Citation: *R.* v. *Charlie*, 2012 YKTC 58

Date: 20120207
Docket: 10-00785C
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

BYRON SHANE CHARLIE

Appearances:
Joanna Phillips — Counsel for the Crown
Malcolm Campbell — Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS C.J.T.C. (Oral): Byron Charlie has entered a not guilty plea to a charge that he committed the offence of failing to attend Territorial Court, contrary to s. 145(5) of the *Criminal Code*.

[2] The facts with respect to the Crown's case went in by admission. Mr. Charlie admits that he did not attend court December 1, 2011 in Mayo when court was called that day. Also going in by way of admission is that the weather reports from that day had indicated that it was snowing and the admission that the plane was unable to land and court, which had been scheduled for 10:00 a.m., instead took place by telephone at 1:00 p.m. from Whitehorse with the court party, returning to Whitehorse.

[3] Mr. Charlie is the only witness called by the defence and his testimony, while subject to cross-examination, was not particularly challenged. His evidence is that he was in Whitehorse on the 30th of November. He was picked up by his girlfriend, Cecile Charette, driven to her parent's cabin just outside of Mayo, where he stayed the evening of November 30th. He went into the Town of Mayo the next morning at about 9:00 a.m. to his cousin's residence, where he stayed for a bit. Cecile Charette and her brother Marcel Charette picked him up to take him to court. At court he did not go inside the building. Mr. Charette came into the building, came out and said basically that court was not starting and no one was there yet.

[4] They went downtown and had breakfast. They drove back to the courthouse at approximately eleven o'clock. They had noticed people wandering around town wondering about court. They sat around the court building. A woman spoke to Cecile Charette that Mr. Charlie did not know but thought had something to do with court. Mr. Charette heard the conversation, which was that the plane could not land and that they should try back in a bit.

[5] They left and came back after lunch again, standing around outside or perhaps going through the front doors, but not going up to the courtroom, which is located upstairs in the building. This same woman, a First Nations woman, identified only as wearing glasses and no further, spoke to Marcel and Cecile Charette while Mr. Charlie was standing with them and said court was going to be cancelled to the next circuit. At that point in time Mr. Charlie testifies he went back to Ms. Charette's parents' cabin, cut some wood, and went back to Whitehorse.

[6] Mr. Charlie subsequently learned that a bench warrant had been issued for him for failing to appear in court that day, court having convened by telephone at one o'clock as stated earlier, and he turned himself in shortly after learning that the warrant had been issued.

[7] The court date he failed to attend was for sentencing. He testified that he went up there intending to deal with this matter by sentencing and that he intended to come back on the next court circuit to attend by sentencing. In cross-examination he admitted that he did not know the woman; he admitted that he did not go up to an RCMP officer that was standing there the second time and ask him any information about court; that he did not go up into the courtroom and maybe his lawyer would have been standing in the courtroom.

[8] Defence counsel's position is that this is not criminally culpable conduct, that the actions of Mr. Charlie, while perhaps not in accord with everything he could have done, resulted in him making an honest mistake with respect to the cancellation of court to the next circuit and, based on this honest mistake, which was accompanied by some diligence on his part, the Crown has not proven its case.

[9] Crown's position is that this was an intentional act that was reckless or wilfully blind in Mr. Charlie's failing to attend court. He made insufficient efforts to confirm what this woman had said. He should have spoken to the police officer. He should have gone upstairs into the courtroom, which he never did on any of the three occasions that he attended at the building in which court was being held; that his reliance on rumour

without active steps is sufficient for the Crown to prove the *mens rea* of the offence that exists based on the evidence we heard and what can be inferred from the evidence.

[10] In the case of *R.* v. *Josephie,* 2010 N.U.C.J. 7, Justice Kilpatrick dealt with a circumstance where an individual failed to attend court. This individual stated that he simply forgot due to personal tragedies that had taken place. Mr. Josephie's position was that in the aftermath of a personal tragedy he simply forgot to attend court. He did not deliberately or recklessly avoid his obligations to the court by failing to appear. In paragraph 10 of that decision through paragraph 12, Justice Kilpatrick, in dealing with the subjective fault element aspect, stated that:

> 10. The severity of the criminal law has long been reserved for those who choose to commit criminal acts. It is reserved for those who deliberately and consciously undertake a risk that results in a prohibited consequence occurring. Punishment for crime is a consequence that is earned by a conscious decision to do, or not do, an act that is legally blameworthy.
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> 11. The criminal law does not inflict punishment for acts that are unintended, or for consequences that are unforeseen and unforeseeable. We are punished for the wrong choices we make, and the wrongs we do as a consequence of these choices.
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> 12. For hundreds of years, criminal liability has been contingent upon proof of the commission of a criminal act by a person having a criminal state of mind. It is this criminal state of mind, the conscious thought process behind the act, that clothes the criminal offence with moral blameworthiness. It is this blameworthiness that serves as a philosophical justification to impose punishment for a crime.

[11] Justice Kilpatrick considers the nature of the regulatory offence in some case law that has dealt with offence, such as failing to appear, by incorporating some of the

criteria for dealing with regulatory offences. He summarizes the Crown's argument in this case as being as follows, in paragraphs 18 and 19:

> 18. The Crown argues that the failure to appear offence should be interpreted as incorporating an objective fault element akin to that associated with the regulatory offence. This Court is urged to follow the interpretation advanced by the BC Court of Appeal in *R.* v. *Ludlow*, 1999 BCCA 365. It is said that the failure to appear offence is quasi-regulatory in nature because it seeks to regulate conduct and prevent harm to the administration of justice.
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> 19. If an objective standard is to be applied to the mental element, then it is said by the Crown that Mr. Josephie was not reasonably diligent when he missed court and he should be convicted on this basis. In the alternative it is argued that Mr. Josephie's admitted conduct amounted to either willful blindness or recklessness, and he should still be convicted.

To some extent, that is the argument of the Crown in the case before me.

[12] Justice Kilpatrick in his analysis in paragraph 24 states that:

> An objective *mens rea* requirement would criminalize the behaviour of a wide range of citizens who are challenged by mental disabilities and psychological and psychiatric disorders. The objective standard of reasonable diligence would cast its net broadly. Many disadvantaged individuals, including those afflicted by Fetal Alcohol Spectrum Disorder would not likely measure up to such a standard.

In paragraph 26:

> Parliament has expressly created a lower fault standard for the offences of dangerous driving, and careless use, careless storage of a firearm. Parliament has not done so for the offence of failing to appear in court. Given the serious consequences associated with conviction, this Court is not prepared to read into the language of the charging provision found in s. 145(5) any legislative intention to replace a subjective fault element with a standard ordinarily reserved for regulatory offence. This Court declines to follow

> the BC Court of Appeal's decision in *Ludlow* to find that there exists an objective *mens rea* requirement for the offence of failing to appear.

Paragraph 28:

> The question of whether an accused has a "lawful excuse" only arises after the Crown has proven beyond a reasonable doubt both the criminal act requirement and the subjective mental requirement that underlies all true criminal offences. Once the criminal act and intent are proven beyond a reasonable doubt, an accused may choose to call evidence and establish upon a balance of probabilities that he or she had otherwise a lawful excuse for the failure to appear.

He concludes that:

> 29. Mr. Josephie may have been negligent in not taking reasonable steps to remember his court date. However, this is not the test for criminal liability. His stated reasons for failing to attend court are not seriously challenged by the Crown. Mr. Josephie was not shaken in cross examination. The only evidence before me is he did not address his mind to his court obligations at all in the wake of a profound personal tragedy.
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> 30. On this evidence, Mr. Josephie cannot be found to be either reckless or willfully blind. A finding of recklessness would be contingent upon there being evidence that Mr. Josephie had addressed his mind to the risk that he would miss court, and he consciously chose to take a chance. This is not the evidence before me.

[13] The *Josephie* case and the law in this area was considered in the case of *R.* v. *Loutitt*, 2011 A.B.Q.B. 545, in which the Queen's Bench on appeal overturned a decision of the Provincial Court judge that followed the approached advocated in *Ludlow.* In paragraph 11, Justice Germain states that:

> The mental element for this offence, or for allegedly analogous offenses, [such as s. 733.1 offences, as stated in

> paragraph 12] has been the subject of considerable court commentary. There are essentially two approaches to these offenses, which are well summarized by Allen P.C.J. in *R.* v. *Eby*, 2007 A.B.P.C. 81 at para. 88-96, 415 A.R. 273, whether the offense is:
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> a) objective, and can be proven simply by conduct; i.e. not being present at the court hearing, or
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> b) subjective, and maybe negated by evidence of forgetfulness, carelessness, belief that a court hearing is set for the incorrect date, or other fact that supports an intention to attend a court hearing.
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> 12. *R.* v. *Eby* involved a breach of probation order offense..., however, Judge Allan concluded the s. 145(5) and s. 733.1 offenses operate in an analogous manner. He concluded that a breach of probation order offense was not proven unless the Crown demonstrated the accused knowingly acted contrary to the probation order, or was willfully blind and engaged in conduct that was contrary to the probation order. This is the "subjective" standard of proof.

[14] In paragraphs 13 and 14 the court analyzes the two streams of cases that have evolved, including the *R.* v. *Legere* (1995), 22 O.R. (3d) 89, 77 O.A.C. 265 (Ont. C.A.) which I had mentioned earlier during submissions, and the contrary case of *Ludlow* cited earlier. The court in paragraph 15 states:

> The most recent case to evaluate the *mens rea* component of *Criminal Code* s. 145(5) is *R.* v. *Josephie*. I'm persuaded by the analysis of Senior Justice Kirkpatrick of Nunavut that the offense of failure to appear under the *Criminal Code,* s. 145(5) is not a strict liability offense but instead an offense that requires a mental element. That mental element is *deliberate* failure to appear, *recklessness*, or *willful* blindness.
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> 16. Additionally, to avoid criminalizing accused persons who have a lawful excuse, s. 145(5) also allows a judge to acquit if an accused has committed the offense knowingly, but if the excuse is lawful. This additional element in 145(5) does not make it a strict liability offense but operates only once the

> Crown has proven the crime beyond a reasonable doubt. In that sense the "lawful excuse" component is a defence that needs to be proven to a balance of probabilities.

Paragraph 18:

> ...in the absence of evidence from the accused, a trial judge may reasonably assume (as juries are constantly instructed) that 'sane and sober' individuals generally intend the consequences of their actions... Thus when the Crown readily and easily proves the failure to appear in court the mental element will essentially be inferred except in the rare and few cases such as the one before the court. Again, from a Crown tactical position the sky is not falling.

Paragraph 19:

> Here, in my respectful view, the learned trial judge erred in law by excluding genuine forgetfulness as a factor that negates the mental element of s. 145(5) offense of failure to appear in court.

And at paragraph 22:

> Where a trial judge receives and accepts, or becomes obliged to accept by virtue of it being made an agreed fact, evidence of forgetfulness that is genuine and not willful blindness, or that raises a doubt about those issues, the Crown has not proven the mental element of the *Criminal Code,* s. 145(5) failure to appear charge.

[15] With respect to the objective and subjective tests to be applied I concur with the reasoning of the courts in *Josephie* and *Loutitt* that the Crown is required to prove the elements of this offence before reasonable excuse arises. These are not regulatory or quasi regulatory offences; they are *Criminal Code* offences that require all the procedures and protections of any related *Criminal Code* offence.

[16] In this case, Mr. Charlie did not do everything he could have done. He did not go upstairs into the courtroom; he did not speak to the police officer in the community, a fact which defence counsel stated is not unusual, given the sometimes negative interactions that individuals have with the RCMP. I say this not in any way saying that the RCMP are acting improperly, but it may be a perception, an uncomfortableness that certain individuals have. So clearly I am not saying anything negative about the RCMP role in this. It is simply something that happens. He did not confirm the identity of this person. He did not make sure he was speaking to a court person.

[17] Was he careless? Yes. In my opinion, does his conduct in having driven all the way from Whitehorse to Mayo, gone to court the next morning near the appointed time for court starting, returning on at least two more occasions and being informed that court was going to the next circuit, commit an offence for which society requires a penal consequence? I find that he did not. This was a mistake. It was an honest mistake. He did not do everything he could have done, but his steps were sufficient for me to find that he has raised a reasonable doubt with respect to the mental element required, and therefore he is acquitted.

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COZENS C.J.T.C.