

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Chief Judge Lilles)

REGINA

v.

THORIN MCGEE MULLIN

Ludovic Gouaillier

For the Crown

Thorin Mullin

On his own behalf

REASONS FOR SENTENCING

[1] LILLES C.J.T.C. (Oral): This is the matter of Thorin Mullin. He has been charged that on or about the 12th day of November 2002, at or near Whitehorse, Yukon Territory, he did unlawfully commit an offence in that he, being at large on his recognizance given to or entered into before a judge without lawful excuse, failed to attend Territorial Court, contrary to s. 145(2) of the *Criminal Code*.

[2] The November 12th date, which is the subject of this charge, was set on September 27th by JP Warde in fix date court. Mr. Mullin was in attendance at that

time. He was there with his lawyer, Mr. Anton. This particular date was communicated to Mr. Mullin. He takes no issue with that. He acknowledges that he was in court and that he must have heard the date at that time.

[3] In his evidence he indicated that prior to court he had a discussion with Mr. Anton and Mr. Anton undertook to set the next court date to December. He left the court that day thinking that the court date was December 12th. He remembers that because December 12th is his father's birthday and he thought to himself that he would have a court date on that day.

[4] Mr. Mullin is not unfamiliar with the court process. He indicated to me in court that he was aware that being required to attend court is a serious matter, and failing to do so is a serious offence. He thought that he may have had some personal experience with that in the past. He also indicated that he has had a lot of court dates and that he usually deals with those court dates by memory. Certainly, at this particular time, he asserts that he made no notation nor did he ask anyone to remind him of the court date. He simply says that he left the court at that day thinking it was December 12th. If there was a misunderstanding or a mistake, according to his evidence, it would have been a mistake that was made at the time the trial date was set, that is to say, September 27th.

[5] Shortly after that, early in October, he went to Fort St. John to work on an oil rig. He returned on November the 20th when the job finished. He believed that he was returning in-time for his December court date. Of course he did not, and he was arrested, and he's currently in custody.

[6] In my discussion with Crown counsel, I explored the nuances and difficulties associated with s. 145(2). The main issue is whether or not this is a full *mens rea* offence, that is to say, whether or not there is an obligation on the Crown not only to prove the factual elements, but also to prove the subjective or mental element; that is to say, an intention, forming a deliberate intention not to make the court appearance, or possibly being wilfully blind or reckless, totally non-caring about the date, so that the *mens rea* element could still be made out.

[7] I pointed out in my discussion during the hearing that if one takes too liberal an interpretation of 145(2), the court system would fall apart and no one would attend court when they are charged. They would come to court and merely stand up on the stand and say, "I forgot," and that would be the end of it.

[8] On the other hand, we should not lose sight of the fact of 145(2), failure to attend, is a serious criminal offence, and all the elements of a criminal offence should be established. In our system, the obligation for establishing guilt, guilt beyond a reasonable doubt, lies entirely upon the Crown. The defence, the defendant, has no responsibility to do anything except by way of a tactical or evidentiary burden to raise a reasonable doubt, should that be necessary.

[9] A number of cases were referred to. Let me repeat some of the principles in those cases. In *R. v. Legere* (1995), 22 O.R. (3d) 89, 95 C.C.C. (3d) 555, it is noted that:

This is a true criminal offence and mere carelessness or failure to take precautions that a reasonable person would take will not support a conviction. The Crown must prove

that the accused had the requisite *mens rea* before any issue of lawful excuse arises.

[10] In *R. v. Bender* (1976), 30 C.C.C. (2d) 496, it says:

Mens rea is an element of the offence of failing to appear and, accordingly, the accused may raise the defence of an honest mistake.

[11] In *R. v. Stuart* (1981), 58 C.C.C. (2d) 203:

Thus where an accused honestly forgot the date of his court appearance he has a defence to the charge even if he forgot due to his own negligence.

[12] Those cases were earlier cases, 1970s, 1981, and the *Legere, supra*, case was a 1995 case. More recently, in the case cited by Crown counsel, *R. v. Ludlow*, [1997] B.C.J. No. 1359 (QL), it appears that that court, the B.C. Court of Appeal, is a little concerned where an accused merely provides an honest mistake as a defence with nothing else.

[13] In *Martin's Criminal Code*, that case is noted up as follows:

The *mens rea* requirement is largely objective.

That means that you look at the facts to try to determine whether or not the person intended to avoid court or not.

Lawful excuse requires the accused to establish due diligence, which includes an honest and reasonable belief in a state of facts that would excuse non-attendance.

[14] In this particular case, the *Ludlow, supra*, case, the defence was made out where the accused did not attend because he was incorrectly advised by the complainant that the charge had been dropped. Of course, the complainant has no authority to give that type of information. The complainant, the victim in a case, may not have any better information than the accused. So, in *Ludlow, supra*, relying on someone that they had no reason to rely on was sufficient to create the state of mind that would excuse liability.

[15] My own view is that in *Ludlow, supra*, an accused relying on what a third party, particularly a victim, said would be unreasonable. It would be, in fact, negligent. *Ludlow, supra*, in my view, does not state that mere negligence is insufficient. I think what we need to do is focus on the state of mind of the accused. What was he really thinking? What can I infer from the facts as they are before me?

[16] Certainly Mr. Mullin gave his evidence in a very straightforward way. He did not contradict himself. His explanation was consistent throughout. When I asked him additional questions, he was able to add additional information. That is not surprising. Because he is here unrepresented, he might not appreciate fully what is relevant and what might be relevant by way of evidence. But he was certainly forthcoming, did not appear to hide anything, and as I mentioned just a moment ago, he was entirely consistent with his story throughout.

[17] Could a person appear in court, hear a date, yet nevertheless, immediately thereafter, be mistaken about that date? The immediate reaction would be, of course not, that is silly, he was right here, he heard the date; how could he possibly be mistaken? Yet I am aware, in talking to people who are in court, I am aware as a result of reading the research literature and hearing from probation officers, that most accused persons in court, when interviewed outside the court as to what took place in court, are often grossly mistaken about what took place, grossly mistaken as to who the major characters are in the courtroom, mistaken about what was agreed to, and, in particular, where accused persons have been sentenced, they are also often mistaken about what the sentence was, the sentence imposed by the court. So the question is, although being present in court, could an accused reasonably and honestly believe something else was said. Could they mishear a date? Is that reasonable? Is that possible? Based on my experience, confirmed by the research literature, yes, it is. In fact, this is so well known that I am prepared to take judicial notice of it.

[18] Now, Mr. Mullin, of course, has been in court numerous times before. One might then say, because of his experience in court, he has been here before, he knows the rules, he knows what to expect. Is it reasonable to expect that he would be mistaken about the date, mishear the date? Well, I think it is less likely that Mr. Mullin would be mistaken or make that mistake honestly, but it is still possible; indeed, it is still reasonably probable.

[19] Counsel have an important role to play in representing accused persons. They also remind clients what has to be done, when it has to be done, and explain to

them what actually took place in the courtroom. There is no indication before me that that was done in this particular case.

[20] Mr. Mullin left the jurisdiction to get a job and was employed there until the latter part of November. That cuts two ways. On the one hand, he said he had this job opportunity arranged through a friend; I inferred that he had the job before he left here. He had a legitimate reason to be engaged in other activities. This is not a person who is hiding out somewhere with no legitimate activity and is clearly then merely trying to avoid court. So he had a legitimate activity, he was doing something that was important to him. He was out of the territory, where he could not conveniently check either with the court or with his counsel as to when this court date was should he have been inclined to do so. The fact that he was away working gives some legitimacy to his explanation.

[21] The other side of that, however, is, because jobs are hard to find, it may be equally true that he got the job down there in Fort St. John and recognized how lucky he was to have this job and was not prepared to give it up to come up here on November 12th to attend court. It may very well be that he very deliberately, knowingly, stayed away because he preferred to complete his work, get his money, and then come back, attend court and take his consequences. I think that it is a possibility too, but it is merely a possibility, and in my view, it is largely speculation on my part. It was not Mr. Mullin's evidence.

[22] Was Mr. Mullin negligent? Yes, he was. Was he careless? Yes, he was. Should he have known better, based on his experience? Yes, he should have. In all

of the circumstances, was his negligence at a very high level? I could probably say, taking into account Mr. Mullin's background and experience with the courts, it probably was. Was he wilfully blind, deliberately staying away from court? Did he go down to Fort St. John, get the job, and deliberately say, "I'm going to stay here and work and not go to court, even though I know I've got a court date in November, because I prefer to get the money from the job and take my chances later?" I cannot be satisfied that he did. In fact, I accept his explanation that he got the court date wrong, that he was honestly but regrettably mistaken. I find that he honestly believed his court date was in December.

[23] This is not a civil matter. This is a criminal matter, and in a criminal matter, the onus, throughout the proceeding, rests on the Crown to establish guilt beyond a reasonable doubt. For the reasons indicated, the Crown has not met its obligation in this particular case and I find Mr. Mullin not guilty.

LILLES C.J.T.C.