

CANADA / JUDGMENT

R. v. Kulcsar

2020 BCSC 682

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Supreme Court of British Columbia

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2020 BCSC 682 R. v. Kulcsar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kulcsar,

2020 BCSC 682

Date: 20200501

Docket: 65848-3

Registry: Chilliwack

Between:

Her Majesty the Queen

Respondent

And

Jason John Kulcsar

Appellant

Before: The Honourable Madam Justice Tucker

On appeal from: An order of the Provincial Court of British Columbia, dated December 5, 2018 (R. v. Kulcsar, Chilliwack Registry File No. 65848-2C).

Reasons for Judgment

Counsel for the Crown:

C. Bright

Counsel for the Appellant:

W.E. Jessop

Place and Date of Hearing:

New Westminster, B.C.

November 22, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 1, 2020

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I. INTRODUCTION

[1] The appellant, Jason Kulcsar, appeals his conviction for careless use, handling and transport of a prohibited weapon contrary to the Criminal Code, R.S.C. 1985, c. C-45, [Code]. The trial judge's reasons ("Reasons") are indexed at R. v. Kulcsar, 2018 BCPC 334.

[2] The relevant Code provision is s. 86(1):

86 (1) Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons.

II. FACTS

- [3] The grounds of appeal advanced are questions of law. There is no dispute about the factual findings made below.
- [4] Mr. Kulcsar is 30 years old. On the night in question, he and his friend, Devan Bertrand, were visiting and playing video games at Mr. Kulcsar's work studio. Mr. Kulcsar left to take his dog, a 60 lb. terrier, for a walk. Five minutes or so away from the studio, he happened across a small metal object in a pull-out beside the road. He thought it might be a cap gun. He picked it up to look more closely. It was, in fact, a French palm pistol - a small-calibre, pocket-sized firearm. The model is known as a "Velo Dog" in keeping with its purpose, for bicyclists to use in fending off animals.
- [5] While Mr. Kulcsar was looking at the pistol, his dog tugged hard on her leash, causing the pistol to slip in his hand. When he caught at it to prevent it from falling, the pistol fired into his palm at an angle towards his wrist. The bullet hit two bones and exited. At first, Mr. Kulcsar didn't feel much pain. He picked the pistol up again, tucked it inside the pocket of the hoodie he was wearing, and headed back to the studio. As he went along, he began to feel "a lot of pain".
- [6] Mr. Kulcsar went inside the studio and told Mr. Bertrand he had shot himself and needed to go to the hospital. Mr. Bertrand described Mr. Kulcsar as "in shock and in pain." Mr. Kulcsar left his dog inside the studio and Mr. Bertrand drove them to the hospital. Mr. Bertrand did not know Mr. Kulcsar had the pistol in his pocket. Mr. Kulcsar did not know what position the trigger was in while the gun was inside his pocket.
- [7] The hospital was less than 10 minutes' drive from the studio. Mr. Kulcsar testified that he did not want to leave the gun at the studio because the police would then attend his residence to look for it. He did not want that, and he wanted the pistol out of his possession. He planned on turning it over at the hospital.
- [8] Mr. Bertrand did not go into the hospital, but rather dropped Mr. Kulcsar off outside. Mr. Bertrand testified that Mr. Kulcsar said he would be okay on his own, and so Mr. Bertrand went on home. Mr. Kulcsar described himself as calm and not needing Mr. Bertrand's assistance at the hospital.
- [9] Mr. Kulcsar went inside and up to hospital reception desk. The pistol was still in his hoodie pocket. He sat and spoke with the receptionist. The receptionist described him as calm. Mr. Kulcsar told the receptionist he had shot himself and that he had the pistol with him. The receptionist called hospital security; security called the police and sent security officers to reception. When the security officers arrived, Mr. Kulcsar, who was seated in the reception

waiting area, cooperatively produced the pistol from his pocket and put it into a bag held by one of the security officers. After that, medical personnel took Mr. Kulcsar into the emergency treatment area and dealt with the wound. Mr. Kulcsar was calm and cooperative throughout his time in the hospital.

- [10] When a police officer arrived at the hospital, security turned the pistol over to him. Another police officer opened the pistol and removed three live rounds from the cylinder.
- [11] It is undisputed that the pistol is a prohibited weapon within the meaning of the Code.
- [12] The trial judge accepted Mr. Kulcsar's evidence that he picked up the pistol and put it in his hoodie pocket with the intention of taking it with him to the hospital, and turning it over there.

III. CHARGES AND CONVICTION

- [13] Mr. Kulcsar was charged with five counts: Count 1 - possession of a .25 calibre palm revolver, while not being the holder of a licence; Count 2 - possession of a firearm knowing that he was not the holder of a licence; Count 3 - careless use, handling or transport of a firearm; Count 4 - possession of a loaded prohibited or restricted firearm; Count 5 - possession of a firearm while prohibited.
- [14] Mr. Kulcsar was convicted on Count 3 alone.
- [15] He was acquitted on all of the possession-based counts (i.e., Counts 1, 2, 4 and 5). The acquittals were based on the trial judge's finding that the doctrine of innocent possession and, in particular, the public duty line of authority therein, applied in the circumstances:
- [70] I want to turn to submissions. Both counsel have turned my attention to the innocent possession line of authorities, which points out that some of the innocent possession cases recognize a public duty defence. For example, as here, that the accused took possession of the revolver in order to deliver it to the authorities at the hospital. The innocent possession authorities recognize an absence of a blameworthy state of mind or blameworthy conduct and the authorities to which counsel have referred are the following: *R. v. Chalk*, 88 OR 3(d) 448; *R. v. Gosset*, [1993] 3 SCR 76; *R. v. Creighton*, [1993] 3 SCR 3; *R. v. Gollan*, [1999] CJ No 3848; *R. v. Ali*, 2018 OJ No 2952; *R. v. York*, 2005 BCJ No 250; *R. v. Gibson*, 2011 OJ No 2664; *R. v. Adedokun*, 2018 OJ No 1733.
- [71] Defence counsel referred to the public duty defence overview found at paragraph 23 of *R. v. Adedokun*, the decision of the Ontario Superior Court of Justice. In that paragraph, the court quotes Justice Green in *R. v. Loukas*, 2006 ONCJ 219 at paragraph 12 as follows:

The notion of "public duty" is somewhat ambiguous. At narrowest, it suggests that the exemption (if such it is) from criminal liability applies only to those, such as the police and court officers, who are required to occasionally possess legally prohibited items in the execution of their professional responsibilities. However, the facts in *Hess* (1948), 94 C.C.C. 48 (B.C.C.A.) suggest a

broad application. As explained by the Ontario Court of Appeal in *R. v. Ormerod*, [1969] 4 C.C.C. 3, at 16: "The concept of 'public duty' in the Hess case ... relates to the handling of things only for the purpose of turning them over to the police, and not with even any momentary intention of keeping or using them." Subsequent jurisprudence has further enlarged the compass of this defence to include, at its most expansive, those situations where control over the unlawful goods is exercised solely for a worthy public purpose and without any intention of keeping, using or otherwise personally benefiting from the property. In these circumstances, and consistent with the values enshrined in s. 7 of the Charter, the law is not prepared to infer a criminally blameworthy state of mind or, put otherwise, to punish the "morally innocent".

[72] The discussion continues at paragraph 24 where the court referred to Doherty J.A. writing for the court in *R. v. Chalk*, 2007 ONCA 815 at paragraph 25 as follows:

I agree with the analysis described above. There are cases where an individual has the requisite control and knowledge, but cannot be said to be in possession for the purpose of imposing criminal liability. These cases will include cases in which a person takes control of contraband exclusively for the purpose of immediately destroying the contraband or otherwise placing it permanently beyond that person's ability to exercise any control over the contraband. In such cases, the intention is solely to divest oneself of control rather than to possess. Like the other appellate courts whose discussions are referred to above, I do not think that criminal liability should attach to that kind of brief, "innocent" possession: see eg., *R. v. Glushek*, supra; *R. v. York*, supra.

[16] The trial judge was persuaded that the public duty line of authority applied to all of the possession-based charges (paras. 94 and 95). She rejected, however, the argument that the same facts and circumstances also constituted a lawful excuse under s. 86(1) for Mr. Kulcsar's manner of conduct:

[96] I do not find that the public duty defence authorities apply to the circumstances with respect to Count 3. The accused did make the choice to use then carry, handle, and transport in a motor vehicle, as well as store in his hoodie, the revolver in question.

[97] He knew the revolver had fired one shot into his hand, yet he chose to return it to the studio without calling the police. He chose to transport it in a motor vehicle driven by his friend. He chose to enter the emergency at the Chilliwack General Hospital with the revolver in his pocket. He did not know much about guns, although he had been to a firing range on a couple of occasions. He did not make any attempt to ensure that there were no further live rounds in the firearm, [and] indeed there were live rounds in the firearm.

[98] There is evidence there were other persons in the hospital. Other patients were waiting and staff were present. ...

- [99] I accept that the accused advised the authorities at the hospital he was carrying a firearm and that he was cooperative in turning the firearm over to them. His possession of the revolver was thus innocent, as I have found, however his behaviour of returning to his studio with the firearm, arranging for his friend to transport him to the hospital, and entering the hospital with the firearm in his hoodie, was careless.
- [100] I do not find that the public duty defence applies to all the circumstances of this case. I do not find that the accused had a lawful excuse to carry, use, carry, handle, transport or store the firearm such as would be the case with police in their possession of service revolvers.
- [101] Also the accused made no diligent effort to ensure there were no further live rounds in the revolver. He did not know this particular revolver. He had found it on the ground and he chose to carry it without further precautions. He could have chosen to leave it by the roadside or at his studio. He chose instead to transport it to a public place, the hospital.
- [102] Accordingly, I find the Crown has proven Count 3 beyond a reasonable doubt and convict the accused of that count.

[Emphasis added.]

IV. ISSUES ON APPEAL

- [17] Two grounds of appeal were pursued. Both allege errors of law:
1. The trial judge erred in law in failing to apply a modified objective standard properly incorporating the circumstances of the appellant when determining mens rea; and
 2. The trial judge erred in law in concluding the appellant was without a lawful excuse for purposes of s. 86(1).
- [18] The appellant's filed materials also alleged reversible error by reason of failure to provide sufficient reasons for concluding the public duty defence did not constitute a lawful excuse, but that ground of appeal was abandoned at the outset of the hearing.

V. STANDARD OF REVIEW

- [19] The right to appeal a summary conviction is governed by Part XXVII of the Code and, more particularly, s. 813. Section 822(1) provides that in a summary conviction appeal under s. 813, ss. 683 to 689 (relating to appeals of indictable offences) apply, with the exception of s. 683(3) and s. 686(5).
- [20] Section 686(1)(a) reads:
- 686 (1) On the hearing of an appeal against a conviction , 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

[21] The applicable standard of review depends on the nature of the ground of appeal in question. A helpful review of the law in this respect was provided by Justice Kelleher in *R. v. Naidu*, 2010 BCSC 851 [Naidu]:

[12] In *R. v. Pomeroy*, 2007 BCSC 142, 41 M.V.R. (5th) 272, Romilly J. wrote a detailed and useful analysis of the function and jurisdiction of a summary conviction appeal court. Those principles apply in the present case.

[13] The two issues raised by the appellant are governed by discrete standards of review.

[14] In *R. v. Plonka*, 2008 BCSC 881, Humphries J. reviewed the jurisprudence on whether an appeal addressing the phrase "as soon as practicable" in s. 258(1)(c)(ii) of the Code raised a question of law or fact. The same considerations apply to the issue raised in this appeal.

[15] In *Plonka*, the court found that the articulation of the correct test and the meaning of the words "as soon as practicable" constitute a question of law. However, the application of that test to the evidence and the finding of facts that lead to the conclusion that the demand was made or was not made as soon as practicable within the correct meaning of that phrase was held to be a question of fact.

[16] However, in *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, the accused sought to exclude two breath samples taken after his arrest on the basis that the arresting officer lacked reasonable and probable grounds to demand the breath samples. The trial judge had found that the officer did not have objective grounds to make the demand. Regarding the standard of review applicable to this issue on appeal, Chief Justice McLachlin and Charron J. (for the Court) stated:

20 While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount at law to reasonable and probable grounds is a question of law. As with any issue on appeal that requires the court to review the underlying factual foundation of a case, it may understandably seem at first blush as though the issue of reasonable and probable grounds is a question of fact. However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law: see *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 23. In our view, the summary conviction appeal judge erred in failing to distinguish between the trial judge's findings of fact and his ultimate ruling that those facts were insufficient, at law, to constitute reasonable and probable grounds. Although the trial judge's factual findings are entitled to deference, the trial judge's ultimate ruling is subject to review for correctness.

- [17] As Shepherd holds that both the articulation of a legal standard and its application to the facts of a case raise a question of law, the entirety of the appellant's first ground of appeal attracts the standard of review of correctness.
- [18] A different standard governs the appellant's alternative ground of appeal attacking the learned trial judge's findings of fact. In *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6, Fish J. reaffirmed the limited scope of appellate intervention on questions of fact:
- [9] ... 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...
- [22] The grounds of appeal here do not assert that the verdict was unreasonable, that it cannot be supported on the evidence, or that there was a miscarriage of justice. Both grounds of appeal assert errors of law. The standard of review applicable to questions of law is correctness.
- [23] As indicated in *Naidu*, the reasons of Justice Romilly in *HMTQ v. Pomeroy*, 2007 BCSC 142 [Pomeroy], setting out the principles applicable to summary conviction appeals is oft-cited by this court (see paras. 26-40). Here, both parties relied on *Pomeroy* as an outline of the applicable law.
- [24] In my view, the following paragraphs from *Pomeroy* are particularly relevant to this appeal:
- (A) Summary Conviction Appeals
- [26] 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: ...
- (C) A trial judge is presumed to know the law
- [39] A judge is presumed to know and properly apply the law, and to have taken into account all aspects of all relevant evidence. Hence, as a general proposition, succinct analysis or silence on a particular issue is not an error in law. Where a comment is open to more than one interpretation, the interpretation consistent with the judge's presumed knowledge of the law prevails. That presumption can only be displaced if an error in law is manifest in the judge's comments: ...

VI. ANALYSIS AND DECISION

- [25] Again, the relevant Code provision is s. 86(1):

86 (1) Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons.

[26] The elements of the offence created by s. 86(1) were recently summarized in *R. v. Penner*, 2019 BCCA 76. There, Justice Frankel, writing for the court, stated:

[30] With respect to careless use of a firearm the actus reus is--in the words of s. 86(1) of the Criminal Code, R.S.C. 1985, c. C-46--that the accused used a firearm "in a careless manner or without reasonable precautions for the safety of other persons." The mens rea or fault element is objective, i.e., that the accused's conduct constitutes a marked departure from the standard of care of a reasonable person in the circumstances: *R. v. Gosset*, [1993] 3 S.C.R. 76 at 102; *R. v. Finlay*, [1993] 3 S.C.R. 103 at 114–115, 120. See also: *R. v. Beatty*, 2008 SCC 5 at para. 43, [2008] 1 S.C.R. 49, and *R. v. Roy*, 2012 SCC 26 at para. 26, [2012] 2 S.C.R. 60, dealing with the offence of dangerous driving causing death.

[27] Section 86(1) is one of several Code provisions that create penal negligence offences. Penal negligence is distinct from both the offence of criminal negligence and the tort of civil negligence. Penal negligence has been addressed in a number of Supreme Court of Canada decisions, including *R. v. Creighton*, [1993] 3 S.C.R. 3 [Creighton]; *R. v. Finlay*, [1993] 3 S.C.R. 103; *R. v. Gosset*, [1993] 3 S.C.R. 76, [1993] S.C.J. No. 88 [Gosset] (cited to QL); *R. v. Hundal*, [1993] 1 S.C.R. 867, [1993] S.C.J. No. 29 [Hundal] (cited to QL); and *R. v. Beatty*, 2008 SCC 5 [Beatty]. Notably, both *Finlay* and *Gosset* involved the specific offence of careless use of a firearm (under what was, at that time, s. 86(2) of the Code).

[28] Actus reus is not in issue on this appeal. It is conceded that the appellant's objective conduct was careless and undertaken without reasonable precautions for safety. There is also no allegation that Mr. Kulcsar's conduct was due to a mistake of fact (reasonable or otherwise). The issues on appeal relate to mens rea and the s. 86(1) exception for lawful excuse.

A. Mens Rea: Failure to Modify the Objective Test

[29] The parties agree the modified objective test is the correct test for determining mens rea under s. 86(1). Both counsel referenced *Gosset* (which, as noted above, involved the same offence) for the proposition in their arguments. However, the more recent decision in *Beatty*, includes a clear and concise summary of the modified objective test in the context of penal negligence offences in general. I find it helpful to start with that summary (per Justice Charron, for the majority):

[6] ... Unquestionably, conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, it is important not to conflate the civil standard of negligence with the test for penal negligence. Unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing blameworthy conduct. Fundamental principles of criminal

justice require that the law on penal negligence concern itself not only with conduct that deviates from the norm, which establishes the actus reus of the offence, but with the offender's mental state. The onus lies on the Crown to prove both the actus reus and the mens rea. Moreover, where liability for penal negligence includes potential imprisonment, as is the case under s. 249 of the Criminal Code, the distinction between civil and penal negligence acquires a constitutional dimension.

- [7] The modified objective test established by this Court's jurisprudence remains the appropriate test to determine the requisite mens rea for negligence-based criminal offences. As the label suggests, this test for penal negligence "modifies" the purely objective norm for determining civil negligence. It does so in two important respects. First, there must be a "marked departure" from the civil norm in the circumstances of the case. A mere departure from the standard expected of a reasonably prudent person will meet the threshold for civil negligence, but will not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm is a question of degree. It is only when the conduct meets the higher threshold that the court may find, on the basis of that conduct alone, a blameworthy state of mind.
- [8] Second, unlike the test for civil negligence which does not concern itself with the mental state of the driver, the modified objective test for penal negligence cannot ignore the actual mental state of the accused. Objective mens rea is based on the premise that a reasonable person in the accused's position would have been aware of the risks arising from the conduct. The fault lies in the absence of the requisite mental state of care. Hence, the accused cannot avoid a conviction by simply stating that he or she was not thinking about the manner of driving. However, where the accused raises a reasonable doubt whether a reasonable person in his or her position would have been aware of the risks arising from the conduct, the premise for finding objective fault is no longer sound and there must be an acquittal. The analysis is thus contextualized, and allowances are made for defences such as incapacity and mistake of fact. This is necessary to ensure compliance with the fundamental principle of criminal justice that the innocent not be punished.
- [30] The appellant agrees the trial judge was alive to the correct legal test, but submits she erred in her application of it. He says she failed to incorporate relevant circumstances into the modified objective test, and thus imposed a stricter standard than ought to have used. He submits that the trial judge's finding of marked departure was made by reference to this overly strict standard, and thus cannot be sustained.
- [31] Specifically, the appellant argues the trial judge failed to take the following personal circumstances into account:
- a) The appellant had a gunshot wound, was in a lot of pain and required immediate medical attention;

- b) The studio was a short distance from the hospital, and driving allowed the appellant to get there sooner than calling for an ambulance would have; and
- c) Going to the hospital enabled the appellant to both: (i) get immediate medical attention; and (ii) turn the pistol over to authorities there.

[32] The Crown submits the trial judge applied the modified objective test properly. With regard to pain and the need for medical attention, the Crown argues the trial judge's factual findings were dispositive of any assertion of incapacity based on those factors.

[33] The appellant argues that a "generous" incorporation of factors particular to the accused is mandated, citing the following paragraphs in particular from Chief Justice Lamer's concurring minority reasons in *Gosset*:

34 Reasonableness cannot, however, be assessed in the abstract, but must relate to the circumstances of the accused and of the offence. In *R. v. Tutton*, [1989] 1 S.C.R. 1392, at p. 1434, I stated that in applying the objective norm set out in the definition of criminal negligence in s. 202 of the Criminal Code (now s. 219), there "must be made 'a generous allowance' for factors which are particular to the accused, such as youth, mental development, education ". This position has since been described (by Eric Colvin in *Principles of Criminal Law* (2nd ed. 1991), at p. 151), as "a highly personalized approach to assessing negligence".

35 Most recently, in *R. v. Hundal*, *supra*, a case considering the test for dangerous driving, Cory J. describes the objective basis for a finding of negligence in the following terms (at p. 883):

the test for negligence is an objective one requiring a marked departure from the standard of care of a reasonable person. There is no need to establish the intention of the particular accused. The question to be answered under the objective test concerns what the accused "should" have known. The potential harshness of the objective standard may be lessened by the consideration of certain personal factors as well as the consideration of a defence of mistake of fact.

36 This approach is consistent with recent judicial pronouncements with respect to the law regarding dangerous driving in England. In *R. v. Reid*, [1992] 3 All E.R. 673 (H.L.), there is a general recognition that the capacity of the accused to appreciate risk is relevant to a determination of fault. Lord Keith, for example (at p. 675), found that the assessment of fault on the basis of inadvertence may have to be "modified . . . for example, where the driver acted under some understandable and excusable mistake or where his capacity to appreciate risks was adversely affected by some condition not involving fault on his part".

[34] The appellant argues that the trial judge was required to assess the reasonableness of his conduct in the context of the surrounding events, and to consider both the facts and the appellant's perception of those facts, citing the majority reasons of Justice Cory in *Hundal* at paras. 38 and 40.

- [35] The appellant argues that the trial judge failed to take into account, in keeping with his cited passages from Gosset and Hundal, the circumstances listed in considering whether Mr. Kulcsar's conduct was a marked departure from that of a reasonable person in the same circumstances.
- [36] I do not accept the appellant's argument. It fails to distinguish between external circumstances and personal circumstances, and it fails to acknowledge that personal circumstances are relevant only to the capacity to appreciate risk.
- [37] Because I find it a very clear articulation, I will again quote the law from Justice Charron's reasons in the Beatty decision. (While neither party cited Beatty in argument, the reasons in Beatty, with respect to the passages I am referencing, is a summary of the existing jurisprudence, including the Hundal, Gosset and Creighton decisions.) In Beatty, Justice Charron summarized the law in relation to personal characteristics and the modified objective test for mens rea as follows:
- [37] The underlying premise for finding fault based on objectively dangerous conduct that constitutes a marked departure from the norm is that a reasonable person in the position of the accused would have been aware of the risk posed by the manner of driving and would not have undertaken the activity. However, there will be circumstances where this underlying premise cannot be sustained because a reasonable person in the position of the accused would not have been aware of the risk or, alternatively, would not have been able to avoid creating the danger. Of course, it is not open to the driver to simply say that he or she gave no thought to the manner of driving because the fault lies in the failure to bring to the dangerous activity the expected degree of thought and attention that it required. As Cory J. explained (at p. 885 of Hundal):

It would be a denial of common sense for a driver, whose conduct was objectively dangerous, to be acquitted on the ground that he was not thinking of his manner of driving at the time of the accident.

However, because the accused's mental state is relevant in a criminal setting, the objective test must be modified to give the accused the benefit of any reasonable doubt about whether the reasonable person would have appreciated the risk or could and would have done something to avoid creating the danger. On these occasions, even when the manner of driving viewed objectively will clearly be dangerous, the accused cannot be convicted. Cory J., in Hundal, gave some useful examples (at p. 887):

Take for example a driver who, without prior warning, suffers a totally unexpected heart attack, epileptic seizure or detached retina. As a result of the sudden onset of a disease or physical disability the manner of driving would be dangerous yet those circumstances could provide a complete defence despite the objective demonstration of dangerous driving. Similarly, a driver who, in the absence of any warning or knowledge of its possible effects, takes a prescribed medication which suddenly and unexpectedly affects the driver in such a way that the manner of driving was dangerous to the public, could still establish a good defence to the charge although it

had been objectively established.

- [38] We can readily appreciate the injustice of branding the driver in each of these examples as a criminal. In the same vein, a reasonably held mistake of fact may provide a complete defence if, based on the accused's reasonable perception of the facts, the conduct measured up to the requisite standard of care. ...
- [39] It is important however not to confuse the personal characteristics of the accused with the context of the events surrounding the incident. In the course of the earlier debate on whether to adopt a subjective or objective test, Lamer J. favoured an objective approach but, in an attempt to alleviate its potential harshness, he would have made generous allowances for factors particular to the accused, such as youth, mental development and education: see for example, *Tutton*, at p. 1434. Under this approach, the young and inexperienced driver's conduct would be measured against the standard expected of a reasonably prudent but young and inexperienced driver. This approach, however, was not favoured by other members of the Court. As Wilson J. stated in *Tutton*, this individualized approach "sets out a fluctuating standard which in my view undermines the principles of equality and individual responsibility which should pervade the criminal law" (p. 1418).
- [40] Some of the language used in *Hundal* nonetheless left uncertainty about the degree to which personal characteristics could form part of the circumstances which must be taken into account in applying the modified objective test. (See for example the references to "certain personal factors" at p. 883 and to "human frailties" at p. 887.) This remaining uncertainty was later resolved in *Creighton*. Short of incapacity to appreciate the risk or incapacity to avoid creating it, personal attributes such as age, experience and education are not relevant. The standard against which the conduct must be measured is always the same -- it is the conduct expected of the reasonably prudent person in the circumstances. The reasonable person, however, must be put in the circumstances the accused found himself in when the events occurred in order to assess the reasonableness of the conduct. To reiterate the example used above, the reasonable person becomes the one who "without prior warning, suffers a totally unexpected heart attack, epileptic seizure or detached retina" or becomes the one who "in the absence of any warning or knowledge of its possible effects, takes a prescribed medication which suddenly and unexpectedly" causes him to drive in a manner that is dangerous to the public. By so placing the reasonable person, the test is not personalized and the standard remains that of a reasonably prudent driver, but it is appropriately contextualized.
- [38] In my opinion, the trial judge applied the modified objective test correctly in this case.
1. Intent to Turn Over Pistol

[39] The appellant's intent to turn the pistol over to authorities at the hospital is not a circumstance to be considered in assessing whether his manner of getting the pistol to the hospital constituted a marked departure. While the accused's personal motivation for engaging in the conduct that is objectively careless may be relevant for purposes of lawful excuse, it plays no role in defining the standard of care, in assessing marked departure, or determining whether a marked departure was due to an incapacity to appreciate risk.

2. Marked Departure

[40] The trial judge concluded that carrying a pistol that had already fired unexpectedly inside a pocket while returning to the studio, riding in a vehicle, and going into a hospital constituted a marked departure. While her decision does not set out that finding in express terms, the Reasons indicate she was fully aware it was required under the legal analysis (see Reasons, para. 80-82 and 91, and *R. v. Ali*, 2018 ONCJ 379, paras. 84 and 85). (The appellant's position on appeal implicitly concedes she found a marked departure.)

[41] The appellant asserts the trial judge reached her finding of marked departure without taking into account the fact that the hospital was only minutes' drive from the studio.

[42] The proximity of the studio to the hospital (and of the pull-out to the studio) is expressly reflected in the Reasons. The Reasons also record the fact that, on arrival at the hospital, the appellant went directly to reception and handed the pistol over to security only minutes later. These distances and time periods are relevant circumstances in assessing whether there was a marked departure from the reasonable person standard of care, but they are not "personal" circumstances. Rather, they form part of the set of external circumstances the appellant was acting within.

[43] The Reasons indicate the trial judge was aware of the distances and time periods involved. It is evident that on her view of the facts no reasonable person would have conducted themselves as the appellant did - not even for 15 minutes or 15 miles. She found the conduct to be a marked departure notwithstanding.

[44] It might also be noted that the distance and time involved cuts both ways on reasonableness. In so much as it was only a 10 minute drive with the pistol to take it to the hospital, the police who attended the hospital to collect it would only have taken an additional 10 to 15 minutes to collect the pistol from the pull-out, studio or any hiding place nearby.

3. Personal Circumstances Relating to Capacity

[45] Being in pain and in need of medical care are personal characteristics. In the language of Hundal and Gosset, these are "human frailties." As impairing characteristics, they are relevant to the issue of capacity: i.e., was the marked departure due to the fact that the accused was incapable of appreciating the risk?

- [46] Capacity is relevant to the modified objective analysis only after an initial finding of marked departure has been made. Capacity goes to whether the inference of want of care otherwise arising from the objective conduct can be sustained. The further question in the analysis is whether and how the same human frailties might have impacted the reasonable person.
- [47] The Reasons show the trial judge was alive to the defence's reliance and emphasis on Mr. Kulcsar's pain and need for medical care (para. 79). The Reasons also indicate that the issue of capacity was directly addressed in argument (para. 90). The Reasons reflect that the Crown expressly argued the mens rea for careless use of a firearm was established here "for the same reasons" it was in Ali.
- [48] The relevant mens rea paragraphs from Ali read as follows:
- [84] I will now deal with the remaining count: the careless handling of the pistol. The legal test was articulated by the Supreme Court of Canada in *R. v. Creighton*; see, too, *R. v. Gosset*. To summarize, this offence requires a marked departure from the standard that would have been exercised in the same circumstances by a reasonable person. The mens rea is to be determined by assessing whether an accused person was capable of appreciating the risk if he/she had turned his/her mind to it. Personal factors short of establishing incapacity to recognize the risk are not to be considered.
- [85] Mr. Ali testified that the reason that he abandoned the pistol under a car in the parking lot was basically due to his panicked state. It may have been loaded. There were other people in the mall parking lot. The security videos from inside the mall show that there were a fair number of people there. I have no difficulty finding that in the circumstances of this case, the abandonment of the firearm did constitute a marked departure from what a reasonable person would have done with that weapon. While panicked, Mr. Ali was clearly well capable of appreciating the risk inherent in his action. He just wanted to get rid of the pistol and either did not think at all or did not think clearly about what he was about to do. The fact that he had a lawful excuse for possessing the firearm does not allow him to dispose of it in an unlawful manner. Therefore, he is found guilty of this count.
- [86] In summary, Mr. Ali is found guilty of Count 1 (careless handling of a firearm) but not guilty of the two possession of a firearm counts. He was acquitted of the weapons dangerous charge earlier in this trial.
- [Emphasis added.]
- [49] The Crown submits that the trial judge's rejection of incapacity is amply demonstrated in her factual findings, in particular her findings about choice, which are then referenced in her legal reasoning.

[50] The trial judge found the appellant "chose to return to the studio without calling the police," "chose to transport [the pistol] in a vehicle driven by his friend," "chose to enter the emergency at Chilliwack General Hospital with the revolver in his pocket," and "chose to carry [the pistol] without further precautions" (paras. 99 and 101). The Reasons emphasize the evidence that the appellant remained calm.

[51] The trial judge's summary of the evidence includes the following:

65 The accused agreed he had made the decision to get into Mr. Bertrand's vehicle, to travel to the hospital with the gun which was still potentially loaded, but that his focus was more on his hand and getting medical attention.

That paragraph of the Reasons appears to reflect (at least in part) the accused's trial testimony about getting into Mr. Bertrand's vehicle to travel to the hospital:

Q: Travel - travel with what could still be a loaded firearm, correct?

A: I didn't - I was mainly thinking about my hand, getting medical attention, and I - but I was aware, correct.

[52] In light of paragraphs 89-91 of the Reasons and the Crown's express reliance on the mens rea reasoning set out in Ali, I agree that the trial judge's findings about choice can and should be read as findings the appellant was making choices with an awareness of risk (paras. 96, 97 and 101). On her view of the evidence, the pain and need for medical attention were not, in fact, incapacitating factors.

[53] The presumptions in favour of the trial judgment, as outlined in paragraph 39 of Pomeroy, are significant. The trial judge was not obliged to set out every step in her reasoning chain in detail. I am satisfied that the correct law was put before her, as was argument on the relevant issues. That being the case, to the extent the defence relied on Mr. Kulcsar's pain and need for medical care in support an assertion of incapacity, she was not persuaded on the evidence.

4. Alternative Courses of Conduct

[54] The trial judge noted that Mr. Kulcsar had options available to him, including leaving the pistol at the pull-out or at the studio. Mr. Kulcsar asserts that just leaving the pistol behind at the pull-out would have been a breach of s. 86(1): Ali.

[55] In Ali, the accused took possession of a gun to remove it from the scene of a fight. At some point during the fight. Mr. Ali retrieved the gun and removed it from the building. However, once outside the building, he threw the gun under a car in a busy parking lot, in full view of others, and left it there. His possession of the gun was innocent, but he was convicted under s. 86(1) for abandoning the gun in the parking lot.

- [56] Here, Mr. Kulcsar picked up the pistol in the middle of the night. He was not in a public parking lot during shopping hours, but rather on a road he described as the middle of nowhere at roughly 3:00 a.m. He could have hidden the pistol nearby and reported its location to the police.
- [57] In any event, even assuming leaving the pistol at the pull-out would result in a violation s. 86(1), it is a straw man argument. He could also have left it inside his studio, hidden it near the studio or turned it over before entering the hospital. The trial judge's point was that Mr. Kulcsar had options.
- [58] I find the first ground of appeal to be without merit.

B. Section 86(1) and "Lawful Excuse"

- [59] The appellant submits that since s. 86(1)'s lawful excuse exception exists in order to prevent punishment of the morally innocent, and since he transported the pistol in service of a valid public policy objective (putting it into the custody of authorities before someone else got hurt), he had a lawful excuse for his manner of transport.
- [60] The appellant's Statement of Argument on appeal reads:
66. In these circumstances it is submitted that acting in the "public duty" is a lawful excuse. The public should be encouraged to turn over prohibited items to the police when found. In the matter at bar there were exigent circumstances at play (the injury) and the appellant attempted to deal with those circumstances in a manner that also advanced the public interest.
67. It is respectfully submitted that if his possession of the firearm was morally innocent then surely the manner in which he handled the firearm must not be morally blameworthy. Particularly so, if the manner in which it was handled was intended to serve a public purpose.

[Emphasis added.]

- [61] The Crown argues that the appellant has failed, both at trial and here, to advance any rationale for why the manner in which he handled the firearm, should be excused by virtue of his ultimate intention with respect to the firearm. The Crown also submits that it is illogical to transfer a public duty argument developed in the context of a different offence to s. 86(1), especially as latter is a penal negligence offence.
- [62] The Reasons include the following paragraphs:
- [92] With respect to Counts 1, 2, 4 and 5, I find the accused has successfully raised what is often referred to as the public duty defence. I accept his explanation as to how he found the revolver, how it discharged into his hand and how he returned to his tattoo studio and asked his friend to drive him to the hospital keeping the revolver on his person the entire time.

- [93] I accept his explanation as to what he said to Ms. Bury at the emergency counter. I accept his explanation that he advised her that he had shot himself and that he had the firearm on him. Further, I accept his explanation that he did not want the weapon on his person while he was talking with the staff, that Ms. Bury asked him if he had it on him and that he then said "yes". Ms. Bury then called security who attended and the accused removed the revolver from the pocket of his hoodie. He placed the revolver into a bag, held by Mr. Bath. The accused was cooperative throughout his dealings with the authorities at the hospital.
- [94] I also find that the revolver falls within the definition of a firearm. I find the reasoning found in the public duty defence cases to be persuasive and especially the reasoning set out in *R. v. Adedokun*, which sets out the overview of the public duty defence.
- [95] Accordingly, I acquit with respect to the four possession charges, being Counts 1, 2, 4 and 5. However, I disagree with the defence analysis with respect to Count 3, that the accused's explanation provides a lawful excuse.
- [96] I do not find that the public duty defence authorities apply to the circumstances with respect to Count 3. The accused did make the choice to use then carry, handle, and transport in a motor vehicle, as well as store in his hoodie, the revolver in question.
- [99] I accept that the accused advised the authorities at the hospital he was carrying a firearm and that he was cooperative in turning the firearm over to them. His possession of the revolver was thus innocent, as I have found, however this behaviour of returning to his studio with the firearm, arranging for his friend to transport him to the hospital, and entering the hospital with the firearm in his hoodie, was careless.
- [100] I do not find that the public duty defence applies to all the circumstances of this case. I do not find that the accused had a lawful excuse to carry, use, carry, handle, transport or store the firearm such as would be the case with police in their possession of service revolvers.

[Emphasis added.]

- [63] The Crown argues that on a review of the Reasons as a whole, the trial judge's reasoning is apparent. The trial judge addressed the basis of the public duty line of authority under the doctrine of innocent possession at some length (paras. 70-72), and then expressed the view that the public duty defence does not extend to a choice to carry, handle or transport the possessed item carelessly. The same conclusion was reached by the court in *Ali* in similar terms (para. 85).
- [64] The trial judge concluded that the public policy line of authority for innocent possession did not apply (as a "lawful excuse") in the circumstances of Count 3. As noted by the Crown, she had discussed the circumstances where it does apply earlier in her reasons. The trial judge also specifically notes that the appellant made choices regarding the manner of possession (para. 96) and, in her earlier reasons, had already noted he had safer options for getting the pistol into the hands of the authorities. Finally, she specifically observes that it is possible to possess innocently and carelessly at the same time (para. 99).

[65] Although not expressed in these terms, the Reasons indicate the trial judge concluded that, where manner of possession is a matter of choice, manner of possession cannot be equated with the public policy goal of possession itself. The question on appeal is whether that conclusion is wrong in law. However curtly expressed, in my opinion, the conclusion is correct. Were it otherwise, a person taking possession of a loaded gun to prevent a murder, would have a lawful excuse to juggle that gun along with two oranges while walking it over to the police station. If it is possible to possess both innocently and safely, public policy is obviously served by that outcome.

[66] I find the second ground of appeal is also without merit.

VII. CONCLUSION

[67] I am not persuaded that the trial judge made any errors of law. The appeal is dismissed.

"Tucker J."

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