been issued. As such, the holder of the registration certificate was not required to prove or disprove any element of the offence: at 485-86.

- [94] The Court addressed the distinguishing factor in Whyte, that the accused was not required to prove or disprove any element of the offence, in Chaulk and again in Keegstra. In Chaulk, a majority of the Court held that s. 16(4), which provided that "Every one shall, until the contrary is proven, be presumed to be and to have been sane", violated s. 11(d) of the Charter. Similarly, the majority in Keegstra held that s. 319(3)(a) of the Criminal Code, which provided that no person could be convicted of wilfully promoting hatred "if he establishes that the statements were true" infringed s. 11(d). Contrary to Whyte, the Court held that the real concern was not whether the accused must disprove an element or prove an excuse, but whether an accused may be convicted where a reasonable doubt exists: Chaulk at 1331; Keegstra at 789-790. The provisions at issue in both Chaulk and Keegstra were justified under s. 1.

2. Evidentiary Onuses

- [95] As stated above, a statute or common law may place upon the accused an onus to adduce evidence that has the effect of raising a reasonable doubt. Typically, this arises in cases where the law establishes a presumed fact and then calls upon the accused to raise some "evidence to the contrary" or "evidence which has the effect of raising a reasonable doubt". When a statute declares that a certain fact is presumed upon proof of another fact, the law refers to this as a "basic fact presumption": Morrison; Downey.
- [96] The case of Laba sets out the Court's early post-Charter approach to evidentiary onuses. In Laba, the Court held that the reverse onus arising from the Criminal Code prohibition on selling or purchasing precious metal ore "unless [the accused] establishes he is the owner or agent of the owner or is acting under lawful authority" infringed s. 11(d) and was not justified under s. 1.
- [97] The provision at issue failed under the "minimal impairment" phase of the s. 1 analysis, as Parliament could have chosen to place an evidentiary onus, rather than a full legal burden, on the accused. Under such a provision, the accused would be required to adduce or raise evidence which, if accepted, would raise a reasonable doubt as to whether he or she was an agent or was acting under lawful authority. The burden would then shift to the Crown to prove the contrary beyond a reasonable doubt. As a result, the words "unless [the accused] establishes that" were struck and substituted with "in the absence of evidence which raises a reasonable doubt".
- [98] In Downey, a case dealing with an evidentiary onus arising from a basic fact presumption, the Supreme Court of Canada held that a presumption that imposes an evidentiary onus upon the accused may violate s. 11(d) where the relationship between the presumed fact and the basic fact is inexorable. In Downey, the Court addressed s. 195(2) of the Criminal Code which stated that "[e]vidence that a person lives with or is habitually in the company of

prostitutes is, the absence of evidence to the contrary, proof that the person lives on the avails of prostitution". The Court unanimously held that s. 11(d) was violated, despite the fact that the burden on the accused was only to raise a reasonable doubt as to the basic fact and not to disprove an element of the offence: at 23, 30.

- [99] The majority of the Court went on to conclude, however, that s. 195(s) was justified under s. 1. The objective of the impugned provision was sufficiently important and s. 195(2) met the proportionality test.
- [100] In *R. v. St-Onge Lamoureux*, 2015 SCC 57, the Supreme Court of Canada established a framework for determining when a statutory presumption will violate s. 11(d) in instances where the Crown is relieved of relying on the normal rules of evidence. At issue were amendments to the Criminal Code addressing presumptions of breathalyzer accuracy and the identity of the accused, which operated in the Crown's favour, in impaired driving cases. To challenge the reliability of the results, the accused was required to raise a doubt concerning the accuracy and reliability of the results and of their identity.
- [101] The majority of the Court held that the amendments at issue violated s. 11(d) of the Charter, notwithstanding that they did not require the accused to disprove an element of the offence. The majority concluded that there were real concerns with the possibility of an instrument malfunctioning and with human error based on expert evidence filed on the appeal that could lead the trier of fact to entertain a reasonable doubt: at para. 25. Yet, the trier of fact would be bound by the statutory presumptions and could be required to convict if all elements of the offence were made out, unless the accused rebutted the statutory presumptions: at para. 27. The Court ultimately upheld the provisions under s. 1, after severing some of the requirements for rebutting the presumptions.
- [102] In *Morrison*, the Court held that s. 172.1(3) of the Criminal Code, which creates a presumption concerning the age of a child in connection with the offence of luring a child, violates s. 11(d) and is not a reasonable limit under s. 1. That section states that evidence that a "person was represented as being under the age of eighteen years, sixteen years or fourteen years is, in the absence of evidence to the contrary, proof the accused believed that the person was under that age". In following *Downey*, the Court held:
- [56] The Crown maintains that the presumption under s. 172.1(3) does not infringe s. 11(d) because the presumption is rebuttable where there is evidence to the contrary. With respect, I cannot agree. A basic fact presumption will infringe s. 11(d) if proof of the basic fact is not capable, in itself, of satisfying the trier of fact beyond a reasonable doubt of the presumed fact. (This is another way of articulating the "inexorable connection" test). The accused's opportunity to raise or identify evidence to the contrary does not resolve or attenuate the s. 11(d) problem created when proof of a basic fact does not lead inexorably to acceptance of the presumed fact. This is because the presumption of innocence requires that the Crown "establi[sh] the guilt of the accused beyond a reasonable doubt before the accused must respond": *St-Onge Lamoureux*, at para. 24 (emphasis added); see also *Downey*, at p. 23.

[57] The mere fact that a representation of age was made to the accused does not lead "inexorably" to the conclusion that the accused believed that representation, even absent evidence to the contrary. To be sure, a trier of fact may well infer, on the evidence, that the accused believed the representation. But that is not the test. The test is whether the connection between the proven fact and the existence of the essential element it replaces is "inexorable". That test is not met here.

3. Application to Billett

[103] The circumstances described at para. 7 of Billett concerning the shifting of the burden of proof to the accused do not apply here. As stated earlier in these Reasons, Cst. Gogean had access to the evidence, thus confirming that the accused did not have peculiar information which would have been impossible for the Crown to adduce. The rationale behind the old rule which would flip the burden of proof to the accused to prove a negative is not present in this case, as the facts at issue, that he was not an RCMP officer, are not peculiarly within the knowledge of the appellant.

[104] However, if the allegation was more general, "a peace or public officer", I am satisfied that the Crown's proposed application of Billett, which places a burden of proof on the accused to establish that he was not a peace officer, is not tenable in law. First, section 130 requires, as an element of the offence, that an accused not be a peace officer. The Crown must thus prove this negative state of affairs beyond a reasonable doubt.

[105] The reverse onus relied upon by the Crown comes not from statutory interpretation as in many cases discussed above. It arises from common law, particularly Billett and Edwards. The quotation from Schwartz above is apt, and I repeat in part: "In pre-Charter cases the imposition of a reverse onus upon an accused was frequently recognized and accepted as an exception to the general rule requiring proof by the Crown of all elements of an offence beyond a reasonable doubt."

[106] It is now established that a statutory provision which could have the effect of permitting a conviction notwithstanding the existence of a reasonable doubt as to guilt will violate the presumption of innocence enshrined under the Charter: Vaillancourt; Oakes; Whyte; Schwartz; Laba; Chaulk; Keegstra.

[107] Under the approach relied upon by the Crown in following pre-Charter case law, the Crown need only put forward "some evidence" that the accused was not a peace officer that should be accepted unless rebutted by the accused. Ultimately, this approach could lead to a conviction even if the Crown's prima facie evidence, raising only "a degree of probability in its favour", could lead to a reasonable doubt.

[108] As such, in my view, s. 130 of the Criminal Code cannot be interpreted in the manner suggested by the Crown so as discharge the Crown of its ultimate, or persuasive, burden of proof on an essential element of the offence.

[109] Although this was not argued by the parties, Billett could be read as placing an evidential, as supposed to persuasive, burden on the accused to raise some evidence which would have the effect of raising a reasonable doubt, as in *Laba*. At the outset, however, I note that such evidentiary onuses have generally been confined to the statutory language of "evidence to the contrary", "evidence which raises a reasonable doubt", or "evidence tending to show". Moreover, an evidentiary onus does not require the accused to establish his or her innocence by proving that an element of the offence is not made out. In *Proudlock*, in explaining the expression of "evidence to the contrary" to rebut a presumption, the Supreme Court noted:

... all the presumption does is to establish a *prima facie* case. The burden of proof does not shift. The accused does not have to "establish" a defence or an excuse, all he has to do is to raise a reasonable doubt. If there is nothing in the evidence adduced by the Crown from which a reasonable doubt can arise, then the accused will necessarily have the burden of adducing evidence if he is to escape conviction. However, he will not have the burden of proving his innocence, it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt. [emphasis added]

[110] Here, there was direct evidence available that was capable of raising a reasonable doubt that the element of the falsity of the representation of the offence was made out. Further, in my view, the characterization of the onus or burden described in *Billett* does not change the operation of the post-Charter cases. Although *Downey*, *Morrison*, and *St. Onge-Lamoureux* dealt with explicit statutory presumptions, the cases confirm that an evidentiary onus placed upon the accused that would enable the trier of fact to convict notwithstanding the presence of a reasonable doubt violates s. 11(d). As such, the Crown's proposed interpretation of *Billett*, which suggests that the Crown's circumstantial evidence ought to be accepted until rebutted by the accused, notwithstanding that it may well raise a reasonable doubt, is still untenable.

[111] It follows that the Crown bears the onus of proving every element of the offence of personating a peace officer, contrary to s. 130, beyond a reasonable doubt. Returning to this case, with the element of proving the falsity of the representation that the accused was an RCMP officer, it did not do so.

C. Other issues raised on appeal

[112] For these reasons, the conviction cannot stand. As the determination of this ground results in a new trial, it is therefore not necessary to consider the other three grounds of appeal raised by the appellant.

VII. Order

[113] The appeal is allowed. A new trial is directed.

"The Honourable Madam Justice Watchuk"

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