CANADA / JUDGMENT

R. v. Muys

2006 BCSC 1483

COURT
Supreme Court of British Columbia

DECIDED
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2006 BCSC 1483 R. v. Muys

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Muys,

2006 BCSC 1483

Date: 20061005

Docket: 22346

Registry: Cranbrook

Between:

Regina

Respondent

And

David George Muys also known as

David George Galbraith

Appellant

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for respondent

A. Mayes

Counsel for appellant

B. Blakley

Date and Place of Hearing:

September 12, 2006

Golden, B.C.

[1] David George Muys, also known as David George Galbraith ('Mr. Muys") was charged with driving a motor vehicle while prohibited from doing so pursuant to various Criminal Code ("CC") and Motor Vehicle Act, R.S.B.C. 1996, c. 318 ("MVA"), provisions: s. 259(4) CC; s. 95(1) MVA; s. 102 MVA. He was also charged with driving a motor vehicle while knowing that his driver's licence was suspended under s. 232 MVA, contrary to s. 234(1) MVA. The Provincial Court judge found him guilty of all four counts based on evidence that he was so driving a motor vehicle.

[2] The question then arose as to whether it offended the rule against multiple convictions as interpreted in R. v. Kienapple, [1975] 1 S.C.R. 729, for a conviction to be entered on the MVA charges in addition to the one under s. 259(4) of the Code. It was the position of Mr. Muys at trial that to convict on other than the one count would offend the rule against multiple convictions as the four offences charged had all arisen out of the same act of driving. The crown at trial sought the entry of convictions on all four counts based on the theory that Mr. Muys had been suspended in a number of ways at the time he drove. That is, in the view of the crown, the court had the ability to enter a conviction for each charge which had, at its base, a different prohibition.

[3] The Provincial Court judge, at the conclusion of argument, simply indicated that he would enter a conviction on the charge arising under the Criminal Code and asked crown counsel on which of the three MVA charges he wished him to enter a conviction. Upon crown indicating the charge arising under s. 95(1) of the MVA, he entered a conviction on that charge, and a conditional stay of proceedings under the counts charging offences under ss. 102 and 234(1) of the MVA.

[4] Mr. Muys now appeals the decision to enter more than one conviction. The crown did not appeal the decision to enter stays of proceedings on the other two charges in the information.

[5] On this appeal, counsel for Mr. Muys repeated her argument based on Kienapple, stressing that the essence of the act for which Mr. Muys was convicted was the same in both charges; it was the same delict. In Kienapple, in delivering the reasons for the majority, Mr. Justice Laskin indicated at p. 748:

In my view, the term res judicata best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences.

[6] He went on at pp. 750-751:

Although there have been cases where multiple convictions were registered, when in substance only one "crime" has been committed, refusal to interfere on appeal was justified on the "no substantial wrong" basis because only one sentence was imposed: see Rex v. Lockett, [1914] 2 K.B. 720, Kelly v. The King (1916), 54 S.C.R. 220. The better practice, however, is to avoid multiple convictions, as was done in the Cox and Paton, [[1963] S.C.R. 500] case, and earlier by the Ontario Court of Appeal in Regina v. Siggins, [1960] O.R. 284, which relied on the opinion of Kellock J. in The King v. Quon, supra. Siggins was a not uncommon case of charging an alleged thief, found in possession of stolen goods, with both theft and unlawful possession. It was there said (at p. 285) that

The Crown is entitled to lay both charges against him, but at the trial, if the jury convict of theft they should not convict on the charge of unlawful possession. If they acquit on the charge of theft they may then consider and, if they see fit to do so, convict on the charge of unlawful possession.

In short, in relation to potentially multiple convictions, it is important to know the verdict on the first count, just as in the case of successive prosecutions it is important to know the result of the first trial: see Friedland, Double Jeopardy (1969), at p. 94.

If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions: see Connelly v. Director of Public Prosecutions, [1964] A.C. 1254, at pp. 1305 and 1308, per Lord Morris of Borth-y-Gest; cf. Rex v. Kendrick and Smith (1931), 23 Cr. App. R. 1.

[Citation in brackets added].

[7] Of course, Kienapple concerned a case in which both counts in the indictment against Mr. Kienapple were offences under the Criminal Code. In this case, only the first charge is under the Criminal Code, the balance being under what crown counsel referred to as administrative provisions. The crown argued that the essential elements of s. 95(1) MVA and s. 259(4) of the Criminal Code differ to such a degree that a conviction can be registered against Mr. Muys for each charge. Although the crown conceded that Mr. Muys had only one intent, to drive a motor vehicle, the actus reus for each offence differs. The crown argued that it logically follows that although Mr. Muys only drove once, he drove with the intent of breaching each of the two prohibitions, thus permitting the entry of a conviction on each count.

[8] The crown referred to three decisions in which an individual had been convicted of what the crown suggested was essentially the same act: R. v. Moody (1985), 33 M.V.R.198, a decision of Judge Millward of the British Columbia County Court; R. v. Hencheroff (1995), 57 B.C.A.C. 33, a decision of our Court of Appeal; and R. v. McKinney (1979) 46 C.C.C. (2d) 566, a decision of the Manitoba Court of Appeal, affirmed by the Supreme Court of Canada at (1980) 50 C.C.C. (2d) 576.

[9] In Moody, the accused was convicted of failing to produce a driver's licence and for driving while prohibited from doing so. Hencheroff involved the same two offences and convictions. McKinney's convictions for hunting out of season and hunting at night arising out of the same incident were also upheld through to the Supreme Court of Canada. While each of these cases involved but one act, the offences were not the same or substantially the same.

[10] Both counsel referred to the decision in Multiple Access Ltd. v. McCutcheon, et al (1982), 138 D.L.R. (3d) 1, where the question before the court was whether certain Ontario legislation relating to insider trading conflicted with similar federal legislation such that the crown could not proceed under the legislation of both jurisdictions at the same time against an accused with respect to a single set of circumstances. That is, did the doctrine of paramountcy prevent the crown from proceeding with both?

[11] The majority of the Supreme Court of Canada concluded that the legislation of both jurisdictions was valid, the provincial legislation merely duplicating the federal, not contradicting it. Mr. Justice Dickson (as he then was) noted at pp. 22-24:

I agree with the submissions of counsel for Saskatchewan that it would be ironic if a province, by adding elements of differentiation in its legislation (which do not conflict with federal provisions governing the same conduct but which, in effect, go further than the federal) could create valid operative provisions whereas in regard to the same legislative field, it could merely duplicate the federal provisions; the cases where overlapping provincial legislation has not been rendered inoperative cannot be validly distinguished on the basis that in each of them there were elements of difference between the provincial and the federal legislation; there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament.

The respondents strenuously support Mr. Justice Morden's reasons in this court. Counsel for the respondent McCutcheon argues: "Where two actions are brought under the federal and provincial legislation against the insider, either concurrently or seriatum, the Court will not permit both to proceed to judgment. Both pieces of legislation cannot operate concurrently in that resort to one precludes resort to the other. The legislation under which one action is commenced operates to prevent the application of the other. In such case, the two statutes meet and are in conflict." I am not of that opinion.

With Mr. Justice Henry I would say that duplication is, to borrow Professor Lederman's phrase, "the ultimate in harmony". The resulting "untidiness" or "diseconomy" of duplication is the price we pay for a federal system in which economy "often has to be subordinated to provincial autonomy" (Hogg, at p. 110). Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative.

The following passage from Professor Lederman's article "The Concurrent Operation of Federal and Provincial Laws in Canada", supra, at p. 199 (fn. 39), is apposite:

As Dr. J. A. Corry has pointed out, our country is increasingly moving away from the older classical federalism of "watertight compartments" with provincial legislatures and federal parliament carefully keeping clear of one another. We seem to be moving towards a co-operative federalism. "The co-ordinate governments no longer work in splendid isolation from one another but are increasingly engaged in cooperative ventures in which each relies heavily on the other". See J. A. Corry, "Constitutional Trends and Federalism," in the volume of essays Evolving Canadian Federalism (Durham, N.C., U.S.A., 1958), p. 96. The multiplication of concurrent fields is one of the facts of this trend.

In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. The courts are well able to prevent double recovery in the theoretical and unlikely event of plaintiffs trying to obtain relief under both sets of provisions. The fact that a court must authorize proceedings under the Ontario Act provides a safeguard against double recovery if the company has already proceeded under the federal Act. In addition the court at the final stage of finding and quantifying liability could prevent double recovery if in fact compensation and an accounting had already been made by a defendant. No court would permit double recovery.

[12] Does Multiple Access suggest that where, as here, the crown has proceeded under similar federal and provincial legislation, convictions can be entered on both provided that only one penalty is imposed? For example, it must be remembered that, in Kienapple, the Supreme Court of Canada did not set aside the two convictions that had been entered against Mr. Kienapple because only one penalty had been imposed. It did, however, direct that the better course of action was not to enter convictions on two charges which arose from the same or similar circumstances.

[13] Of course, in this case, two penalties were imposed: a sentence of 14 days incarceration on the Criminal Code charge and a $500 fine on the MVA charge. While arguably under s. 734 of the Criminal Code Mr. Muys could have been given both the jail term and the fine, the essence of what occurred here was the imposition of two penalties for the same offence. So, even if Multiple Access is authority for entering convictions under both the federal and provincial legislation, that is a question I do not have to decide here because more than one penalty was imposed, essentially "double recovery" in the terms used in Multiple Access.

[14] It is my view that this case is properly decided under Kienapple in that the offence was the same or substantially the same under both the federal and provincial charges for which Mr. Muys was convicted. It may be that I would not have taken the same view with respect to the charge of driving without a driver's licence but I do not have to concern myself with that because the crown did not appeal the entry of a conditional stay of proceedings on that count.

[15] If I am in error in determining that convictions should not have been entered on both counts because of the principle in Kienapple then I would have found the Provincial Court judge to have been in error in imposing two penalties and, while allowing both convictions to stand, would have quashed the imposition of the $500 fine on the provincial offence on the authority of Multiple Access.

[16] In the result, I would quash the conviction under s. 95(4) MVA and substitute, instead, a conditional stay of proceedings for that charge as the Provincial Court judge did with the other two MVA charges in the information.

"T.J. Melnick, J."

The Honourable Mr. Justice T.J. Melnick

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